

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

- by -

Nizar Kassam operating Minit-Tune & Brake  
("Kassam")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Michelle Alman

**FILE No.:** 2000/359

**DATE OF DECISION:** August 2, 2000

## DECISION

### OVERVIEW

This decision addresses an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Nizar Kassam ("Kassam"), operating Minit-Tune & Brake ("Minit-Tune"), from a Determination issued April 28, 2000 by a delegate of the Director of Employment Standards ("the Director"). The Determination concluded that Kassam had contravened section 46 of the *Employment Standards Regulation* (the "*Regulation*") and section 85(1)(f) of the *Act* by failing to produce certain employment records for Len Cook ("Cook") in response to a Demand for Employer Records issued January 7, 2000. Pursuant to section 28(b) of the *Regulation*, the Director's delegate ordered Kassam to pay a \$500.00 penalty for failing to produce the required payroll records.

Kassam appeals from the Determination, alleging that he only failed to produce the demanded payroll records because they were largely destroyed by water damage sustained while the records were held at two separate locations. Kassam also alleges that he should not be subject to any penalty because he supplied adequate payroll information created from reliable, non-payroll, records, to wit, Cook's T-4 "filings." Kassam further alleges that the Director's delegate evidenced bias in favour of Cook by issuing the Determination and failing to accept Kassam's explanation that the required payroll records were unavailable due to water damage.

The parties made written submissions in these appeals. Kassam offered reply submissions further to the Director's submissions. I note in passing that while N Kassam is the named appellant, Shinan Kassam ("S. Kassam") signed the appeal form. S. Kassam also prepared the appeal and reply submissions for Kassam. S. Kassam implies in the reply submissions that S. Kassam also prepared the originals of Cook's payroll cheque stubs, copies of which were attached to the Director's submissions.

### ISSUES

The issues to be decided are whether Kassam violated section 46 of the *Regulation* and section 85(1)(f) of the *Act* by failing to provide requested payroll records in response to a Demand for Records, and if so, whether he must pay a penalty of \$500.00 pursuant to section 98 of the *Act* and section 28(b) of the *Regulation*.

### THE FACTS AND ANALYSIS

Cook worked for Kassam as a mechanic at the Minit-Tune operation located at 10585 King George Highway in Surrey. He voluntarily left his employment, and on August 30, 1999 filed a complaint for overtime and statutory holiday pay owing for the period May 11, 1998 to August 30, 1999.

On January 7, 2000 the Director's delegate wrote to Kassam requesting payroll records in order to investigate Cook's complaint. She attached a printout of section 28 of the *Act*, which concerns

the payroll records an employer is required to keep. On January 13, 2000 Kassam replied with a letter to advise the Director's delegate that he believed the complaint was malicious and false. Kassam did not provide any payroll records to help him refute the complaint's allegations.

On January 14, 2000, the Director's delegate telephoned Kassam seeking payroll records. The Determination recites that in that conversation Kassam told the Director's delegate that he would need 3 weeks to gather the records, and that some records were lost in a fire. In his appeal submissions Kassam complains that the Director's delegate "did not understand the nature of the loss of records," because they were destroyed by water damage, including water from fire sprinklers which went off in an adjacent storage unit, and not directly by fire.

Also on January 14, 2000, the Director's delegate issued to Minit-Tune a Demand for Employer Records pursuant to section 85(1)(f) of the *Act*. The Demand required delivery of the records by noon on February 7, 2000. The Demand further clearly stated in bold type at the bottom of the page that:

"Failure to comply with a record requirement may result in a \$500 penalty for each contravention..."

Kassam wrote by fax to the Director's delegate on February 5, 2000 to enclose Minit-Tune's employer records for Cook. The enclosed records consisted of a one-page table concerning Cook's wages for the period in question. The table purported to describe, among other things, the statutory holidays Cook had taken, the number of hours of statutory holiday pay he had received, his regular and overtime hours worked, and the total of Cook's hours for each pay period. The table did not include a record of Cook's daily hours of work as required by section 28(1)(d) of the *Act*. In certain instances, the numbers of regular and overtime hours worked did not total up to the same figure entered for the total hours worked in those pay periods.

