



An appeal

- by -

Charan Rai and Manjinder Rai operating as Surrey Farms Produce
(the "Rais" or the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Ib S. Petersen

FILE No.: 2001/499

DATE OF HEARING: September 12, 2001

DATE OF DECISION: September 18, 2001

DECISION

APPEARANCES:

Mr. Charan Rai Mr. Sukhi Rai	on behalf of the Rais
Mr. Jim Walton	on behalf of the Director

OVERVIEW

This is an appeal by the Rais pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued on June 27, 2001 which imposed a penalty of \$500.00 on them. The Determination concluded that the Employer had contravened 46 of the *Employment Standards Regulation* (the “*Regulation*”) by restricting entry and inspection under Section 85(1)(a) of the *Act* to an Agriculture Compliance Team on June 26, 2001.

FACTS

While this appeal raises some factual issues, the material facts are relatively straight forward and, in my view, largely not in dispute.

On June 26, 2001, the Agriculture Compliance Team (the “Team”) --composed of officers from the Employment Standards Branch, Human Resource and Development Canada and Canada Customs and Revenue Agency--attended a farm property operated by the Rais, off the King George Highway, Surrey, British Columbia. There were some 40 persons working in a section on the farm. Some of these persons were employees of two farm labour contractors, and some were employees of the farm. It is possible, as contended by the Rais, that there were some “U-pickers,” *i.e.*, persons picking berries for their own use.

The Team, with 6-7 members, drove onto the farm property in two vehicles. In cross examination, Charan Rai first stated that he “didn’t know” when the Team arrived, then stated it arrived at 10:30 to 11:00 a.m. This is contrary to the evidence by both Sharn Kaila (“Kaila”) and Dave Dhillon (“Dhillon”), members of the Team, who explained that they were on the farm between 9:10 a.m. and 9:30 a.m. This is confirmed by the “Initial Interview” sheet, submitted on behalf of the Director. In the circumstances, I prefer the evidence of Kaila and Dhillon that they arrived shortly after 9:00 a.m.

After entering the farm property, part of which is leased to two other operators, the Team followed what they believed to be a “road-way” or “path-way” to the specific section or field where the workers were performing work, picking berries. The Rais complain that the Team

drove on newly planted strawberries. This is denied by the Director's witnesses. They stopped at or near that section or field. Shortly after their arrival on the farm property, Sukhi Rai, the son of the owner, attended the scene. Sharn Kaila, an Employment Standards Officer, explained to the Sukhi Rai that they had authority to enter a place where work was being performed, that the reason was to ensure compliance with the *Act* and *Regulation*, and that a failure to comply could result in a penalty. Sukh Rai did not allow the Team access to the specific section or field where work was being performed. In my view, this was not seriously in dispute.

Kaila explained that penalties are rarely issued in these circumstances, it is the "last resort." In most instances, access is granted once the authority to enter has been explained.

Kaila's testimony, and that of Dhillon, an officer of Canada Customs and Revenue Agency, was that the written notice was provided on June 26, 2001. This notice set out Section 85 of the *Act* and the consequences of failing to comply. Charan Rai and Sukhi Rai took issue with being provided the written notice on June 26. This document was entered into evidence, and I accept that it was provided to Sukhi Rai on June 26. Dhillon testified that Sukhi Rai took the document, crumpled it up and put it into his pocket. In the circumstances, I find Dhillon's and Kaila's evidence credible and believable. In any event, neither of the Rais took issue with having been explained that Section 85 of the *Act* allowed them entry and the consequences of failure to allow entry.

Dhillon explained that Sukhi Rai told the Team that he would not allow entry to the section or field where the workers were performing work. He complained about trespass and wanted to see a court order. As mentioned, the legal basis and the purpose of the visit was explained to him. It appears that he called his father, Charan Rai, the owner of the farm property, on his cell phone. Charan Rai attended the site some 5 to 10 minutes later. The evidence was that it was--similarly--explained to him under what authority the Team was seeking access to the workers.

