

An appeal

- by -

562649 B.C. Ltd. operating as Jani-King Commercial Janitorial Services
("Jani-King" or "employer")

- 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: Paul E. Love

FILE No.: 2000/636

DATE OF DECISION: January 22, 2001

DECISION

OVERVIEW

This is an appeal filed by 562649 B.C. Ltd. operating as Jani-King Commercial Janitorial Services (“Jani-King”) of a Determination dated August 22, 2000. In this determination the Director assessed as escalating penalty against Jani-King in the amount of \$450.00, on the basis that the company had committed a second offence. The Determination did not clearly identify the facts on which the Delegate relied in issuing the Determination and therefore I cancelled the Determination.

FACTS

On September 10, 1999, a Delegate issued a Determination which found that Julieta Bato and Allen Klarreich, a partnership operating as Jani King Commercial Janitorial Services and, Bato Enterprises Ltd. had contravened sections 16, 17, 18, 20, 40 and 58 of the *Employment Standards Act* (the “*Act*”). The Determination was upheld by the Tribunal in *Julieta Bato and Allen Klarreich, a partnership operating as Jani King Commercial Janitorial Services, and Bato Enterprises Ltd., #D536/99*.

The Delegate, (a different Delegate from the person issuing the September 10, 1999 determination) issued the penalty determination in the amount of \$400 because of the past history of the company in violating the *Act*.

The employer argues that the company does not have a history of violating the *Act* as it is a new company. The company says that there are no details in this determination as to what incidents led to the fine, and that there is no detail in how 542649 BC Ltd. contravened parts 3, 4 and 7 of the *Act*. Mr. Klarreich submits that the employer has been in business for less than 2 and a half years. So it is not possible for it to have done all of the alleged things.

The employer submits a copy of a Franchise Transfer agreement transferred from Karim Alef to 562649 B.C. Ltd. on May 8th, 1998. The document also encloses an addition/deletion agreement which identifies Julia Panililio Bato as a transferring franchisee and Allen Klarrieich as a franchisee.

ISSUE:

Did the Delegate err in issuing the penalty determination?

ANALYSIS

In an appeal under the *Act* the burden rests with the appellant, in this case Jani-King, to demonstrate an error in the determination such that I should vary or cancel the determination.

The Director has the discretion to impose a penalty. When the Director exercises the discretion to impose a penalty, the reasons for imposing a penalty must be clearly stated in the Determination: *Chamberlain (c.o.b. Super Save Gas)*, *BCEST #D347/97* and *Folch BCEST #D 109/99*.

In this case, given the drafting of the Determination, I am unable to discern for which incident or incidents the Director is imposing a penalty. This Determination refers only to a Determination dated September 10, 1999 which was upheld on appeal. It is unclear on the face of the Determination why the Director seeks an escalating penalty. The history of the employer is not set out in the Determination. I note that on August 22, 2000 the Director issued three separate determinations against this employer. It may be that the Director is also relying on the Determination issued on August 22, 2000 in respect of 562649 B.C. Ltd., but this is not apparent from the face of this penalty Determination.

The Director argues in its written submission that the principals, Klarreich and Bato, have a history with the branch going back to at least 1997, operating Jani-King Commercial Janitorial franchise under a variety of names including Bato Enterprises Ltd, a partnership of Allen Klarreich and Julietta Bato, and now 562649 B.C. Ltd. The problem with this submission is that if this was the Delegate's reasoning it should have been set out in the penalty determination. The penalty determination in this case is an example of very bad drafting. A person who receives a penalty ought, from reading the Determination only, to be able to tell why a penalty was imposed. The penalty determination ought to be a self contained document, and an adjudicator reading the determination should be able to follow through the reasoning of the Delegate.

On the basis of the evidence before me it appears that the original determination that was upheld was issued against Julieta Bato and Allen Klarreich, a partnership operating as Jani King Commercial Janitorial Services, and Bato Enterprises Ltd. There is no evidence before me as to why the Director seeks to issue a penalty against 562649 B.C. Ltd. operating as Jani-King Commercial Janitorial Services. There is no evidence in the Determination which links or explains why the Director seeks a penalty against 562649 B.C. Ltd. It may be that the Director is entitled to issue a penalty, but there is no information in the Determination which clearly sets out why the Director seeks a penalty against the company, when the only history referred to in the Determination is a Determination against Julieta Bato and Allen Klarreich personally, apparently made in 1999. It may be that the Director would be entitled to a penalty against those individuals, but the Delegate has not sought a penalty against the individuals Bato and Klarreich. It may be that the Director would be entitled to an escalating

penalty, against the company, if this Determination was clearly drafted to indicate upon what events the Director relies for the penalty.

While I am cancelling this Determination because it is unclear, it is open to the Director to issue a new and proper determination setting out the facts and reasons on which it relies.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated August 22, 2000 is cancelled.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal