

An appeal

- by -

JCR Construction Ltd.  
("JCR")

- 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:** Ib S. Petersen

**FILE No.:** 2001/296

**DATE OF DECISION:** July 11, 2001

## DECISION

### SUBMISSIONS:

Mr. James Rogers on behalf of JCR

Mr. Gerry Omstead on behalf of the Director

### ANALYSIS

This is an appeal by JCR pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on February 5, 1998 which imposed a penalty of \$500.00 on JCR. The Determination found that the Employer had contravened Section 46 of the *Employment Standards Regulation* (the “Regulation”) by failing to produce payroll records.

From the file, it appears that a union filed a complaint with respect to work done by JCR on federal property. In response to this, the delegate requested production of documents related to this and, in fact, delivered a Demand for Employer Records. It is not in dispute that JCR refused to comply with the requests and the Demand.

JCR takes issue with the Determination and wants it cancelled. It would appear, among others, from the appeal that JCR refused to comply because of its view that it was under federal jurisdiction. As well, as a non-union company, it disputed the delegate’s right to issue the Demand based on a third party--*i.e.*, non-employee--complaint. I note that, in a submission to the Tribunal, JCR produced the payroll records for one employee with the stipulation that it not be given to the union.

In *Narang Farms and Processors Ltd.*, BCEST #D482/98, the penalty process is summarized as follows:

“... the penalty determinations involve a three-step process. First, the Director must be satisfied that a person has contravened the *Act* or the *Regulation*. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the *Regulation*.”

The relevant legislation is Section 46(1) of the *Regulation* and Section 85(1)(f) of the *Act*.

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

85(1) For the purpose of ensuring compliance with the Act and the regulations, the director may do one of 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 deliver to a place specified by the director, any records for inspection under paragraph (c);

Section 85(1)(c) and (f) of the *Act* broadly permits the director access to records relevant to an investigation. Section 46(1) of the Regulation provides for delivery of records “as and when required.” The records may be required from “a person,” *i.e.*, not just, for example, an employer. In the instant case, there is no doubt that a Demand was delivered to JCR and that JCR refused to comply with the Demand.

The Director’s authority under Section 79(3) of the *Act* is discretionary: the Director “may” impose a penalty. Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it. The delegate’s reasons are stated in the Determination. Specifically, there, the delegate details his efforts to obtain documents for his investigation. These included several notices requesting production of documents and JCR’s refusal to comply. The delegate states, as well, that “[n]o reasonable explanation for the failure to deliver accurate records was given.” In the circumstances, there is nothing to suggest that the delegate exercised his discretion for some improper purpose.

JCR’s objection was based on two grounds: jurisdiction and the source of the investigation, a union.

First, there is, in my opinion, little support for JCR’s jurisdictional argument. The fact that JCR was under contract with a federal entity, Defence Contracting Canada, to do renovation work on federal property, CFB Esquimalt, is not by itself sufficient to establish federal jurisdiction over the employment of workers involved in the work. The delegate noted this on several occasions in his correspondence to JCR. Ultimately, it would have been up to the Tribunal (or the courts) to decide the point. However, under the *Act*, it is not open to JCR to simply refuse to comply with a lawful Demand. In the circumstances, jurisdiction is not a valid defence to the penalty.

Second, it is clear that a third party may file a complaint (see Section 74(1)). The statute is quite clear that “an employee, former employee or other person” may file a complaint. It appears that JCR’s concern was that the information not be provided to the union. I appreciate those concerns and, unless the union is in some way acting on behalf of the representative of the employees concerned, there may well be privacy issues preventing the delegate from releasing information to the union. However, these issues were not fully argued before me. All the same, it appears that the delegate made demands for documentation under the *Act* for the purpose of conducting an investigation and, although, in my view, he could have allayed JCR’s concerns by more clearly explaining the investigatory process including with respect to the sharing of

information obtained by him in the course of his investigation, and JCR was, in the circumstances, obligated to comply with these demands.

Section 28 of the *Regulation* provides that the penalty for a contravention of Section 46 of the *Regulation* is \$500. The amount of the penalty is not discretionary. The penalty in this case was the amount mandated by legislation. It cannot, therefore, be argued that the delegate erred in this aspect of the Determination.

In the result, the appeal is dismissed.

### **ORDER**

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated February 5, 2001 be confirmed.

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**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**