

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act*, R.S.B.C. 1996, c. 113

-by-

Ludhiana Contractors Ltd.  
("Ludhiana" or the "employer")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	Kenneth Wm. Thornicroft
<b>FILE No.:</b>	98/392
<b>DATE OF HEARING:</b>	July 23rd, 1998
<b>WRITTEN SUBMISSIONS RECEIVED:</b>	July 31st, 1998
<b>REPLY SUBMISSIONS RECEIVED:</b>	August 7th, 1998
<b>DATE OF DECISION:</b>	August 24th, 1998

**DECISION**

**APPEARANCES**

Tarseam S. Bhullar                      counsel for Ludhiana Contractors Ltd.

Heidi Hughes                              counsel for the Director of Employment Standards

**OVERVIEW**

This is an appeal brought by Sadhu S. Dhaliwal on behalf of Ludhiana Contractors Ltd. (“Ludhiana” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on June 17th, 1998 under file number 84657 (the “Determination”). I am advised by Ludhiana’s counsel that Mr. Dhaliwal is Ludhiana’s sole officer and director.

The appeal was heard at the Tribunal’s offices on July 23rd, 1998 at which time I heard evidence and submissions from both the employer and the Director. At my direction, I also received further supplementary written submissions from both parties’ counsel; I would like to thank both counsel for their helpful submissions.

**FACTS**

On January 29th, 1998, the Director issued a Farm Labour Contractor Licence (“FLCL”) to Ludhiana. The FLCL stated that the employer was “licensed under the [Act] to conduct the business of Farm Labour Contractor for the year 1998 and may employ a maximum of 15 employees”. The FLCL also stated that the “license expires on December 31, 1998” but could be cancelled or suspended “at any time in accordance with section 7 of the [Regulation]”.

By way of the Determination now before me, Ludhiana’s FLCL was cancelled because of certain violations of the *Act* and *Regulation*, the particulars of which are set out in the Determination. Although I heard evidence and submissions at the appeal hearing relating to whether or not the employer breached the conditions of its FLCL [the basis for cancellation under section 7(b) of the *Regulation*], it should be noted that the employer’s FLCL was not cancelled on this basis. On its face, the Determination is clear--it was issued under section 7(c) of the *Regulation* based on the employer’s numerous contraventions of the *Act* and *Regulation*.

## ISSUES TO BE DECIDED

The employer says that the Determination ought to be cancelled for a number of reasons; in particular, the employer says that:

- it was not given a reasonable opportunity to be heard prior to the issuance of the Determination;
- the Determination is void for want of particularity and because it was issued following an “industry-wide audit”;
- the Determination constitutes a “penalty” and therefore could not be issued by the delegate in question by reason of section 117(2) of the *Act*; and
- the delegate who issued the Determination had no authority to do so.

During the course of the hearing, I also indicated to the parties that, because the Tribunal had not yet addressed the issue, I wished to hear their submissions regarding the appropriate standard of review in appeals of this kind (*i.e.*, an appeal of the Director’s exercise of her statutory discretion to cancel a FLCL).

I intend to address this latter matter prior to dealing with any of the other issues raised by the employer. Before examining the issues raised by the employer in its appeal, however, I first wish to outline the governing legislative and regulatory framework.

## ANALYSIS

### *Relevant Statutory and Regulatory Provisions*

The licensing of firm labour contractors is governed by Part 2 of the *Employment Standards Regulation*. FLCLs are issued by the Director pursuant to Section 5(2) of the *Regulation* upon receipt of a written application form, completion of an oral and/or written examination testing the applicant’s knowledge of the *Act* and *Regulation*, the posting of a performance bond and the payment of a \$150 licence fee. All FLCLs expire on December 31st of the year in which they are issued and cannot be transferred or otherwise assigned to another party [see subsections 9(a) and (b) of the *Regulation*].

It should be noted that the issuance of a FLCL is a discretionary matter--section 5(2) states that the Director “may” (not “must” or “shall”) issue a licence even if the applicant has otherwise met the four licensing criteria. Further, section 5(5) of the *Regulation* provides that “[T]he Director may refuse to issue a licence to an applicant who has had a previous licence cancelled”. It should be noted that notwithstanding an earlier (November 28th, 1997) licence cancellation, the employer was licensed for the calendar year 1998.

