

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")

-ofa Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thomicroft

FILE No.: 98/393 & 98/518

WRITTEN SUBMISSION

DEADLINE: September 18th, 1998

REPLY SUBMISSION

DEADLINE: September 25th, 1998

DATE OF DECISION: October 21, 1998

DECISION

OVERVIEW

Ludhiana Contractors Ltd. ("Ludhiana" or the "employer") is a farm labour contractor as defined in section 1 of the *Employment Standards Act* (the "*Act*"). Ludhiana appeals, pursuant to section 112 of the *Act* two Determinations, both issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director") on June 17th, 1998 under file number 84657.

The section 13(1) Determination

The first Determination concerns an alleged violation of section 13(1) of the *Act*. This latter provision mandates that all farm labour contractors be licensed by the Director. In particular, the delegate found that Ludhiana had 20 employees working at a particular Chilliwack farm location on June 16th, 1998 whereas it was only licensed and bonded to employ 15 employees.

Notwithstanding the alleged violation, no penalty was imposed under section 98 of the *Act*. The Determination reads, in part, as follows:

" As Ludhiana Contractors Ltd. has contravened a specified provision of a Part of the *Emp[oyment Standards Act]* or a Part of the *Emp[oyment Standards Regu[ation]*, there is a penalty in accordance with the prescribed schedule of penalties.

T AKE NoncE that a further contravention by Ludhiana Contractors Ltd. of the specified provision will result in a penalty of \$0.00 per employee as set out in section 29 of the *Emp[oyment Standards Regu[at]ions* [sic]. Contraventions beyond that may result in penalties to a maximum of \$500.00 per employee."

The section 6(1)(f) Determination

In the second Determination the delegate alleged that Ludhiana "was transporting employees to work in a school bus...not registered with the Director" contrary to section 6(1)(f) of the *Employment Standards Regulation*. This latter regulatory provision states that:

"(1) A farm labour contractor must do all of the following:

(t) file with the Director

(i) an up-to-date list of the registration numbers and licence numbers of each vehicle used by the farm labour contractor for transporting employees, and

(ii) if the vehicle is owned by the fann labour contractor, copies of the inspection certificate and other records that must be maintained under section 25 of the Motor Vehicle Act Regulations."

By way of this Detemlination an unspecified penalty was imposed

" As Ludhiana Contractors Ltd. has contravened a specified provision of a Part of the *Employment Standards Act* or a Part of the *Employment Standards Regulation*, there is a penalty in accordance with the prescribed schedule of penalties.

TAKE NOTICE that a further contravention by Ludhiana Contractors Ltd. of the specified provision will result in a penalty of \$250.00 per employee as set out in section 29 of the *Employment .Standards Regulations* [sic]. Contraventions beyond that may result in penalties to a maximum of \$500.00 per employee."

ISSUES TO BE DECIDED

The employer appeals both Determinations on the basis that both are null and void as a matter of law. In my view, both Determinations are nullities and, thus, should be cancelled. My reasons for so concluding are set out below.

ANAL YSIS

The section 13(1) Determination

Section 98 of the *Act* authorizes the Director to impose a penalty , "in accordance with the prescribed schedule of penalties" set out in sections 28 and 29 of the *Regulation*, for certain contraventions of the *Act* or *Regulation*. A penalty , in the form of a determination, may be issued by the Director under section 79(3)(c) of the *Act*.

Section 28 of the *Regulation* provides for a monetary penalty (in essence, an administrative penalty) of \$500 for certain specifically identified contraventions; section 29 of the *Regulation*, which is relevant here, provides for a "sliding scale" of penalties ranging from \$0.00 to \$500.00 "multiplied by the number of employees affected by the contravention".

This Determination, on its face, does not impose *any* penalty. The reference to a \$0.00 penalty being imposed for a "further contravention" suggests that a subsequent violation would be treated as a "first offence" under section 29(2)(a) of the *Regulation*.

Given that the Director did not even impose a \$0.00 penalty, it is not clear to me why this particular Determination was issued. Had a \$0.00 penalty been assessed, that would have permitted the Director to issue a \$150 (per employee) penalty in the event of a subsequent

contravention, however, as matters now stand, a "second contravention" will apparently be treated as a first offence with a concomitant \$0.00 penalty being levied. Thus, I am faced with a situation where the appeal now before me is essentially moot because the Determination has no practical or immediate legal consequence.

While I suppose that it could be argued that by setting out the contravention in the form of a determination, the *fact* of the contravention, if not appealed, could be characterized as *res judicata*--e.g, if the Director subsequently decided to cancel the employer's farm contractor's licence based on the contravention. However, that potentiality thus forces the contractor to go through the time and expense of appealing the determination despite the fact that the determination will not result in an increased penalty being imposed for a subsequent contravention. I do not consider that this Tribunal should give its imprimatur to the practice embodied in this Determination. For one thing, I consider that to do so would be inconsistent with subsections 2(b) and (d) of the *Act*.

In any event, even if a determination was not issued regarding the fact of the contravention, the Director could still, it seems to me, rely on the contravention should she subsequently decide to cancel the contractor's licence; of course, in such circumstances the contravention itself--along with the penalty--could then be appealed but note that there would only be one appeal rather than, as might well otherwise occur, two appeals (one relating to the contravention; the other to the subsequent licence cancellation).

The Director may only issue a determination in accordance with the provisions of section 79 of the *Act*. Section 79(3) (c) of the *Act*--which authorizes the imposition of a penalty under section 98--is the relevant subsection inasmuch as the delegate purports to levy , by way of the Determination, "a penalty in...accordance with the prescribed schedule of penalties". However, because no penalty has been assessed, not even a \$0 penalty (this much is clear because had a \$0 penalty been assessed, a *further contravention* would necessarily result in a \$150 per employee penalty rather than the \$0 penalty indicated in the Determination), this Determination is, in my opinion, null and void. Only determinations that levy a prescribed "penalty" may be issued under section 79.

The section 6(1)(f) Determination

In my view, the critical deficiency in this Determination concerns its lack of particularity in several respects. First, as is clearly evident from the relevant portions of the Determination reproduced above, the Determination does not disclose, on its face, the actual monetary penalty that is being levied. The Determination merely refers to "a penalty in accordance with the prescribed schedule of penalties" but without knowing whether this is a first, second, third or fourth contravention, one cannot know, even after reviewing section 29 of the *Regulation*, the dollar amount of the particular penalty that is being assessed. Such necessary information is not set out anywhere in the body of the Determination.

Second, while one might infer that a \$150 per employee penalty is being assessed (by reason of the reference in the body of the Determination to a \$250 per employee penalty in the event of a

further contravention), for a person without prior knowledge of the escalating penalties contained in section 29 of the *Regulation*, that inference could only be drawn after first referring to section 29; that a \$150 per employee is being assessed is not immediately apparent from a reading of the Determination.

Third, depending upon "the number of employees affected by the Determination" the penalty can range from \$150 (only one employee affected) to any multiple of \$150 depending upon the number of employees affected. There is a reference in the Determination to 20 employees on the day in question but the number of "affected employees" could, given the nature of this violation--using a vehicle that was not registered with the Director--exceed 20 employees. Thus, the actual amount of the penalty is not set out in the Determination.

Among other concerns, this lack of particularity as to the dollar amount of the penalty could certainly confuse any enforcement activities that might be undertaken by the Director pursuant to Part 11 of the *Act*. For example, how would a third party served with a garnishing order under section 89 know that the amount demanded by the Director was, in, fact, the correct amount to be remitted? How could this Determination be filed with, and enforced as an order of, the B.C. Supreme Court under subsections 91(1) and (2) if the "debt" is not set out in the body of the Determination?

Fourth, if a penalty other than \$0 is being assessed, in my view, essential fairness dictates that the prior contraventions upon which the greater penalty is predicated ought to be set out in the body of the Determination. There are no such particulars in the Determination. If this is simply a "first offence" (as might be implied by the failure to identify any previous contraventions in the body of the Determination) then a \$0 penalty ought to have been levied rather than the \$150 per employee penalty apparently levied.

ORDER

Pursuant to section 115 of the *Act*, I order that the two Determinations now under appeal before me, both dated June 17th, 1998 and filed under number 84657, be cancelled.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal