

**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 -

B and P Contracting Ltd.  
(" B and P ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** C. L. Roberts

**FILE No.:** 2000/580

**DATE OF DECISION:** October 3, 2000

## DECISION

This is a decision based on written submissions by Paul Bining on behalf of B and P Contracting Ltd., and J. V. Walton for the Director of Employment Standards.

### OVERVIEW

This is an appeal by B and P Contracting Ltd. (“B and P “), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued July 31, 2000. The Director found that B and P contravened Section 6(4) of the *Employment Standards Regulation* in failing to provide a daily log for inspection, and Ordered that B and P pay \$150.00 to the Director for the contravention, pursuant to Section 98 of the *Act* and 29 of the *Regulation*.

### ISSUE TO BE DECIDED

Whether the Director erred in assessing a penalty for failing to provide a daily log without reasonable explanation.

### FACTS

As set out by the Director’s delegate, the facts are as follows.

On July 21, 2000, the Agriculture Compliance Team conducted a site visit at Makara Farms Ltd. at 34727 Hallert Road, Abbotsford. B and P had provided labour to Makara Farms to harvest blueberries. A daily log containing the names of the workers who were working on the farm was not provided for inspection.

The delegate determined that B and P had contravened section 6(4).

B and P had a previous Determination issued against it for contravening section 6(4) of the *Regulation* on July 10, 1998 for which it was assessed no penalty. That Determination was not appealed. On that basis, the Director’s delegate determined a penalty of \$150.00 in accordance with section 29 of the *Regulation*.

### ARGUMENT

B and P says that it leases out Makara farms, and has done so for the past three years. Attached to the appeal documents is a copy of the lease agreement that B& P says was provided to the Director. B and P contends that, as the lessor of the farm, it need not keep a daily log, and seeks to have the Determination cancelled.

The Director’s delegate states that on July 21, the Agricultural Compliance Team visited Makara Farms, and observed B and P providing farm workers to pick blueberries. Mr. Walton contends that

he spoke with Mr. Bining, who advised him that he had leased the property from Makara Farms. He acknowledged that he did not have a daily log, and expressed his view that he did not have to provide one so long as he was working on his leased property. Mr. Walton states that he asked Mr. Bining to fax him a copy of the lease by July 26, or he would consider him to be a farm labour contractor.

Mr. Walton further states that he spoke with Mr. Mike Makara who was working on the site. Mr. Makara advised Mr. Walton that there was no signed lease relating to that Makara Farm site, and that he had hired B and P to pick his blueberry crop.

The Determination was issued on July 31, and on August 3, a copy of a lease agreement was received at the Abbotsford Employment Standards office. On August 28, Mr. Walton states that he spoke to Mike Makara and confirmed with him that he was the owner of 34727 Hallert, that he had not leased it to anyone, and that he had hired B and P as a farm labour contractor. He further advised Mr. Walton that the lease provided by B and P did not apply to the property a 34727 Hallert Road.

The delegate argues that the penalty is appropriate in the circumstances, given that B and P has been a farm labour contractor for 17 years and had been issued three Determinations in July 1998 which had not been appealed. Further, the delegate notes that B and P had been issued a status report as part of their 2000 licensing process which detailed the previous 6(4) contraventions, and the consequences of further contraventions.

## ANALYSIS

Section 6(4) of the *Regulation* provides that a farm labour contractor must keep at the work site and make available for inspection to the director a daily log that includes

- a) the name of the employer and work site location to which workers are supplied, and
- b) the names of the workers who work on that site on that day.

Section 98 of the *Act* provides that if the director is satisfied that a person has contravened a requirement of the *Act* or the *Regulation*, the director may impose a penalty on the person in accordance with the prescribed scheduled of penalties. Section 29 of the *Regulation* prescribes those penalties for contravention of section 6.

The *Act* places the burden of maintaining records and making them available for inspection on the employer.

The lease agreement referred to by both parties is written on Makara Farms Ltd. letterhead. It is dated July 21, 2000, the same date as the Compliance Team visited the site and spoke with Mr. Bining and Mr. Makara. According to the agreement, B and P is to lease blueberry land that requires hand harvesting from Makara Farms Ltd., and that Makara “have the right and all the discretion as to the amount of work they chose to perform with their own crews to try to limit the total final net payment to B & P”.

Although section 6(4) of the *Regulation* applies to all farm labour contractors, and B and P is a farm labour contractor, B and P takes the position that the *Regulation* does not apply to it in this situation because it leases the farm.

The burden of establishing that a Determination is in error rests with an appellant.

In his reply to the appeal, Mr. Walton stated that he called Mr. Makara on August 28 to confirm that the lease did not cover the property at 34727 Hallert Road, and that he had hired B and P to pick his blueberry crop. This submission was not refuted by Mr. Bining in his response dated September 14. I would expect that Mr. Bining would have obtained some sworn evidence from Mr. Makara refuting Mr. Walton's assertions if this had not been the case. I place little weight on the "Lease Agreement" given the date it was entered into and in light of all the other evidence.

B and P does not dispute that it did not provide a daily log. It argues that it was not obliged to do so. On a balance of probabilities, I am not persuaded that B and P leased the property from Makara, and dismiss the appeal.

**ORDER**

I Order, pursuant to Section 115 of the *Act*, that the Determination dated July 31, 2000 be confirmed in the amount of \$150.00, together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

***C. L. Roberts***

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**C. L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**