

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 -

Purewal Contracting Ltd.
("Purewal")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

PANEL: G. Crampton, N. Edelman, I. Petersen

FILE NO.: 97/650 & 97/820

DATE OF HEARING: November 24, 1997

DATE OF DECISION: December 18, 1997

DECISION

APPEARANCES

Meheoob (Bob) Virji
Jarnail Purewal

on behalf of Purewal Contracting Ltd.

Adele Adamic
Catherine Hunt
Kevin Rooney
Jim Walton
Gagandeep Dhaliwal

on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Purewal Contracting Ltd. (“Purewal”), under section 112 of the *Employment Standards Act* (the “*Act*”), against the following determinations which were issued by a delegate of the Director of Employment Standards:

Date of Determination	Section Contravened	Effect of Determination
November 17, 1997	Section 28 of the <i>Act</i> Section 6 of the <i>Regulation</i>	FLC License cancelled.
November 17, 1997	Section 28 of the <i>Act</i> Section 28 of the <i>Regulation</i>	\$500.00 Penalty
August 14, 1997	Part 5 of the <i>Act</i>	\$1,050.00 Penalty

Purewal filed an appeal against another determination (also issued on August 14, 1997) in which the Director’s delegate cancelled its Farm Labour Contractor (FLC) license on that date. However, the Director’s delegate re-issued the FLC license to Purewal provided that certain conditions, which will be described below, were met. Thus, by agreement of the parties, the real substance of Purewal’s appeal against the determinations which were issued on August 14, 1997 is the determination which imposed a penalty of \$1,050.00 on Purewal.

A hearing was held on November 24, 1997 at which time evidence was given under oath or affirmation by James V. W. Walton, Gagandeep Dhaliwal and Meheoob (Bob) Virji.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether it was a reasonable exercise of the Director's authority under Section 79 of the *Act* to issue the three determinations described above and, thereby, to impose on Purewal a penalty of \$500.00, a penalty of \$1,050.00 and to cancel on November 17, 1997 the Farm Labour Contractor license which had been reissued to Purewal on August 14, 1997.

FARM LABOUR CONTRACTOR PROJECT

Before describing the factual underpinnings of this particular appeal, we believe it is important to provide a brief description of the context in which this appeal arises.

The licensing of farm labour contractors (FLCs) and their duties are set out in Section 5 of the *Employment Standards Regulation* [B.C. Reg. 396/95] (the "*Regulation*") which states:

Licensing of farm labour contractors

- (1) An application for a licence to act as a farm labour contractor must
 - (a) be made to the director, and
 - (b) be accompanied by a fee of \$150.
- (2) The director may issue a licence only if the applicant has
 - (a) completed a written application in a form required by the director,
 - (b) paid the licence fee,
 - (c) satisfied the director by an oral or written examination, or both, of the applicant's knowledge of the Act and this regulation, and
 - (d) posted security in accordance with subsection (3).

- (3) The security must
 - (a) be posted under the Bonding Act,
 - (b) be of a type that is listed in section 8 of the Bonding Regulations and is acceptable to the director, and
 - (c) equal the amount obtained by multiplying the minimum hourly wage by 120 hours and multiplying the result by the number of employees specified in the licence.
- (4) The director may include in a licence issued to a farm labour contractor any condition the director considers appropriate for the purposes of the Act.
- (5) The director may refuse to issue a licence to an applicant who has had a previous licence cancelled.

Jim Walton, an Industrial Relations Officer and a delegate of the Director of Employment Standards (the “Director’s delegate”), provided an overview of the requirements of Part 2 of the *Regulation*. He also provided an overview of the recent project by the Director and her staff to administer the provisions of the *Act* and the *Regulation* as they pertain to farm workers and FLCs. The project has three objectives:

- to ensure farm workers are paid according to the requirements of the *Act* and *Regulation*;
- to ensure that FLCs are licensed properly; and
- to ensure that FLCs have posted security in accordance with Section 5 of the *Regulation* and the *Bonding Act*.

