

An appeal

- by -

KNN Distribution Inc.
("KNN" or the "Appellant")

- 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: Norma Edelman

FILE No.: 2001/788

DATE OF DECISION: February 19, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by KNN Distribution Inc. ("KNN" or the "Appellant") against a Determination issued by a delegate of the Director of Employment Standards on November 6, 2001. The delegate found that KNN owed Harpal Dhillon ("H. Dhillon"), Kuldip Dhillon ("K. Dhillon"), Ajit Pannu ("A. Pannu"), and Gurnam Pannu ("G. Pannu") [the Respondents] wages in the amount of \$14,276.33 for work performed, for the most part, in 2001. KNN appealed the Determination on the ground that the Respondents were not its employees during 2001.

ISSUE TO BE DECIDED

Does KNN owe wages in the amount of \$14,276.33 to the Respondents?

FACTS AND ANALYSIS

KNN operates a blueberry farm. The Respondents filed complaints at the Employment Standards Branch claiming that KNN owed them wages as follows: H. Dhillon for the period January 12 to August 28, 2001; K. Dhillon for the period July 23 to August 28, 2001; A. Pannu for the period November 14, 2000 to August 28, 2001; and G. Pannu for the period July 24 to August 28, 2001.

On September 7, 2001 the delegate issued a Demand for Employer Records to KNN. The delegate requested records for all employees for the period January 1, 2000 to August 28, 2001. The payroll records delivered to the delegate included some 2000 records for A. Pannu but did not include records for the Respondents for the year 2001, nor did they contain a daily account of hours worked for any employee.

On October 22, 2001 the delegate sent a letter to KNN outlining the wages owed to the Respondents based on their submissions alone as no records had been provided by KNN. The delegate determined that the total amount owed was \$14,116.10. KNN was given until October 31, 2001 to advise if it disputed the delegate's findings. KNN responded in a letter dated October 29, 2001 stating, "Further to your letter dated October 22, 2001 please be advised that we will submit, within the next several weeks, confirmation that the alleged wages owing in the total amount of \$14,116 are wrong. We forwarded to you all of the accounting records maintained by us. Will you please return the records so that we can complete our submission."

Subsequently, the delegate issued the Determination in the amount of \$14,276.33, which was the amount, set out in his October 22 letter plus interest. In determining the amount of wages owed, the delegate accepted the Respondent's records (which included picking cards and some hourly

records) as an accurate reflection of work performed for KNN. In the Determination the delegate stated that KNN acknowledged that the Respondents were employees and that certain wages remained outstanding.

KNN appealed the Determination on the ground that the Respondents were not its employees in 2001 and only A. Pannu was an employee in 2000. Accordingly, payroll information did not exist for the Respondents for 2001. KNN attached a copy of a T4 for 2000 for A. Pannu. It also attached some payroll records for the A. Pannu, H. Dhillon and K. Dhillon, which it says, shows they were employees of All Season Harvesting Inc. ("All Season") in 2001. All Season hired the employees to work on properties harvested by KNN. It said "It's trades practice to use the harvester (KNN Distribution Inc.) cards to keep records of the picking, but the employer remained All Season Harvesting Inc."

KNN further states that after it sent the October 29, 2001 letter to the delegate, it phoned him to say that additional time was needed because he had all its payroll records and it needed the records to confirm the information. The Determination was issued within a week of its letter and within several days after the return of the payroll records, and thus before it had an opportunity to review the payroll records.

KNN requested that the Determination be cancelled.

In reply to the appeal the delegate said a farm labor contractor license was issued to All Season on June 14, 1999. One of the principals of KNN (Akashdeep Nijjer) and his father function as managers of All Season and are involved in the day-to-day operation of the company. All Season had their farm labor contractor license canceled on October 30, 2001 due to non-compliance issues. All Season provided contract labor to farms and transported workers to these farms. Vehicles used by All Season to transfer workers are all registered to KNN. Employees of both companies would be transported either to farms harvested by KNN or farms harvested by other farm owners. If employees were contracted out to other farmers, the employer would be the licensed contracting company, All Season, and if employees were transported to farms harvested by KNN, the employer would be KNN.

