

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.: 2001/796

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 1, 2001. The delegate imposed a penalty of \$500.00 on KNN for failing to produce records. In its appeal, KNN requests that the Determination be cancelled.

ISSUE TO BE DECIDED

The issue to be decided is whether the penalty imposed on KNN was appropriate in the circumstances.

FACTS AND ANALYSIS

On September 7, 2001, the delegate issued KNN a Demand for Employer Records under Section 85(1) of the Act. Records were demanded for all employees for the period January 1, 2000 to August 28, 2001. The Demand was received by KNN on the same day.

In the Determination the delegate stated that the Demand was issued in response to complaints received from Harpal Dhillon, Kuldip Dhillon, Ajit Pannu and Gurnam Pannu (the "complainants"). A different delegate was investigating their complaints and an inspection of the payroll records was relevant to his investigation.

KNN provided some records to the delegate, but it did not provide records for the complainants for the period January 1, 2001 to August 28, 2001. As a result the delegate imposed a \$500.00 penalty on KNN for failing to produce records as required under Section 46 of the *Employment Standards Regulation*.

The delegate stated that the merits of a complaint could often only be determined through an inspection of records, and failure to deliver records delays investigation and may deny an employee a minimum employment standard. The records demanded were relevant to an investigation, the employer was aware of the demand and the records were not delivered. In this case proper payroll records were required in order to determine if there was merit to the complainant's allegations. No reasonable explanation for failure to deliver accurate records was given. If a reasonable explanation had been given, the delegate may have exercised his discretion and a penalty would not have been issued. Finally, the delegate said if there are no disincentives against employers who fail to participate in an investigation, then such conduct may be repeated and that a penalty is issued in order to create a disincentive against employers who frustrate investigation through failure to prove proper payroll records.

KNN appealed the Determination on November 16, 2001. It says as follows:

Please cancel the determination.

Records were delivered, however, the four noted individuals were not employees of KNN Distribution in 2001, and therefore, payroll records for them were not available.

The investigator did not ask if they were employees of KNN Distribution Inc. They were employees of All Season Harvesting Inc.

The delegate who conducted the investigation into the complainants' complaints filed a reply dated December 4, 2001 to KNN's appeal. The delegate said that when he hand delivered the Demand, KNN made no mention the complainants were not employees in 2001. He said when KNN was first contacted regarding the Respondent's complaints it said A. Pannu, H. Dhillon and K. Dhillon worked for both All Season Harvesting Inc. ("All Season") and KNN and that all wages owed by All Season were paid, but wages from KNN remained outstanding. He further said that he sent a letter to KNN on October 22, 2001 outlining the wages alleged to be outstanding by the complainants. In the letter he advised KNN that the records it previously provided were incomplete and that if it was in disagreement with the claims it was to submit supportive evidence by October 31, 2001. KNN replied on October 29, 2001 that it would submit within the next several weeks confirmation that the amounts owing were wrong. It also said it wanted the delegate to return all the records it had previously sent to him so it could complete its submission. Nothing was said about the complainants not being employees of KNN. The delegate said that KNN had almost two months, from the date the Demand was served to the response date of his October 22, 2001 letter, to provide payroll records for the complainants or simply state they were not employees of KNN. It was given an opportunity to provide records but failed to do so and failed to provide a reasonable explanation for not doing so and as a result the penalty was imposed via the November 1, 2001 Determination. Subsequently, the delegate issued another Determination dated November 6, 2001, which outlined the wages owing to the complainants by KNN. The delegate said when he hand delivered this Determination, KNN still made no mention that the complainants were not its employees, although it did question why all outstanding wages were put under its name and the delegate explained that it 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's December 4, 2001 submission was forwarded to KNN for its reply. The Tribunal received no reply.

This appeal has been decided based on the written submissions of KNN and the delegate.

The burden is on the Appellant to show that the Determination is wrong and should be varied or cancelled. In this case, I am not satisfied that the Appellant, KNN, has met that burden. It has not persuaded me that the Determination should be cancelled.

Section 98 of the *Act* authorizes the Director of Employment Standards and her delegates to impose prescribed monetary penalties where a person has contravened the *Act* or *Regulation*. In

the event a person fails to produce payroll records that have been properly demanded under Section 46 of the *Regulation*, a \$500.00 penalty may be imposed pursuant to Section 28(b) of the *Regulation*.

In this case, the Demand was properly sent and received by KNN. KNN says it did not produce records for the complainants because they were not its employees, but All Season's employees. It also says the delegate did not ask if the complainants were employees of KNN. It is not clear to me what this last statement means. In any event I accept that KNN was aware, at least by the time the Demand was served, that the complainants had claims against KNN and further, that it agreed wages were owed to the complainants. In his reply to the appeal, the delegate said when he first contacted KNN (which would have to be either when the Demand was served or earlier) KNN admitted the complainants worked for KNN and were owed wages. KNN was given an opportunity to reply to this statement, but it did not do so. Insofar as KNN has not challenged the foregoing, I accept the delegate's position as accurate. As such, KNN was obliged to keep records regarding the complainants and to produce them as and when required by the delegate.

Even if I did not accept that KNN admitted the complainants worked for it and it owed them wages, the evidence before me still falls short of establishing that the penalty should be cancelled. When KNN replied to the delegate on October 29, I would have expected it to say the complainants were not its employees, rather than saying the amounts owing to them were wrong. The amounts owing to the complainants would be irrelevant if they were not employees of KNN. Accordingly, I find that KNN's explanation for why it did not provide records to the delegate lacks credibility.

The delegate has the discretion under Section 98 to impose a penalty for a contravention of the *Act* or *Regulation*. There is nothing in this case that suggests the delegate exercised his discretion improperly. The delegate set out his reasons in the Determination for exercising his discretion to impose the penalty. There is no dispute that KNN failed to provide records to the delegate and failed to explain, prior to the imposition of the penalty, why it did not provide the records. Further, its explanation, made after the fact, is not believable. I agree with the delegate that KNN has not provided a reasonable explanation why it could not fully comply with the Demand. Accordingly, I find no basis to conclude that the delegate erred in imposing the \$500.00 penalty on KNN.

ORDER

Pursuant to Section 115 of the *Act*, I order that the November 1, 2001 Determination be confirmed.

Norma Edelman
Adjudicator
Employment Standards Tribunal