The project team is comprised of staff from both the Ministry of Labour and Human Resources Development Canada (Employment Insurance).

Mr. Walton described the approach which the project staff have adopted as having the following components:

- meetings with FLCs in groups and in person;
- a public information package mailed to all licensed FLCs;
- awareness/education concerning the provisions of the *Act* and *Regulation* pertaining to farm workers and FLCs;

- fair, consistent and culturally sensitive investigations;
- interviews with farm workers, FLCs and farmers/producers; and
- a telephone inquiry line.

When meeting with FLCs all project staff used a standard “FLC Interview Checklist” which was developed to ensure that the objectives of fairness and consistency were met. As part of the project, all licensed FLCs were required to submit their payroll records for inspection and review by the Director’s delegates.

To meet the project’s objectives of awareness and education, Mr. Walton explained that there was a 2-part enforcement process for FLCs who contravened the *Act* or *Regulation*. On the occasion of a first contravention of the *Act* the process consisted of:

- imposition of \$0 penalty;
- arranging a personal meeting between the FLC and the Director’s delegate;
- providing the FLC with a copy of the *Act* and *Regulation*; and
- giving clear information to the FLC about the expectation of compliance.

For those FLCs who were found to have contravened a requirement of the *Act* or *Regulation* on a second occasion, the enforcement process consisted of:

- imposition of a monetary penalty (Section 28 or Section 29 of the *Regulation*);
- arranging a personal meeting between the FLC and the Director’s delegate;
- requesting an explanation of the non-compliance; and, possibly
- cancelling the FLC license (Section 7 of *Regulation*).

On or about May 9, 1997 the Director’s delegate mailed to all licensed FLCs a multi-page document entitled “Essential Information for the Farm Labour Contractor”. This set of documents was also given to all FLCs who were issued a license after May 9, 1997 under Section 5 of the *Regulation*. Purewal was on the list of FLCs to which the documents were mailed.

With that brief overview of the FLC project, we will now set out the facts which have given rise to this appeal.

CHRONOLOGY OF CONTRAVENTIONS BY PUREWAL

June 26, 1997

Mr. Jarnail Purewal attended a meeting on June 26, 1997 with two employees of the Employment Standards Branch (Tara Parker and Kaajal Mayer) to discuss the specific

sections of the *Act* and *Regulation* relating to FLCs. As noted in the “FLC Auditing Form/Checklist” which they used, they specifically discussed the duties of a FLC and the requirement to pay Statutory Holiday Pay and Vacation Pay since those provisions of the *Act* had been contravened by Purewal. The general comments on the “FLC Auditing Form/Checklist” show that the discussion dealt with statutory holiday pay provisions, a possible failure by Purewal to pay minimum wages and the potential imposition of a penalty in the amount of \$1,050.00.

Also on that date, following the meeting, determinations were issued by the Director’s delegate as follows:

- *Part 5 of the Act: Statutory Holiday Pay*
A determination was issued following an audit of Purewal’s payroll records on June 6, 1997. The audit revealed that Purewal had not paid Statutory Holiday Pay on March 28, 1997 (Good Friday) and May 19, 1997 (Victoria Day).
- *Section 6 of the Regulation: Duties of Farm Labour Contractors*
A determination was issued following an investigation which was conducted on June 10, 1997 at Van Eeklen Farms when Purewal was found to have failed to:
 - a) carry the license while on licensed activities;
 - b) show the license to all people the contractor deals with; and
 - c) display prominently at work sites the wages the contractor is paying.
- *A penalty in the amount of \$0.00 under Section 29(2)(a) of the Regulation.*

These determinations were served personally on Purewal by Kaaljal Mayer at 1:40 p.m. on June 26, 1997 in Abbotsford, B.C. The determinations contained a clear warning that:

- “...a further contravention by Purewal will result in a penalty of \$150.00 per employee;
- “contraventions beyond that may result in penalties to a maximum of \$500.00 per employee;” and
- “under Section 7 of the *Employment Standards Regulation* the Director may **cancel or suspend** a farm labour contractor’s license, subject to the provisions of that section.”

