

An appeal

- by -

Imperial Security & Protection Services Ltd.  
("Imperial Security")

- 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:** James Wolfgang

**FILE No.:** 2003A/19

**DATE OF DECISION:** March 27, 2003

## DECISION

### OVERVIEW

This is an appeal by Imperial Security and Protection Services Ltd. (“Imperial”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued by the Delegate of the Director of Employment Standards (the “Director”) dated December 12, 2002. The Determination found Imperial Security and Protection Services Ltd. had contravened Section 46 of the *Employment Standards Regulation* by failing to produce proper payroll records. The penalty for this contravention was assessed at \$500.00 under Section 28 (b) of the *Employment Standards Regulation*.

According to the Delegate, initially there were two complaints filed. The complaint by Jaspal Si Dhanda (“Dhanda”) was filed August 31, 2001. My file did not contain a copy of the original complaint form.

On January 22, 2002 the Delegate for the Director issued a Demand for Records to Imperial pursuant to section 85 (1)(f) of the *Employment Standards Act*. The payroll records were to be supplied to the Delegate by February 14, 2002. That Demand was returned as the business had changed address. On January 28, 2002 the Demand was re-mailed and was delivered January 30, 2002. Proof of delivery was included in the material supplied by the Tribunal.

Imperial claimed the payroll records were in storage and could not be produced within the time period requested by the Delegate. This was accepted and settlement proceedings continued. When the changes to the *Act* were announced in June 2002, the Delegate made Imperial aware this may reduce Dhanda’s claim to 6 months rather than the 24 months provided in the previous *Act*. An offer of settlement for \$350.00 was made by Imperial to Dhanda during June 2002. Dhanda rejected this as he wished to determine if his claim would go back beyond the 6 months.

During the period from the filing of the complaint and the Demand for Records there were ongoing discussions between the Delegate and Imperial in an attempt to resolve the complaints. According to the Delegate, Imperial was made aware of the following points:

1. The payroll records were essential to the investigation.
2. A penalty may be assessed if the payroll records were not produced.
3. If Imperial did not supply the payroll records the Delegate would use the records of the employee.

Copies of two faxes from the Delegate to Imperial dated September 3 and 5, 2002 were included which demonstrate contact had been maintained during the period. The September 5, 2002 fax gave Imperial until September 15, 2002 to provide the records or a determination would be issued. Sometime during this period the second complaint was withdrawn.

On November 1, 2002, Section 80 of the *Act* was amended. Complaints filed prior to May 31, 2002 were allowed to be retroactive for 24 months. Imperial was notified of this by fax on November 1, 2002.

On November 12, 2002 Imperial wrote to the Delegate indicating they would be in “contact” by December 16, 2002. The Delegate rejected this further request for an extension. Imperial was ordered on November 13, 2002 to produce the records by November 27, 2002 or to arrive at a settlement with Dhanda by that date. Failure to do so would result in a Determination being issued.

On November 26, 2002 Imperial made an offer of settlement to Dhanda through the Delegate in the amount of \$1,000.00. Dhanda rejected this.

The Determination, dated December 12, 2002, was issued, using the information on the hours worked as supplied by Dhanda, however Dhanda’s records only covered the last 15 months of his employment, not the 24 months provided in the *Act*.

The Determination stated no reasonable explanation for the failure to deliver records had been given. It states, in part:

The explanation by the Employer that the records were in storage and that he was unable to provide them at the requested time was accepted by the Investigating Officer. After 11 months of not providing the Records, even though settlement proceedings were underway, the Employer wrote to the Officer stating that he would get back to the Officer before December 16, 2002, which was not acceptable to the Officer.

Imperial’s appeal to the Tribunal was filed January 15, 2003. They requested the Determination be cancelled as new evidence became available that was not available at the time of the investigation.

## ISSUE

Is Imperial in breach of Section 46 of the *Employment Standards Regulation* and, if so, should the penalty of \$500 under Section 28(b) of the *Employment Standards Regulation* be upheld?

## THE FACTS AND ARGUMENT

Dhanda was employed by Imperial as a mobile Security Guard from October 30, 1998 until March 18, 2001.

In his appeal letter to the Tribunal dated January 13, 2003, Dave Mander (“Mander”) of Imperial claims his brother was abducted on October 9, 2001 and has not been seen since. Mander claims he spent most of the past year investigating the disappearance. He stated he returned to work in October 2002 and promptly started to deal with the case. He also stated he had difficulty in contacting the delegate as the Branch office where he worked was closing. He has requested the \$500.00 penalty be removed from his file.

The delegate summarized the events during the investigation in a submission to the Tribunal received February 05, 2003. It stated at page 2, in part:

A review of the file indicates that Mr. Mander was in active communication with Mr. Brulotte throughout 2002. This included requesting an extension of time to provide the records “because they were stored off-site” and later to say that the records could not be found and to request a further extension because “fall and winter” were the busy seasons for the business.

Finally, in a third complaint against Imperial, the delegate indicates Mr. Mander provided payroll records, after a number of delays and a Demand for Records was issued. The delegate was of the opinion Mr. Dhanda's records could have been provided at the same time.

There is evidence of several contacts between Mander and the Delegate and the issue of the disappearance of Mander's brother is not mentioned as a reason for not providing the records.

## ANALYSIS

In an appeal of a Determination the onus is on the appellant to show, on a balance of probabilities, that the Determination ought to be varied or cancelled. To be successful the submissions from the appellant must demonstrate some error in the Determination, either in the facts accepted, the factual conclusions reached or in the Director's analysis of the applicable law.

Imperial stated in their appeal:

“Evidence has become available that was not available at the time the Determination was made. Please see attached”.

Attached was a copy of a letter dated January 13, 2003. Mander claimed the delay in supplying the records was the result of the abduction of his brother and asked for the penalty of \$500 to be removed from his file.

During the investigation, Imperial gave a number of reasons for not supplying the payroll records for Dhanda. They first argued the records were kept “off site” and it would take additional time to make them available. They later stated the records could not be found. They then argued the fall and winter were their busiest time. Finally, before the Tribunal, they used the argument that Mander's brother had disappeared and considerable time had been used investigating the disappearance.

The information of the disappearance was not given to the Delegate during the investigation, however it is not new information. It was available at the time of the investigation. Mander's brother was abducted 6 weeks after Dhanda's complaint and 14 months before the Determination was issued. Mander did not present this evidence until his appeal to the Tribunal.

While it is a most unfortunate personal situation for Mander, the Delegate was most lenient in granting several extensions and there was ample time to produce the records as ordered.

The Delegate's submission to the Tribunal dated February 5, 2003 stated, in part:

.....In other words, Mr. Mander participated fully in Mr. Brulotte's investigation, with the exception of his failure to produce records as required, and there is no evidence that Mr. Mander was unable to participate, or requested any consideration, due to his personal situation.

It should be noted that Imperial had the opportunity to review the 15 months of payroll records supplied by Dhanda and recommended several changes.

Further in the February 5, 2003 submission to the Tribunal the Delegate states:

.....When the parties were unable to reach a settlement of the complaint, Mr. Brulotte issued a determination for wages owed to Mr. Dhanda, from (sic) overtime, using the records provided by Mr. Dhanda. Since Mr. Dhanda's records only cover the 15 month period prior to the end of his employment, Mr. Brulotte was able only to make a finding for wages owed for that period and *not for the full 24 months prior to the end of Mr. Dhanda's employment as was the entitlement under the Employment Standards Act at that time.* It was Mr. Brulotte's belief, as set out in his determination for wages owed to Dhanda at page 4, "Analysis" section (Attachment A). Imperial's failure to provide the records very probably resulted in a finding that did not reflect Mr. Dhanda's full entitlement to wages under the *Act*.

The failure of Mander to produce the payroll records resulted in Dhanda being denied his minimum entitlement under the *Act*. This could have resulted in a loss to Dhanda in excess of \$800.00, based on the original Determination.

Section 46 of the Employment Standards Regulation states:

**46** (1) A person who is required under section 85 (1) (f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required.

Imperial failed to provide the payroll records as required under Section 46 (1) and is therefore liable. Section 28 of the *Employment Standard Regulation* is very specific and states:

**28** The penalty for contravening any of the following provisions is \$500 for each contravention:

- (a) section 25 (2) (c), 27, 28 29, 37 (5) or 48 (3) of the Act;
- (b) section 3, 13, 37.6 (2), 37.9 (2) (b) (ii), 38.1 (i) to (k) or 46 of this regulation. (emphasis added)

Imperial has failed to prove the Determination to be in error as indicated above and the Determination is upheld.

## **ORDER**

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated December 12, 2002. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

---

**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**