The delegate stated when KNN was first contacted regarding the Respondent's complaints, it said that A. Pannu, H. Dhillon and K. Dhillon worked for both All Season and KNN and that all wages earned at All Season had been paid in full. KNN acknowledged that G. Pannu only worked for KNN and that wages for all the Respondents remained outstanding from KNN. He further stated that KNN did not advise him prior to the issuance of the November 6 Determination that the Respondents were not employees in 2001 and A. Pannu was only an employee in 2000, nor did it provide proper records for the Respondents. When the November 6, 2001 Determination was hand served to KNN it did question why all outstanding wages were put under KNN and it was explained that the Determination only dealt with wages earned while working for KNN and that wages were also outstanding for All Season and would be dealt with separately.

The delegate also said that All Season's employee list submitted by KNN only confirms what he was told initially by KNN that K. Dhillon, H. Dhillon and A. Pannu were employees of both All Season and KNN and G. Pannu only worked for KNN. The delegate enclosed an Earnings and Deductions Summary Report submitted by All Season in response to a Demand for Employer Records issued on September 7, 2001, which shows the latest pay period for which H. Dhillon, K. Dhillon and A. Pannu were paid, was July 15, 2001. He also enclosed copies of the Respondent's picking cards, which show, he says, that they performed work for KNN well beyond that date. Further, in response to a letter sent to All Season on November 9, 2001, payroll records including copies of picking cards for H. Dhillon and K. Dhillon were submitted to him and they contain no picking cards for work performed at properties harvested by KNN. The delegate said this supports KNN's initial response that the Respondents were employed by KNN when work was performed at properties harvested by it and when performing work at properties harvested by other owners, All Season employed the Respondents.

The delegate further said that copies of Records of Employment issued to A. Pannu confirm that he was an employee of both All Season and KNN in 2000 and the same arrangement was likely in place for 2001. As well, he stated that a comparison of KNN's payroll list and All Season's payroll list demonstrates at least 33 employees worked for both companies in the year 2001.

The delegate said that KNN's submission that the Respondents were not its employees is without merit and is an argument that could have and should have been brought to his attention well before the Determination was issued. The principals of KNN have a history of non-compliance with the Employment Standards Branch and have done nothing more than attempt to frustrate investigation by failing to provide proper payroll records.

KNN was provided with an opportunity to reply to the delegate's submission. No reply was received from KNN.

The burden is on the Appellant, KNN, to show that the Determination is wrong. I am not satisfied that KNN has met that burden.

I agree with the delegate that KNN's argument that the Respondents were not its employees in 2001 could have and should have been brought up during the delegate's investigation. As I stated in Tribunal Decision (BCEST # D081/02), which is being issued concurrently with this Decision, I accept that KNN was aware, at least by the time it received the Demand, that the Respondents had claims against it and yet it did not raise the argument that they were not employees until it filed an appeal of the Determination issued on November 1, 2001. KNN had all its records in its possession at the time it was served the Demand and I find no reasonable explanation for why it failed to advise the delegate when it responded to the Demand that the Respondents were not its employees. The Tribunal has consistently held that in the absence of a legitimate reason, evidence and information will not be considered on appeal when it could have and should have been presented to the delegate during the investigation process (see Specialty Motor Cars BCEST # D570/98). As indicted above, I can find no legitimate reason why KNN

did not advise the delegate that the Respondents were not its employees. For that reason alone, the appeal is dismissed. All the information provided by KNN on the appeal could have and should have been presented to the delegate in the initial investigation.

However, even if I consider KNN's reasons for the appeal, the appeal is still not successful.

First, KNN does not dispute the delegate's statements that it initially told him that the Respondents were employees of KNN and that all were owed wages by KNN and further that A. Pannu, H. Dhillon and K. Dhillon also worked for All Season. Second, the fact that A. Pannu, H. Dhillon and K. Dhillon appear on All Season's records does not mean they were not also employed by KNN. Third, the picking cards support the position that the Respondents were employees of KNN. Finally, KNN's statement that the reason its name is on the picking cards is due to trades practice to use the harvesters cards is not borne out by the payroll information sent to the delegate by All Season on November 28, 2001.

For the above reasons I conclude that the delegate did not err in concluding that the Respondents were owed wages in the amount of \$14,276.33.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated November 6, 2001 be confirmed.

Norma Edelman
Adjudicator
Employment Standards Tribunal