August 14, 1997

- *Part 5 of the Act: Statutory Holiday Pay*
A determination was issued following an audit of Purewal’s payroll records on August 12, 1997. The audit indicated that Statutory Holiday pay was not paid out to seven employees on July 1, 1997 (Canada Day). The other workers were paid \$7.50/hr. or were not entitled to the Statutory Holiday on July 1, 1997. The

\$7.50/hr. wage was understood by the Director's delegate to include statutory holiday pay and vacation pay. Thus, these employees were entitled to the number of hours worked at a regular rate of \$7.50/hr. These employees received 8 hours of pay at the regular wage rate. The 7 employees in question were entitled to time and a half for work performed on July 1, 1997, plus an extra day off with pay.

- *\$1,050.00 Penalty*

In addition, the Director's delegate issued a determination which imposed a penalty of \$1,050.00 on Purewal for a second contravention of Part 5 of the *Act*. This penalty was imposed under Section 29(2)(b) of the *Regulation* which states in part:

Penalties for other contraventions

29. (2) *The penalty for contravening a specified provision of a Part of the Act or of a Part of this regulation is the following amount:*

(b) *\$150 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on one previous occasion;*

- *FLC Licence cancelled*

Also on this date, the Director's delegate issued a determination in which he cancelled the FLC license which had been issued to Purewal on July 3, 1997. That cancellation was made under authority of Section 7 of the *Regulation*. However, on the same date, the Director's delegate reissued a FLC license to Purewal for the following reasons:

- a) it acknowledged its non-compliance with the *Act* and *Regulations*;
- b) it confirmed that it understood the requirement of the *Act* and *Regulations*;
- c) it paid the penalty in full (into a trust account pending the outcome of its appeal); and
- d) it gave an undertaking to comply with the *Act* and *Regulations* in the future.

These determinations were delivered personally to Purewal by Jon Sarin on August 14, 1997 at Abbotsford, B.C.

October 15, 1997

The Director's delegate issued a "Demand for Employer Records" to Purewal on October 15, 1997. The records which Purewal provided were reviewed by a member of the project team who noted the following (amongst other) comments on the "FLC Auditing Form/Checklist":

- Not paying semi-monthly;
- Amount of cheques usually doesn't equal the amount of net pay;
- Pays \$7.50/hr at least, yet still pays 8 hours on statutory holiday; and
- Cheques for 6 employees out of a sample of 60 were not found on the payroll records.

November 17, 1997

- *Section 17 of the Act: Semi-monthly paydays*

A determination was issued following another audit of Purewal's payroll records. The audit included a review of payroll cheques and the payroll records. While the payroll records showed a semi-monthly payday, the payroll cheques were for lump sum amounts which were triple the semi-monthly pay amounts.

Purewal has not appealed this determination and its representative, Mr. Virji, stated at the hearing stated that it would not be appealed.

- *Penalty \$500.00*

Purewal provided payroll records to the Director's delegate as required by a Demand for Employer Records (dated October 15, 1997). Those records were reviewed and/or audited.

In addition to the audit of the payroll records provided by Purewal, an audit was conducted of picking cards provided by Makara Farms Ltd. Those audits revealed that the names of eight (8) of Purewal's employees who were working at Makara Farms Ltd. did not appear on the payroll records. These names are S.K. Bains, H.K. Brar, S.S. Dhanoa, S.S. Dosangh, M.S. Gill, N.S. Gill, B.K. Saggu and Onkar Sandhu.

As a result, the Director's delegate determined that Purewal had contravened Section 28 of the *Act* by failing to keep proper payroll records. The penalty for this contravention (\$500.00) was imposed under Section 28 of the *Employment Standards Regulation*.

