

**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 -

David Marshall  
operating as Sedona Orchards  
("Marshall" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE NO.:** 98/674

**DECISION DATE:** December 14, 1998



the day in question. He also explains that he spoke with Marshall on that day and confirmed the number of employees with him based on the ACT's interviews with the employees. Marshall did not question the employee count. Marshall does not dispute this. He argues that "there was no benefit to question the employee count at the time". I disagree. I am not prepared to allow the a party, such as the Employer in this case, who refuses to participate in the investigation to later question the merits of the Determination. The Employer acted as a farm labour contractor. It did not have the licence at the material time. In the result, the Employer contravened Section 13(1) of the *Act*.

I now turn to the second element, the delegate must exercise his discretion within "well established legal principles". In other words, the delegate must exercise his discretion for *bona fide* reasons, must not be arbitrary and must not base his decision on irrelevant considerations." There is nothing to suggest that the delegate did not exercise his discretion within well established legal principles. As well, 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 Employer has previously contravened the specified provision of the *Act*. This, in my view, 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. In this case, there was a previous contravention of "a specified provision". The penalty for a second contravention is \$150 multiplied by the number of affected employees. Given my conclusion with respect to the number of employees, the amount of the penalty is correct.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated October 5, 1998 be confirmed.

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