Pursuant to section 7 of the *Regulation*, the Director may cancel or suspend a FLCL if the licensee made “a false or misleading statement” in the original licence application, if the licensee breaches “a condition of the licence”, or if “the farm labour contractor contravenes the Act or this regulation”. As noted above, the Director cancelled Ludhiana’s FLCL relying on the latter provision. As mandated by section 10 of the *Regulation*, a FLCL is cancelled by way of a determination that must include the reasons for cancellation. A determination cancelling a FLCL may be appealed to the Tribunal and such an appeal proceeds as would any other appeal of a determination issued by the Director (see section 12 of the *Regulation*).

*The Appropriate Standard of Review*

Although section 12 of the *Regulation* provides that a determination cancelling a FLCL may be appealed to the Tribunal, neither the *Act* nor the *Regulation* give any directions as to the particular standard of review that should guide the Tribunal’s decision-making process. In my view, an appeal of the Director’s refusal to issue, or, as here, cancel a FLCL is materially different from the usual sort of appeal to the Tribunal that is brought under section 112 of the *Act*--these appeals typically call for the Tribunal to find facts and review legal conclusions [see section 108(2) of the *Act*] reached by the Director regarding the proper interpretation of the *Act* or *Regulation*. These appeals are in the nature of an “appeal by rehearing” (see *World Project Management Inc.*, EST Decision No. D325/96). In essence, and to borrow a phrase from the nomenclature of judicial review, the Tribunal determines if the determination under appeal is legally and factually “correct”.

However, as noted above, the issuance of a FLCL and the subsequent cancellation of that FLCL are both matters within the *discretion* of the Director. The appeal now before me is very different from the typical sort of appeal to the Tribunal that follows the Director’s investigation and adjudication of a dispute between an employer and an employee (say, for example, concerning the employee’s entitlement to overtime pay or compensation for length of service). In such appeals, the Tribunal reviews a decision made by the Director in her capacity as the arbiter of the parties’ (employer and employee) respective rights and obligations under the *Act*. As a general rule, if the Director’s determination is not “correct”, the appeal will succeed.

However, in the case of a licence cancellation, the Director is the *principal* respondent party rather than a neutral adjudicator who determines disputes under the *Act* between an employer and an employee. When issuing or cancelling FLCLs, the Director is exercising a power more akin to an administrative rather than an adjudicative function.

Under both sections 5 and 7 of the *Regulation*, the Director “may” either issue or cancel a FLCL, as the case may be. The use of the word “may”, rather than “must” or “shall” connotes a permissive or discretionary power--see section 7 of the *Interpretation Act*. Nevertheless, the Director cannot exercise her discretion capriciously; whether issuing or cancelling a FLCL, the Director is required to address the criteria set out in sections 5 and 7, respectively, of the *Regulation*. Counsel for the Director submits that a Director’s decision to cancel a FLCL should

be entitled to a good deal of deference and that the Tribunal ought not to interfere with Director's exercise of her discretionary power unless it can be shown that the Director failed to act in good faith or took into account irrelevant considerations--see *Glover v. Plasterer et al.*, Victoria Registry No. V02973, February 27th, 1998 (B.C.C.A.). In my view, this latter submission correctly sets out the proper approach to be taken by this Tribunal when reviewing a decision by the Director to cancel a FLCL.

What, then, constitutes "good faith"? Good faith may be presumed where the Director has cancelled the FLCL based on one or more of the three criteria set out in section 7 of the *Regulation*. A lack of good faith may be implied where the Director has cancelled the FLCL based on some other extraneous consideration or where there is evidence that the Director acted in a discriminatory fashion toward the licensee. In an appeal to this Tribunal, the onus rests on the contractor to show that its FLCL was improperly cancelled.

*Is the Determination sufficiently particularized?*

Section 10(a) of the *Regulation* states that a determination cancelling a FLCL must include "the reasons for the determination". Counsel for the employer submits that the Determination is void *ab initio* because it does not include a sufficient statement of the reasons for issuance. While I accept the principle that a determination cancelling a FLCL is void if it does not contain a satisfactory explanation of the reasons for cancellation--and the reasons must accord with the three criteria set out in section 7 of the *Regulation*--I do not agree that this Determination is insufficiently particularized.

Section 7(c) of the *Regulation* provides that the Director may cancel a FLCL because of contraventions of the *Act* or *Regulation*. In the body of the Determination, the Director's delegate specifically refers to *six* previous determinations issued for violation of various provisions of the *Act* or *Regulation* dating from August 1997--none of these previous determinations were appealed and thus the fact of these previous violations is now *res judicata*.

Section 10(a) of the *Regulation* states that the determination must include the reasons for cancelling the FLCL. In the body of the Determination, the delegate sets out, for each previous contravention, the date, the specific statutory or regulatory provision contravened and a general summary statement about the nature of the violation. I fail to see how such information can be characterized, as submitted by the employer's counsel, as "sketchy"; indeed, I believe the Determination is more than sufficiently particularized. Counsel submits that further factual information regarding the previous contraventions should have been provided because the employer "may not even remember is [sic] he violated [the] section with out [sic] further particularization". In my view, no such requirement is imposed on the Director--it is legally sufficient to incorporate by reference the underlying facts as described in previous determinations (I might add that the panel in *Sidson, infra.*, adopted the same view). If the employer has some difficulty recalling the circumstances of the previous contraventions, the employer could simply review the previous determinations in order to refresh its memory.

The various Tribunal decisions cited by counsel for the employer in his brief--all setting aside determinations for want of particularity--are not applicable to the present case. If the previous determinations, upon which the Director's decision to cancel are predicated, did not sufficiently set out the underlying facts, those determinations could have been appealed, and possibly set aside. In such a case, there would then no longer be any previous contraventions upon which the Director could rely for purposes of cancellation. However, where the underlying determinations *are* sufficiently particularized, I see nothing wrong with the Director simply incorporating the facts set out in those previous determinations by referring to such determinations in the body of the "cancellation determination".

In my view, it is abundantly clear on the face of the Determination that both subsections 10(a) and (b) of the Regulation have been satisfied.

*Reasonable Opportunity to be Heard*

Ludhiana says that the Determination should be set aside because the Director did not give it a reasonable opportunity to respond to the allegations made against it prior to the issuance of the Determination (see section 77 of the *Act*). I have some very real doubts as to whether or not section 77 applies in the context of this case.

I note that in *Sidson Farms Ltd.* (EST Decision No. D325, August 18th, 1998), a three-person panel apparently accepted that the Director was bound by section 77 and was obliged to give an applicant "a reasonable opportunity to respond" prior to making a decision *refusing to issue* a FLCL. I also note, however, that counsel for the Director in that case, seemingly accepted that the Director was bound by section 77 where an application for a FLCL might be refused. The question as to whether or not section 77 applies in the case of an issuance or cancellation of a FLCL was not argued in *Sidson*. For the reasons set out in greater detail below, I am of the view that section 77 has no application where the matter before the Director relates to either the issuance or the cancellation of a FLCL. If section 77 has any application whatsoever in the case of an application for a FLCL, the obligation thereby imposed on the Director goes no further than to fairly consider the application on its merits and to refuse to issue a FLCL based only on the criteria set out in section 5 of the *Regulation*.

Section 77 essentially codifies the well-established principle that parties to a dispute are entitled to know the case against them and to be heard by, and make submissions to, the decision-maker (the *audi alteram partem* principle). However, where, as here, the Director's determination to cancel the FLCL was based on prior contraventions that had been crystallized into determinations, I query whether section 77 has any application. The employer was given an opportunity to respond to the allegations that resulted in previous determinations; the employer was entitled to appeal those determinations but chose not to do so. Once the previous contraventions were established, the Director then had the discretion to cancel by reason of section 7(c) of the *Regulation* and I have already concluded that, so long as the Director is acting in good faith and not relying on extraneous considerations (and there is nothing in the material before me to suggest that is the case), the Tribunal should defer to the Director's exercise of her discretionary authority.