- *Cancellation of FLC license*

The Determination in which the Director’s delegate decided to cancel Purewal’s FLC license gave the following reasons for that decision:

Having regard to all the facts surrounding the issuance of the Farm Labour Contractor licence and subsequent failure to comply with the provisions of the *Act* and *Regulations* (as detailed below), I have determined, pursuant to Section 7(c) of the *Employment Standards Regulation*, that the Farm Labour Contractor licence of Purewal Contracting Ltd. be cancelled. The following is a list of determinations previously issued to Purewal Contracting Ltd.:

June 26, 1997	Part 5	<i>Employment Standards Act</i>
June 26, 1997	Section 6	<i>Employment Standards Regulation</i>
August 14, 1997	Part 5	<i>Employment Standards Act</i>
August 14, 1997	Section 6	<i>Employment Standards Regulation</i>

The Director’s delegate also noted that a \$500.00 penalty had been imposed on November 17, 1997.

In his testimony, the Director’s delegate stated that an additional factor which he considered prior to cancelling Purewal’s FLC license was that a member of the FLC project team had found several “picking cards” provided by Makara Farms Ltd. which contained names that could not be found in the payroll records provided to him by Purewal in response to his October 15th “Demand for Employer Records”. He also considered the pattern of non-compliance by Purewal the earlier imposition of penalties against Purewal and the fact that the FLC license issued to Purewal would expire on December 31, 1997.

Gagandeep Dhaliwal testified that as a member of the FLC project team she reviewed the payroll records which were provided by Purewal in response to the October 15th “Demand for Employer Records”. According to Ms. Dhaliwal, her review of those records showed that there were “picking cards” for eight employees whose names could not be found in Purewal’s payroll records. She also testified that she and a colleague, R. Randhawa, met with Mr. J. Purewal and Mr. M. (“Bob”) Virji on November 17, 1997 to discuss these differences. She testified, further, that Mr. Purewal called her later that day to offer a possible explanation for the differences in the records.

The names which Ms. Dhaliwal found on “picking cards” but not in the payroll records were: S.K. Bains, H.K. Brar, S.S. Dhanoa, S.S. Dosangh, M.S. Gill, N.S. Gill, B.K. Saggu and Onkar Sandhu

Ms. Dhaliwal made the following comments and observations concerning Mr. Purewal’s possible explanation:

Mistakes in reading names and employees of other contracts

We only used the names that were clearly legible to ensure that we were being fair. We also disregarded those cards which only had last names (even though there were no individuals on the payroll records who had these last names).

Mistakes in writing names

Mr. Purewal suggested that the names were just written down wrong because the producer writes down the names and there may be a communication problem since the workers do not speak English. Major Singh Dhanoa. But, the sounds of M and S are very different. The chance of a misunderstanding of this nature is minimal.

Mr. Purewal also suggested that M.S. Gill and M.K. Gill were the same person and that it was possible that the initial could just be wrong. But, this isn't possible because we found picking cards for both M.S. Gill and M.K. Gill for August 6th and 8th.

Nicknames

He said that B.K. Saggu was actually Harbhajan Kaur Rakhre (B. Stands for Bhajan and Saggu is her maiden name). Again this isn't possible because both B.K. Saggu and Harbhajan Kaur Rhakre were working on the August 11th, 18th, and 19th.

Temporary Worker

Mr. Purewal admitted that Onkar Sandhu had worked for him for a few days and had received cash payment for his work.

Under cross examination, Ms. Dhaliwal noted that when Makara Farms Ltd. submitted the "picking cards" for review they were identified as being the cards for employees of Purewal. She also noted that the handwriting on all of the cards was the same, from which she concluded that all the cards in question had been completed by the same FLC or his agent. She also agreed that on one of the cards "S.K. Bains" could be read as "S.K. Bath". Finally, Mr. Dhaliwal testified that while Makara Farms Ltd. engaged other FLCs, Purewal was the only FLC which wrote farm workers names on the picking cards – other FLCs used numbers.

