

**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 -

Dhaliwal Contractors Ltd.  
("Dhaliwal" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	Ib S. Petersen
<b>FILE NO.:</b>	98/542
<b>DECISION DATE:</b>	November 6, 1998

## DECISION

### APPEARANCES

Mr. Tarseam Bhullar                                      counsel for Dhaliwal  
Mr. Jim Walton    on behalf of the Director

### OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a \$0.00 penalty Determination of the Director’s delegate issued on July 30, 1998. The Determination, found that Dhaliwal contravened Section 6(4) of the *Regulation* (failure to keep a daily log).

### FACTS AND ANALYSIS

The issue to be decided in this appeal is whether it was a reasonable exercise of the Director’s authority under Sections 79 and 98 of the *Act* to issue the July 30, 1998 Determination.

Dhaliwal argues that the determination is wrong as follows:

1. Walton who issued the Determination participated in the investigation (contrary to Section 117(2) of the *Act*.
2. The Determination is void for lack of particularization.

The Director argues that Walton did not participate in the investigation. The burden is on the appellant, here the Employer, to prove that the Director’s delegate exercised his authority in a manner contrary to the *Act* and the *Regulation*. The Employer provides no particulars to support an allegation that Walton both investigated the matter and issued the penalty determination contrary to Section 117(2). The Employer’s ground of appeal is simply an allegation which, in any event is denied by the Director. In the result, I summarily dismiss the appeal on the first point.

The Employer argues that it does not set where Pashura Enterprises Farm is situated and does not set out the content of the conversation between members of the Agriculture Compliance Team and the representative of Dhaliwal. The Director argues that the Determination contains sufficient particulars. Dhaliwal regularly provides labour to the owner of Pashura Enterprises Farm and, therefore, there is no confusion as to the location of the farm. The driver of the van identified himself as Dhaliwal driver.

I note that the Employer does not dispute the substance of the Determination, namely that it did not keep the daily log as required by Section 6(4) of the *Regulation*. In my view the Determination

provides sufficient particulars. The Determinations set out the date, place, nature of the alleged contravention, *i.e.*, the factual basis for the Determinations, and referred to the relevant statutory provision. The Employer could, for example, provide *viva voce* evidence and produce payroll records and other documents to prove that, in fact, it did keep the daily log as required or that it did not provide labour to the farm in question on the date in question. The Employer contravened the *Regulation*.

That, however, is not the end of the matter. In *Narang Farms and Processors Ltd.*, BCEST #D482/98, at page 2, the penalty process is summarized as follows:

“In my view, 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*.”

In this case, there is no doubt that the Employer contravened Section 6(4) of the *Regulation*. However, the only reason in the Determination for the “\$0.00” penalty is that the Employer contravened “a specified provision of a Part of the *Employment Standards Act* or a Part of the *Employment Standards Regulation*”. In my view, this is insufficient. I refer again to the decision in *Narang Farms*, at pages 7-8:

“...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. ... 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 *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 the circumstances, the contravention of the Regulation having been established to my satisfaction, I am not prepared to cancel the Determination. Rather, I prefer to vary the Determination striking out the "\$0.00" penalty. "The *Regulation* does not require that a penalty has been imposed for the previous contravention; it merely requires a contravention." (*Narang Farms*, at page 8). In other words, the Director may rely on this contravention in case the Employer again contravenes the *Act* or the *Regulation*.

## **ORDER**

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated July 30, 1998 be varied, striking out the penalty.

**Ib Skov Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**