

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 -

Narang Farms and Processors Ltd.
(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	98/449
HEARING DATE:	September 25, 1998
DECISION DATE:	November 6, 1998

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Turning to the first step in the analysis, the contravention of the *Act*, Section 9(1) provides: “A person must not employ a child under age 15 without the Director’s permission”. At first glance, this provision is not unduly complicated. However, on reflection, whether a person has, in fact, contravened this provision requires that the child is an “employee” performing “work” for an “employer”. The Director says that Rajwinder Lakhan is an employee within the definition of an “employee” in Section 1 of the *Act* which includes “a person an employer allows, directly or indirectly, to perform work normally performed by an employee” (Section 1 “employee” (b)).

First, the definition of an “employee” is quite broad, as indicated by the word “includes”. Second, the definitions are to be read disjunctively. In other words, it is sufficient to meet one of the definitions. Section 1 of the *Act* provides (in part):

“employee” includes

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee ...

Similarly, the definition of “employer” is broad. Section 1 of the *Act* provides:

“employer” includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

The material facts are in dispute. On July 1, 1998, shortly after noon, members of the Agricultural Compliance Team of the Employment Standards Branch attended farms operated by the Employer. After speaking with the farmer at the processing plant, Gurmail Narang, they went to the farmed areas on Defehr Road.

Narbinder Barn, who was called to testify on behalf of the Director, says that the team arrived at the farm between 12:15 and 12:30 and left before 1:00 p.m. While they were there, “someone” told them that a young person was “working”. She went down the rows of plants and approached--what she understood to be--three employees, one of whom was the nine year old Rajwinder Lakhan. She asked the older of the three, Manminder Kaur Lakhan, if she was the mother of Rajwinder Lakhan and was told that she was her sister. As I understood Barn’s evidence, the mother, who was not called to testify, was not in the immediate surroundings. Barn had observed

the girl picking berries with her sisters: she had a basket tied around her waist and was putting berries into it. The bucket was half full. Barn asked the age of the girl and was told that she was nine. A third sister--who did not attend the hearing--was working there as well. Before leaving the farm, she told Narang who explained that he was unaware of the girl working. She agrees that she did not ask the girls how long they had picked berries or if they picked berries for the Employer before. I understood Walton's evidence to be that he had not specifically instructed Barn or other members of the team to ask those questions.

Narang, who testified for the Employer, states that he was not aware of the nine year old girl working. She came to the farm without his consent or authority. He also explained that because he operated a number of farms with different products, and around 100 employees, he--and his supervisors--could not control who was there. In cross-examination, he explained that he had told the "pickers" not to bring children to work. There was no evidence of whom had been told, what exactly they had been told, and when they had been told. There was no evidence that the mother of Rajwinder Lakhan, who was an employee, specifically had been told of this. Inderjit Singh Lakhan, Manminder Lakhan and Rajwinder Lakhan, who were called to testify for the Employer, did not testify that they had been told that employees were not permitted to bring children to work. In Narang's view, if the children were picking berries, they did so for their own consumption or to take them home. Narang admitted that, in the past, at least, it was not uncommon for employees to bring children to work where, in some instances, they would assist the employees, their parents, grandparents, or other relatives, with berry picking or other work. In other instances, the children were brought to the work place for child minding purposes.

Inderjit Lakhan is the father of Manminder and Rajwinder Lakhan. Inderjit Lakhan says that he went to the farms with his wife in the farmer's van in the morning. His two daughters arrived between 11:00 and 11:30 a.m., bringing lunch for their mother, and picked berries for only two to five minutes to bring home. He explains that he went home with his daughters. Manminder Lakhan's recollection was somewhat different. She states that she and her sister came to the farm around noon to bring their mother's lunch. While the mother finished a row of plants, she and her sister picked berries to eat and to bring home. In cross-examination, she agreed that she used an ice cream bucket as a container for berries, strapped to her waist with a scarf. Her nine year old sister also had a bucket or basket (given to her by the mother), from which she transferred berries to the sister's ice cream bucket. She states that they were there for approximately thirty minutes when they left without their father. Rajwinder Lakhan testified that she did not pick berries to earn money, although her recollection and testimony--understandably, in view of her age--was not clear. She agrees that she did not have the farmer's permission to work on the farm.

I find that there were a number of inconsistencies in the testimony of the Lakhans. The father states that the daughters picked berries for only two to five minutes (and he was quite certain about this); Manminder Lakhan says they did so for one half hour, and Rajwinder Lakhan did not know for how long. The father says that he went home with his daughters; Manminder Lakhan says he remained

at the farm with their mother when they left. Moreover, it was not clear from the direct testimony of Rajwinder Lakhan for what purpose she was picking berries. In my view, it is more probable than not, that Rajwinder Lakhan, in fact, was assisting her mother in her employment, picking berries.

The Act defines “work” to mean “the labour and services an employee performs for an employer whether in the employee’s residence or elsewhere” (Section 1). There is no doubt that Rajwinder Lakhan was picking berries. As well, it is clear that she was picking berries on the Employer’s premises, the farm. The question is whether, in the circumstances she was picking berries as an employee for the Employer. The definition of an “employee” in Section 1 of the Act is broad and, as mentioned above, “includes a person an employer allows, directly or indirectly, to perform work normally performed by an employee”. Berry picking is normally performed by a employees. Employees are paid for this. In this case there is no evidence to suggest that the employer “directly” allowed Rajwinder Lakhan to work at the farm. Quite the contrary, the Employer’s evidence was that it did not know she was working. The question, therefore, is whether the Employer “indirectly” permitted her to work. Rajwinder was picking berries on farming property owned or operated by the Employer. She used a container to collect berries. The contained was supplied by her mother (who was an employee). The contained was half full. Her mother was not in the girl’s immediate surroundings, but worked either at another row of plants or on the same row of plants but at some distance. It was clear from Barn’s testimony that she did not see the mother with the girl. The Employer’s evidence was that she did so to collect berries for her own consumption or bring home. In view of the inconsistencies in the Employer’s evidence, I am not prepared to accept that. As such, I find that the Employer indirectly allowed her to perform work or services normally performed by an employee.

Narang’s evidence was that he did not know she was working and that she did not have his permission. The Employer’s knowledge of the statutory requirement is irrelevant: ignorance of the law does not constitute a defence (*Aujlas’ Farm Ltd.*, BCEST #D428/98).

I now turn to the second element, the delegate’s exercise of his discretion. The Employer argues that it has a large number of employees, operates several large farms with different crops, and says that it--and its supervisors--cannot control who work there. Narang explains that he is aware of the requirement for a Director’s permit for employees under age 15 and, in fact, has obtained permits for several of his own relatives. He also explains that he told employees not to bring children to work. In other words, the Employer is arguing that it took reasonable steps to avoid the contravention. It that sufficient to avoid the penalty? Or, put differently, did the Director’s delegate exercise his power in a manner consistent with “established legal principles” when he issued the penalty Determination in these circumstances?

Recent decisions of the Tribunal has raised the issue of whether a “due diligence” defence is available with respect to administrative penalties imposed under the *Act* (*Punjab Labour Supply*

Ltd., BC EST #D392/98, and *Royal Star Plumbing and Heating & Sprinklers Ltd.*, BCEST #D168/98). In my view, it is not helpful to characterize the contraventions as “offences” along the lines of the decision of the Supreme Court of Canada in *R. v. Sault Ste. Marie (City)*, <1978> 2 S.C.R. 1299 (see also *R. v. Wholesale Travel Group Inc.* (1991), 84 D.L.R. (4th) 161). The *Act* expressly provides that a “person who contravenes a requirement of Parts 2 to 8 commits an offence”--which is subject to prosecution in the courts (Section 125). This method is rarely--if ever--utilized. The prohibition against employing children under age 15 is found in Part 2. As such, a contravention of Section 9 may well be an offence. Nevertheless, the *Act* also provides for another method of ensuring compliance with the *Act*: administrative penalties under Section 98. It is clear from the *Act* that these are two separate methods.

Whether the defence is available to an administrative penalty depends on the language of the particular statutory provision. The primary purpose of the *Act* is to ensure that “employees receive at least basic standards of compensation and conditions of employment” (Section 2(a)). Section 4 provides that the requirements of the *Act* or the *Regulation* are minimum requirements that cannot be waived. The minimum requirements are set out in Parts 2 through 8, inclusive, of the *Act* and in the *Regulation*. The *Act* allows the Director to investigate matters under the *Act* in accordance with the principles of natural justice. For example, the *Act* expressly provides that the Director “must make reasonable efforts to give a person under investigation an opportunity to respond” (Section 77) or provide reasons for a determination (Section 81). A person affected by a determination has the right to appeal to the Tribunal. On completing an investigation, and a contravention of a requirement of the *Act* or the *Regulation* has been found, the Director may require the person to comply with the requirement, require the person to remedy or cease doing the act, or impose a penalty (Section 79). In my view, the remedies under the *Act* are compensatory or directed towards compliance, rather than penal.

Nevertheless, it is clear that the penalties can be substantial: escalating from \$0.00 to a maximum of \$500.00 per contravention multiplied by the number of affected employees (Section 29, *Regulation*). The penalty for contravening a record requirement is \$500.00 for each contravention. There is no specific statutory language in the *Act* which would suggest that a “due diligence” defence is not available with respect to the imposition of administrative penalties. In that regard, I am mindful, as well, that the purposes of the *Act* include the promotion of fair treatment of employers and employees (Section 2(b)) and to provide “fair and efficient procedures for resolving disputes over the application and interpretation of the *Act* (Section 2(d)). While it may be efficient, from one point of view, to simply penalize all persons who contravene the *Act*, it may not be “fair” to penalize a person who has taken all reasonable care to avoid the contravention and little is gained from the stand point of enforcement to penalize such a person. This involves consideration of what is reasonable in the circumstances. The burden to prove reasonable care rests with the person asserting the claim. In most cases, this would be difficult to establish. In this case, even if I accept the Employer’s fairly general statement that it told employees not to bring children to the work place, I am not persuaded that the Employer took

reasonable care. In order to establish reasonable care, I would expect the Employer to lead detailed evidence with respect to its efforts to prevent Rajwinder Lakhan from working. Such evidence was not available here.

In my view, the “due diligence” defence ties in with the requirement that the Director’s discretion be exercised reasonably. The Director’s authority under Section 79(3) of the *Act* is discretionary: the Director “may” impose a penalty. The use of the word “may”--as opposed to “shall”--indicates discretion and a legislative intent that not all infractions or contraventions be subject to a penalty. It is well established that the Director acts in a variety of capacities or functions in carrying out her statutory mandate: administrative, executive, quasi-judicial or legislative. In the case of a penalty determination, the Director is not adjudicating a dispute between two parties, an employer and an employee, rather the Director is one of the parties. As such, the Director is exercising a power more akin to an administrative rather than an adjudicative function. The Tribunal has had occasion to deal with appropriate standard for the Director’s exercise of discretionary power in the context of an administrative function in a number of cases. In *Takarabe et al.* (BCEST #D160/98), the Tribunal reviewed the case law and noted at page 14-15:

“In *Jody L. Goudreau et al.* (BCEST #D066/98), the Tribunal recognized that the Director is “an administrative body charged with enforcing minimum standards of employment ...” and is “... deemed to have specialized knowledge of what is appropriate in the context of carrying out that mandate.” The Tribunal also set out, at page 4, its views about the circumstances under which it would interfere with the Director’s exercise of her discretion under the *Act*:

The Tribunal will not interfere with the exercise of discretion unless it can be shown that the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

... a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in the law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”. *Associated*

Provincial Picture Houses v. Wednesbury Corp.,
<1948> 1 K.B. 223 at 229.

In *Boulis v. Minister of manpower and Immigration* (1972), 26 D.L.R. (3d) 216 (S.C.C.), the Supreme Court of Canada decided that statutory discretion must be exercised within “well established legal principles”. In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant considerations.”

Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it (*Randy Chamberlin*, BCEST #D374/97). Given that the power to impose a penalty is discretionary and is not exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. It is not adequate to simply state that the person has contravened a specific provision of the *Act* or *Regulation*. This means that the Director must set out--however briefly--the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention. In this case, the Determination makes reference to a second contravention of the same Section. In my view, this is sufficient.

The third step is the determination of the actual penalty. Section 98 of the *Act* provides the Director's delegate with the discretion to impose a penalty in accordance with the prescribed schedule. Section 29 of the *Regulation* establishes a penalty escalating from \$0.00 to a maximum of \$500.00 for each contravention of a specified provision. The Regulation does not require that a penalty has been imposed for the previous contravention; it merely requires a contravention. The Director, or her delegate, has no discretion to determine the amount of the penalty once she, or her delegate, has determined that a contravention of a specified provision of the *Act* has occurred.

There is no dispute with respect to the third element, amount of the penalty.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated July 7, 1998 be confirmed.

Ib Skov Petersen

Adjudicator
Employment Standards Tribunal