PUREWAL'S EVIDENCE AND SUBMISSIONS

August 14, 1997

Purewal made the following submission in support of its reasons for appealing the determinations dated August 14, 1997 in which a penalty of \$1,050 was imposed by the Director's delegate:

- Purewal did not contravene Part 5 of the *Act*.
- The seven employees named in the Determination did not work on July 1, 1997 (Canada Day); and
- The hours of work recorded for July 1, 1997 in Purewal's payroll records for the seven employees was its mechanism for ensuring that those employees received statutory holiday pay;

Purewal submitted into evidence copies of its payroll records for the seven employees in support of its submission. Mr. J. Purewal attended the hearing but did not testify.

Mr. M. ("Bob") Virji (the principal of Bob Virji & Company, Public Accountant) testified that the "payroll sheets" were prepared by his client (Purewal Contracting Ltd.). His evidence was that he informed Purewal how to complete the hours of work records which were submitted to his company in order to prepare payroll cheques for Purewal's employees. Under cross-examination, Mr. Virji testified that Purewal informed one of his staff which 7 of Purewal's employees did **not** work on July 1, 1997. All other employees (43 in total) were considered to have worked on the statutory holiday and should be paid accordingly. Mr. Virji did not produce any payroll records or any other documentary evidence to establish that such payments were made in accordance with the *Act* and *Regulations*.

Mr. Virji testified, under cross-examination, that there is no written record of the number of hours worked by those employees who did, in fact, work on July 1, 1997.

Mr. Virji also testified that farm workers who work on farms (as distinct from those who work in nurseries or greenhouses) are not paid at least semi-monthly as required by Section 17 of the *Act*. He stated candidly that such employees are paid an advance semi-monthly and that payroll records are prepared only when they are "...laid off at the end of the picking season." However, he did not produce any documents to show how such advances are recorded and reconciled with any payments which may be made at the end of the season.

According to Mr. Virji, farm workers employed (in the field) by Purewal were paid \$7.00/hour prior to June 26, 1997 and \$7.53/hour thereafter. The \$7.53/hour amount was

intended to include statutory holiday pay (3.6%) and vacation pay (4%). He also testified that his company does not rely on the “picking cards” to prepare Purewal’s payroll. Payroll cheques are prepared strictly on the basis of the hours of work records provided by Purewal. Thus, Virji does not distinguish between “field” farm workers and “greenhouse” farm workers for payroll purposes.

November 17, 1997

Purewal submits that the determinations which were issued on November 17, 1997 were not related to any contravention of Part 5 of the *Act*. Rather, a contravention of Section 28 (payroll records) was the reason for issuing the determinations.

Purewal’s written Reasons for Appeal included the following response to the findings of fact which led the Director’s delegate to determine that Section 28 of the *Act* had been contravened:

- **S.K. BAINS:** I do not have S.K. Bains working for my company. I do have Surjit K. Banshi working for the company.
- **H.K. BRAR:** her actual name is Gurjit K. Brar. She goes with the nickname of Harjit. That is why in the cards the first initial was H.
- **S.S. DHANOA:** The only Dhanoa working for the company is Major S. Dhanoa.
- **S.S. DOSNAJH:** I donot have S.S. Dosanjh working for the company. I do have Balbir Kaur Dosanjh working and she is going by the last name of Kaur rather than Dosanjh.
- **M.S. GILL:** Manjit K. Gill is working.
- **N.S. GILL:** Nashattar K. Gill is working.
- **B.K. SAGGU:** Her actual name is Harbhajan K. Rakhra. She goes with her nickname of Bhajan and with her maiden name of Saggu.
- **ONKAR SANDHU:** He was only employed on casula basis. He worked for \$200 for the whole farming season.

In addition, Mr. Virji submitted on behalf of Purewal that the picking cards on which the Director’s delegate relied could “....possibly belong to employees of Makara Farms Ltd.”

ANALYSIS

Purewal was a licensed FLC in 1996 and 1997. To obtain those licenses, Purewal was required to comply with the requirements of Part 2 of the *Regulation*.

Purewal did not appeal the determinations which were issued against it on June 26, 1997 (\$0.00 penalty; contravention of Section 6 of *Regulation* and Part 5 of *Act*).

The determinations which were issued on August 14, 1997 support a finding of Purewal's on-going contravention of part 5 of the *Act*.

Section 28 of the *Act* requires employers to keep detailed payroll records for each employee. Specifically, Section 28(1)(d) requires the employer to record "the hours worked by an employee on each day, regardless of whether the employee is paid on an hourly or other basis."

Section 85(1)(c) of the *Act* describes the powers given to the Director of Employment Standards to inspect any records that may be relevant to an investigation under Part 10 of the *Act*. Section 85(1)(f) permits the Director to:

require a person to produce, or to deliver to a place specified by the Director, any records for inspection under paragraph (c).

The \$500.00 penalty was imposed by the Director's delegate on November 17, 1997 under authority given by Section 98 of the *Act* and Section 28 of the *Regulation*.

Section 28 of the *Regulation* establishes a penalty of \$500.00 for **each contravention** of Section 28 of the *Act* and Section 46 of the *Regulation*. Thus, the Director has no discretion concerning the amount of the penalty to be imposed once she has determined that a contravention of Section 28 has occurred. The penalty is legislated to be \$500.00.

Section 29(2) of the *Regulation* sets out the penalty for contravening a provision or requirement listed in Appendix 2 of the *Regulation*. In particular, Section 29(2)(a) imposes a \$0 penalty for contravening a "specified provision" for the first time. Section 29(2)(b) imposes a penalty of \$150 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on one previous occasion.

Part 5 of the *Act* is one of the specified provisions in Appendix 2 of the *Regulation*. The \$1,050.00 penalty which was imposed on August 14, 1997 was imposed under these provisions of the *Act* and *Regulations*.

The chronology which we have set out above in this decision leads us to conclude that Purewal was notified clearly that it had contravened the *Act* and *Regulations* and was also warned clearly that further contraventions would lead to additional penalties and, possibly, cancellation of its FLC license. Despite the clear warnings and the information/guidance provided by the FLC project team staff, Purewal did not comply with the requirements of the *Act* and *Regulation*. We find that Purewal's various contraventions of the *Act* and *Regulation* have been established clearly through the determinations and other evidence described above.

It is trite law that the appellant bears the onus in an appeal. We find that Purewal has fallen considerably short of meeting the onus which it bears to show that the cancellation of its FLC license on November 17, 1997 was an unreasonable exercise of the Director's authority.

As noted above, Mr. Purewal attended the hearing but did not testify. We find this somewhat remarkable since, in our opinion, Mr. Purewal would have been in a considerably better position than Mr. Virji to give evidence about the identity of his own employees. This comment is particularly significant given Mr. Virji's admission that he or his staff did not rely on the "picking cards" to prepare Purewal's payroll.

We find Mr. Virji's evidence to be of no value, to put it in the most charitable way possible, given his inability to answer even the most basic question in a straight-forward manner.

In summary, Purewal did not make any submission nor adduce any evidence which would lead us to conclude that the Director's delegate was unreasonable in exercising the discretionary authority given under Sections 79 and 98 of the *Act* and Section 7 of the *Regulation*. For all of these reasons we find that the Determinations reflect an exercise in judgement by the Director's delegate which was just and proper in all of the circumstances.

ORDER

We order, under Section 115 of the *Act*, that the Determinations dated November 17, 1997 and August 14, 1997 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

Norma Edelman
Registrar
Employment Standards Tribunal

Ib S. Petersen
Adjudicator
Employment Standards Tribunal