The Rais do not dispute that the Team was denied entry to the section or field where the work was actually being performed at the time it was requested. In fact, it is quite clear on the evidence that this was the case. Charan Rai said, under cross examination, that he "would not allow [the Team] into the field." He explained that he told the Team that he "knew his legal rights" and that they would have to make an appointment. In his view, the Team could not enter without his permission. Charan Rai was quite clear: he "wouldn't let them into the crops" or "rows" [where the work was going on]" There was some suggestion that the Rais acted on legal advice. In any event, the Rais expressed the view that the Team should have made an appointment to attend the work place, or should have waited until lunch time, or until the end of the work day, or waited until the workers came to weigh in their berries.

ANALYSIS

The Rais take issue with the Determination and want it cancelled. As the Appellants, they have the burden to persuade me that the Determination is wrong. In my opinion, they have failed to meet that burden. For the reasons set out below, the appeal is dismissed.

In *Narang Farms and Processors Ltd.*, BCEST #D482/98, the penalty process is summarized as follows:

“... the penalty determinations involve a three-step process. First, the Director must be satisfied that a person has contravened the *Act* or the *Regulation*. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the *Regulation*.”

The relevant legislation is Sections 28 and 46 of the *Regulation* and Section 85 of the *Act*.

46(2) No person may restrict or attempt to restrict the director from making a entry under section 85(1)(a) of the *Act*.

85(1) For the purpose of ensuring compliance with the *Act* and the regulations, the director may do one of more of the following:

- (a) enter during regular working hours any place, including any means of conveyance or transport, where
 - (i) work is or has been done or started by employees,
 - (ii) an employer carries on business or stores assets relating to that business,
 - (iii) a record required for the purposes of this *Act* is kept, or
 - (iv) anything to which this *Act* applies is taking place or has taken place;

28. The penalty for contravening any of the following provisions is \$500 for each contravention:

- (a)
- (b) ... 46 of this regulation.

Section 85(1)(a) of the *Act* broadly permits the director entry “during regular working hours” to “any place” where “work is or has been done by employees.” In the instant case, there is no doubt in my mind that the Rais “restricted or attempted to restrict” entry to the Team to the specific section or field where work was being performed. I do not agree with the Rais’ submission that because the Team were actually on the farm property, it did not restrict or

attempt to restrict entry. The Canadian Oxford Dictionary defines “restrict” as “control, curtail, or reduce.” In my view, the conduct of the Rais restricted--or at the very least, attempted to control, curtail or reduce--entry. In point of fact, the Rais denied the Team entry to the place where work was done, at the time entry was sought. The interpretation urged upon me by the Rais is untenable.

While I would expect that the Director and her delegate would conduct themselves professionally and carry out their duties in a manner that interferes or intrudes as little as possible with an employer’s affairs and operations, there is no requirement in the *Act* or *Regulation* that the Director is required to wait until it is convenient for the employer. In fact, as argued Director, such delay may defeat the purposes of the *Act*. I would like to add that there was nothing before me to substantiate that the members of the Team did not act in a professional and courteous manner in the fulfilment of their duties.

The Director’s authority under Section 79(3) of the *Act* is discretionary: the Director “may” impose a penalty. 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). The Director’s evidence before me was that the imposition of a penalty in these cases is rare. The evidence was that the penalty is the “last resort” and that the preferred approach is to persuade the person to whose property entry is sought. I accept this evidence. As well, as the Determination states, the Rais were informed of the Director’s authority under Section 85 of the *Act*, and the consequences of a failure to comply, and--yet—they continued to deny entry. In these circumstances, as noted in the Determination, if there were no disincentives against employers who fail to allow entry, such conduct may be repeated and the purposes of the *Act*--among others to ensure that employees in the Province receive at least basic standards of compensation--may be defeated. In brief, in my view, this is ample explanation for the exercise of the Director’s discretion.

Moreover, and in addition, in this case, there was evidence from Kaila and Dhillon that Charan Rai told them that he had waited for an opportunity to challenge the provisions of the *Act* allowing entry.

Section 28 of the *Regulation* provides that the penalty for a contravention of Section 46 of the *Regulation* is \$500. The amount of the penalty is not discretionary. The penalty in this case was the amount mandated by legislation. It cannot, therefore, be argued that the delegate erred in this aspect of the Determination.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated June 27, 2001 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal