



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.:** 2000/637

**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. The employer offered no cogent excuse for failing to comply with the demand for records, and therefore I confirmed the Determination.

### FACTS

On July 31, 2000, a Delegate issued a Demand for payroll records, records the employer was required to keep pursuant to Part 8 of the *Employment Standards Act* (the “*Act*”), and records related to a payroll deduction of \$200 made by the employer from a paycheque in the pay period November 1-15, 1998. The demand was made pursuant to section 85(1)(f) of the *Act*. At the time she issued the demand the Delegate was investigating a complaint made by Eliseo Erpilla under the *Act* concerning wages. Although duly served with a demand by registered mail, the employer did not produce any documents. The employer claimed that Eliseo Erpilla was not an employee. In a Determination dated August 22, 2000 the Delegate determined that Ms. Erpilla was an employee and was entitled to wages plus interest in the amount of \$2,776.41.

The Delegate, (a different Delegate from the person issuing the demand) issued the penalty determination in the amount of \$500.00 because the non-production of the records frustrated the investigation of all issues, including the issue of whether Eliseo Erpilla was an employee. In the Determination the Delegate indicates that the employer was aware of the requirements of the *Act*, and had contravened the *Act*, in failing to keep records on two previous occasions.

In the appeal, the employer alleges bias, but does not set out any evidence in support of the allegation. He alleges that the employee lied about being an employee, and the employer attempted to bolster its allegation with allegations of other “misconduct or wrongdoing” of the employee. The employer alleges that it produced all the documents that it had, and that the demand for documents was “irrelevant” given that Eliseo Erpilla was not an employee.

### 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 the employer, to demonstrate an error in the determination such that I should vary or cancel the determination.

In this case the information sought by the Delegate was in the course of an inquiry under the *Act*. The Delegate had grounds to seek the information as the employee complained under the *Act* that money was owing arising out of an employment relationship. The Delegate is empowered to make the demand under s. 85 of the *Act* and 46 of the *Employment Standards Regulation* (the “*Regulation*”), and a person who is required to keep records, must produce the records. When a Delegate receives a complaint, the Delegate has the power to investigate the complaint. The Delegate is not bound to accept the position put forward by the employer, or the employee, without investigation. Often it is in the interests of an alleged employer to co-operate with the Delegate so that the investigation can be concluded as quickly as possible. No reasonable excuse has been offered by Jani-King for failing to comply with the demand. I do not accept the submission of Jani-King that it had no records concerning Eliseo Erpilla.

Under s. 98(1) of the *Act*, the Director may impose a penalty, as set out in the *Act* or *Regulations* for a contravention of the Act. The Delegate seeks the specified penalty of \$500.00 which is set out in s. 28 of the *Regulation*. While the Delegate has the discretion as to whether a penalty should be imposed, once the Delegate decides to impose the penalty the amount of the penalty is \$500.00. There is no discretion to reduce the amount of the penalty.

One of the purposes of the *Act*, as set out in s. 2(d) is to ensure that disputes under the *Act* are resolved in a fair and efficient manner. The employer has frustrated the investigation by failing to produce records. The employer has shown no reason why he should have relief from the penalty, and therefore I confirm the Determination.

## **ORDER**

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

***PAUL E. LOVE***

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**