Kassam's February 5, 2000 letter indicated that his accountant would be preparing a T-4 for Cook which would include "taxable benefits" Cook had received in the form of free work done at Minit-Tune on Cook's own, and some of Cook's friends', personal vehicles. Kassam requested that the Director's delegate advise him if further records were required, and asked for patience, as seeking further records might be slowed by the demands of the tax season on Kassam's accountant's time. The letter contained no explanation to the effect that the required payroll records were unavailable due to water damage.

The Director's delegate wrote again to Kassam on April 12, 2000 advising that his failure to produce records in February, 2000 meant he was "in a penalty situation." The Director's delegate also stated in her letter that she had called Kassam on April 6, 2000 to obtain an explanation of the manner in which Cook's overtime hours had been obtained for the table produced on February 5, 2000. The Director's delegate wrote that Kassam had not been able to explain how he had obtained Cook's overtime hours. The delegate also wrote that Kassam had said he would have his accountant give the explanation, but had declined to give the Director's delegate his accountant's name. In her April 12, 2000 letter the Director's delegate also enclosed a calculation sheet indicating the amount of overtime wages and vacation pay on those overtime wages owing to Cook, and requested delivery to her by April 26, 2000 of a cheque payable to Cook in the amount of \$3,168.36.

On April 26, 2000 Kassam wrote to the Director's delegate disputing her overtime calculations for Cook. Kassam gave an explanation of one selection from the table he had sent as payroll records for Cook in order to clarify that the table was an accurate (or more generous to Cook) reflection of the overtime which Cook had worked. In the April 26, 2000 letter Kassam also describes the table as a "summary," and indicates that retrieval of records of Cook's daily hours worked is "a timely and arduous task, particularly considering that the time frame extends back to May, 1998." Again, Kassam offered no further explanation about the daily work records being unavailable due to water damage. Kassam's April 26, 2000 letter also stated that should a Determination be issued, he wished by that letter to appeal. He also requested that the Director's delegate continue to contact Kassam by letter rather than by telephone.

Section 28 of the *Act* states in relevant part:

***Payroll records***

**28** (1) *For each employee, an employer must keep records of the following information:*

...

(d) *the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;*

And section 85 of the *Act* provides in relevant part:

***Entry and inspection powers***

**85** (1) *For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:*

...

(c) *inspect any records that may be relevant to an investigation under this Part;*

...

(f) *require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).*

Where the Director finds a violation of the *Act* or *Regulation*, section 98 of the *Act* states:

***Monetary penalties***

**98** (1) *If the director is satisfied that a person has contravened a requirement of this Act of the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.*

The relevant sections of the *Regulation* here are:

***Penalty for contravening a record requirement***

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

- (a)     *section ...28...of the Act;*
- (b)     *section ...46 of this regulation.*

***Production of records***

**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.*

In his appeal submissions Kassam clearly states that he did not have the required payroll records indicating Cooks daily hours of work. Kassam's letters to the Director's delegate during her investigation offer no further amplification on the water damage explanation he gave her orally on January 14, 2000. Kassam's letter dated April 26, 2000 offers only a single example of explanation of his method of arriving at Cook's overtime hours, and even evidences a disinclination to be bothered with the effort necessary to retrieve the demanded information. Kassam's offer of a single verbal explanation for why the required records were missing must be reviewed together with his offer instead of a "summary" of payroll information and his subsequent statement implying that the required information would cost too much effort to obtain. In the entirety of the circumstances, I find that the Director's delegate was justified in determining that Kassam was in violation of sections 28 and 85(1)(f) of the *Act*, and section 46 of the *Regulation*.

The Director's delegate here properly applied the 3-step analysis described in *Narang Farms Ltd.*, BC EST #D482/98 by finding in this case a contravention of section 85(1)(f) of the *Act*, and by implication of section 46 of the *Regulation*; exercising her discretion to determine whether a penalty was appropriate in the circumstances; and determining that a \$500.00 penalty was owed in accordance with the provisions of section 28 (b) of the *Regulation*.

**ORDER**

Pursuant to section 115 of the *Act*, I confirm the Determination issued April 28, 2000.

**Michelle Alman**  
**Adjudicator**  
**Employment Standards Tribunal**