As I indicated above, the Director's discretionary authority to issue or cancel a FLCL is more in the nature of an administrative than an adjudicative function. I am not satisfied that, prior to cancelling a FLCL, the Director is obliged to comply with section 77 of the *Act*. This latter section governs in the case of an investigation of a complaint, or where the Director proceeds on her own motion, with respect to a potential violation of the *Act* or *Regulation* which might result in the issuance of a determination under section 79 of the *Act*. However, a determination to cancel a FLCL is not issued under section 79, but rather under section 10 of the *Regulation*. Although the *Regulation* states that certain sections of the *Act* apply in the case of a licence cancellation (for example the appeal procedures), tellingly, section 77 is not mentioned.

In my view, whatever the Director's obligation under section 77 might be in the case of a licence cancellation, it was satisfied during the investigation of the previous contraventions. If the Director was obliged to, in effect, re-open the various investigations regarding the previous contraventions prior to issuing a determination under section 10 of the *Regulation*, one of the purposes of the *Act*, namely, the fair and efficient resolution of disputes [see section 2(d) of the *Act*], would be frustrated.

I might add, in any event, that having heard the *viva voce* evidence presented by the Director (consisting of the delegate who issued the Determination and two other investigating officers) as well as that of the employer's principal, Mr. Dhaliwal, I am entirely satisfied that, in the circumstances of this case, the Director did provide to the employer a reasonable opportunity to respond to the allegations made against it prior to issuing the Determination. Mr. Dhaliwal testified that prior to the Determination being issued he was telephoned and told to report to the Abbotsford office with his licence in hand; I am satisfied, based on this conversation and other conversations with representatives of the Director the previous day, that Mr. Dhaliwal knew that his company's licence was in jeopardy and that he was given an opportunity to explain his position before being advised that Ludhiana's FLCL was cancelled.

*Does the Determination impose a Penalty?*

The employer says that the Determination was improperly issued because, given that a "penalty" was imposed by the Determination, section 117(2) of the *Act* was contravened. This latter subsection states that:

117. (2) The director may not delegate to the same person both the function of conducting investigations into a matter under section 76 and the power to impose penalties in relation to that matter.

First, in my opinion, this subsection has no application to the situation at hand. The cancellation of a FLCL does not directly flow from an investigation conducted pursuant to section 76 of the *Act*.

Second, the employer says that the Determination is a "penalty" determination, however, I cannot agree. "Penalty" is a term specifically defined in section 1 of the *Act* as meaning "a monetary penalty imposed under section 98". In turn, section 98 refers to the monetary penalties prescribed in the *Regulation*. While I suppose one could characterize, in a generic sense, the cancellation of

a FLCL as a type of penalty, the legislature has seen fit to give the term “penalty” a restricted meaning--the Determination now under appeal does not assess a “penalty” as that term is defined in the *Act*.

*Industry-wide Audit*

The employer says that the Determination ought to be set aside because it was issued during the course of an industry-wide audit. Although I did hear some brief evidence that the Director was conducting an investigation of farm labour contractors, that investigation is, in my view, wholly separate and independent from the Determination now before me. This Determination was issued based on previously documented and confirmed contraventions of the *Act* and *Regulation*. This Determination was issued solely based on the record of the employer and not because of some generalized concern about farm labour contractors as a whole.

It may be that the previous contraventions were uncovered as a result of an industry-wide audit--I have no evidence before me one way or the other on this point. However, even accepting that such was the case, I do not accept the employer’s submission that such audits offend section 8 of the *Canadian Charter of Rights and Freedoms* (“Everyone has the right to be secure against unreasonable search and seizure”).

First, the mere *fact* of an audit does not implicate section 8, unless in fact there was a search of the employer’s premises or a seizure of the employer’s records. I have no evidence before me that either a search or seizure occurred in this case--in a great many investigations, a Determination is eventually issued without any search of the employer’s premises, or seizure of the employer’s documents, ever occurring and this case appears to fall into that category.

Second, even if there was evidence before me of a search or seizure, I would take the view that such a search or seizure, given the context of employer-employee relations in this province and the restrictions on the Director’s powers of search and seizure contained in section 85 of the *Act*, is not “unreasonable”--see *Belgoma Transportation Ltd. v. Director of Employment Standards* (1985), 20 D.L.R. (4th) 156 (Ont.C.A.) and *R. v. Bichel* (1986), 4 B.C.L.R. (2d) 132 (B.C.C.A.). At the very least, even if such activities could possibly implicate section 8, I would consider the activities to be saved under section 1 of the *Charter* (the “reasonable limits” clause).

Finally, even if it could be said that section 8 is implicated in this case, it does not follow that the evidence so obtained would automatically be excluded--see section 24(2) of the *Charter*. For my part, I fail to see how the Director’s reliance on documents obtained pursuant to demand under section 85 of the *Act*, and utilized to determine if an employer was living up to its obligations under the *Act*, the *Regulation* and its FLCL, would “bring the administration of justice into disrepute”. In my view, the only potential for bringing the administration of justice into disrepute would be where the Director (and by extension this Tribunal) could not consider such documents in the course of adjudicating a dispute arising under the *Act* or *Regulation*.

*Improper Delegation*



Counsel for the employer asserts that the delegate who issued the Determination, Mr. Jim Walton, I.R.O., was not authorized under section 117(1) to do so, however, that assertion has not been proven--indeed, Mr. Walton stated at the appeal hearing that he had the delegated authority to cancel a FLCL and, in addition, produced evidence attesting to his status as a delegatee. The "delegation matrix" referred to on the back of Mr. Walton's photo-identification card specifically refers to Mr. Walton's "primary" authority under section 127(2)(c) of the *Act* (i.e., the provisions authorizing regulations to be issued respecting both issuing and cancelling FLCLs).

Further, subsequent to the appeal hearing, and as part of her written submissions, counsel for the Director tendered an affidavit from Ms. Jill Walker, in which the former Director stated that during the spring or summer of 1997, she delegated the authority to cancel FLCLs to Mr. Walton. Counsel for the employer objects to the admission of Ms. Walker's affidavit into evidence because he was not given a opportunity to cross-examine Ms. Walker. That is true, but, in my view, also irrelevant. There is no suggestion before me that Ms. Walker swore a false affidavit; counsel for the employer *was* given the opportunity to cross-examine Mr. Walton at the appeal hearing regarding the latter's status as a delegatee but chose not to do so.

In the absence of any evidence--as opposed to mere allegations--that Mr. Walton did not have the delegated authority to cancel a FLCL, and given the overwhelming evidence that he had such authority, I cannot accept the employer's suggestion that the Determination ought to be cancelled because Mr. Walton lacked the requisite authority to issue it. I might add that I would arrive at this conclusion irrespective of whether or not Ms. Walker's affidavit is considered to be properly before me.

In his written submission, counsel for the employer also asserted a somewhat different argument with respect to the "improper delegation" issue. Counsel for the employer submits that because section 79(3) of the *Act* "does not provide for the cancellation of a [FLCL]", neither the Director nor his [sic] delegates are "empowered to cancel [a FLCL]" because section 5 and 7 of the *Regulation* are "ultra vires [the] enabling legislation".

Ludhiana's counsel notes that Section 79 of the *Act* (the Director's authority to issue determinations) does not mention the Director's authority to cancel a FLCL. That is so. The Director's authority to both issue and cancel FLCLs is contained in sections 5 and 7 of the *Regulation*. However, the short and complete answer to the employer's submission on this point is found in section 127(2)(c) of the *Act*:

127. (2) Without limiting subsection (1), the lieutenant Governor in Council may make regulations as follows: ...

(c) respecting the licensing of employment agencies and farm labour contractors and the suspension or cancellation of their licences...

The relevant regulations are found in Part 2 of the *Regulation*. The Determination was issued pursuant to these latter regulatory provisions and not section 79(3) of the *Act*.

*Summary*

Based on the evidence and submissions before me, I cannot conclude that the Director acted in bad faith when it cancelled the employer's FLCL. The employer's FLCL was cancelled because of a well-documented history of failing to abide by the *Act* and the *Regulation*. Nor can I conclude that there is any merit to the other arguments raised by the employer in its appeal.

**ORDER**

Pursuant to section 12(3) of the *Regulation* and 115 of the *Act*, I order that the Determination be confirmed as issued.

**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**