Employment Standards TRIBUNAL

An appeal

- by -

Super Save Disposal Inc.
("Super Save")

- 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.: 2001/312

DATE OF HEARING: August 15, 2001

DATE OF DECISION: August 21, 2001

DECISION

APPEARANCES:

Mr. James Kitsul	counsel, on behalf of Super Save
Ms. Adele Adamic	counsel, on behalf of the Director

OVERVIEW

This is an appeal by Super Save pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on April 5, 2001 which imposed a penalty of $500.00. The Determination concluded that the Super Save, the "employer," had contravened Section 46 of the *Employment Standards Regulation* (the "*Regulation*") by failing to produce payroll records.

BACKGROUND

The background facts are largely not in dispute and may briefly be set out as follows.

In early 1998, a complaint was filed against an entity named "Actton Transport Ltd. operating as Super Save Disposal" by a Mr. Norberg for regular wages, overtime wages, statutory holiday pay and termination pay. It appears that Norberg alleged that he worked for Actton Transport Ltd. ("Actton"). A Delegate of the Director wrote to this entity at a business address at 13395 Langley Bypass, surrey, British Columbia, setting out the particulars of the complaint and requesting a response. Over time, other complaints were added to Norberg's. I gather that these were drivers, as well.

In May 1998, the Delegate issued a Demand for Employer Records to an entity named "Actton Transport Ltd. operating as Super Save Disposal," though the letter was addressed to "Actton Transport Ltd. operating as Super Save Propane." From correspondence on file, dated May 20, 1998, from the Delegate, addressed to "Actton Transport Ltd. operating as Super Save Propane" it appears that Actton took the position that it was under federal jurisdiction. Accordingly, the Delegate cancelled the Demand and forwarded the file to Human Resource and Development Canada ("HRDC") and closed the file.

By letter dated June 11, 1998, an officer of HRDC contacted Actton. From the correspondence, it would appear that Norberg claimed to drive truck for Super Save Disposal which was described as a division of Actton, the party named in the correspondence. The correspondence requested a response from Actton. Eventually, HRDC determined, in a letter, dated February 8, 2000, addressed to the "Actton Group," that the appellant Super Save did not fall within federal jurisdiction. Briefly, the letter stated that Super Save "is a provincially registered limited

company which is engaged in the waste disposal business" and was, therefore, not a "federal work, undertaking or business." The letter invited Kitsul, counsel for the Actton Group of Companies, to contact HRDC to discuss the determination. Otherwise, the complaints would be returned to the provincial labour standards authorities.

It appears that there was no appeal of this determination. However, on February 23, 2000, Kitsul wrote HRDC, taking the position that the drivers were employed by Actton, and not Super Save, and that the complaints should be dealt with under federal jurisdiction.

In October 2000, HRDC forwarded the complaints to the B.C. Employment Standards Branch. The letter expressed HRDC's view that the complainant drivers "[n]otwithstanding an indication that the individuals worked for Actton Transport Ltd. ... were in fact employed by Super Save disposal Inc." As well, the letter expressed regret with respect to the time it had taken to process the complaints and noted that the "question of 'jurisdiction' has taken some time to resolve. We have given careful consideration to the operations of the business, involved technical specialists as well as the assistance of legal services."

On February 1, 2001, a Delegate of the Director wrote to Super Save (I assume from the context of the file). On February 28, 2001, Kitsul responded. He wrote to the Delegate that Actton's position was that it, and not Super Save, was the employer of the complainant drivers and that their employment was governed by the federal *Canada Labour Code*, not the provincial *Employment Standards Act*. The letter also enclosed T-4's for the complainant drivers, indicating that Actton was the employer.

On March 13, 2001, a Delegate of the Director issued a Demand for Employer Records, addressed to "Super Save Disposal" (not, on its face the correct corporate entity, the appellant Super Save). The Demand was issued under Section 85 of the *Act* and concerned records relating to "wages, hours of work, and conditions of employment" and records and employer is required to keep under the *Act* and the *Regulations*.

On April 5, 2001, the Delegate issued the Determination under appeal. The Determination was issued against the appellant Super Save. The finding and conclusions may be summarized as follows:

- The Delegate had issued the Demand, referred to above, to Super Save Disposal Inc., "the employer."
- The Demand was properly served.
- The "employer," *i.e.*, Super Save, failed to produce the payroll records.
- HRDC determined that complaints were within the provincial jurisdiction.

- The Delegate stated the "employer's" position to be that the complaints were within the federal jurisdiction.

- Inspection of the payroll records was relevant and necessary to the investigation under the *Act*.

- "No reasonable explanation for the failure to produce records was given. If a reasonable explanation had been given, the Director may have exercised discretion and a penalty would not have been issued."

ISSUES

Super Save takes issue with the Determination and wants it cancelled. It would appear from the appeal that Super Save took the position that it was not the employer and, therefore, did not have the records in question. Super Save argues that this is a reasonable explanation.

FACTS

At the hearing, Kitsul testified that Actton and Super Save are two separate legal entities and two separate companies. He also testified at length to the corporate structure of what may be, perhaps loosely, termed the "Actton Group of Companies." He explained that some of the companies under this group operate in Alberta and in Quebec. With respect to Actton, specifically, he testified that it "provides drivers and trucks to a number of companies," including Super Save, under verbal contractual arrangements. The companies for which Actton provides these services include Alberta and Quebec companies.

In cross examination by counsel for the Director, Kitsul was shown a photograph of a truck, relevant to the complainants, and he agreed that it was a garbage truck. It appeared to have Super Save's name on it. In re-direct, he explained that some of the trucks carry Actton's name. He also agreed with the proposition that the truck in question was unlikely to cross provincial borders, though he explained--in redirect--that some of the trucks may be transferred and registered in other provinces.

ARGUMENT

Super Save argues that the Demand was made on Super Save Disposal, which is not a legal entity. In other words, there was an error in the Demand as far as the entity to whom it was addressed. Super Save notes that it is not an associated company under Section 95. While the corporate records show that there is one common director as between the two companies, they should be treated as arms length. In any event, Super Save does not have the records demanded by the Delegate. These records are with Actton and available, subject to federal jurisdiction. The penalty Determination should be set aside.

Counsel for the Director argues that the Director is required to investigate complaints (Sections 74 and 76). When the Director investigates, a person under investigation must be given a reasonable opportunity to respond (Section 77). The corporate searches indicate that the companies in question are British Columbia companies. The sole director and 100% shareholder of Actton is also a director and 80% shareholder of Super Save. The records and registered offices of both companies are the same. In the circumstances, I ought to take a broad view of the "employer" to whom the Demand is addressed (Sections 95 and 2). Under Section 85, there is an obligation to comply with a Demand and in this case Super Save declined the opportunity to respond. The director submits that, while the jurisdictional argument was not fully argued, Super Save operates a garbage disposal business which, under the traditional tests to determine jurisdiction, "in pith and substance," is under provincial jurisdiction. Counsel notes that the trucks "do not cross [provincial] borders." The penalty should be upheld.

Super Save replies that it has cooperated with the investigation. It has consistently taken the position that the employment of the complainants fall within the federal jurisdiction.

ANALYSIS

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 Super Save. While the Demand did not state the correct legal name of the recipient, as the "Inc." was missing, it was delivered to the correct address and, it would appear, came to the attention of Super Save, there is no suggestion that Super Save was in any way prejudiced by that error. The Determination correctly named the appellant. In my view, not much turns on this.

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--such as they are--are stated in the Determination. The delegate states, as well, that "[n]o reasonable explanation for the failure to deliver accurate records was given." While I agree with most of the Director's submissions on the investigatory process, as set out above, I am persuaded that the Delegate erred in his decision to issue a penalty. In my view, that was unreasonable decision in these circumstances. The Delegate erred in at least two respects.

First, in my view, there is a reasonable explanation for Super Save's failure to provide the payroll records demanded. The Demand speaks to records relating to "wages, hours of work, and conditions of employment" and records and employer is required to keep under the *Act* and the *Regulations*. Super Save's response to the Demand was that it did not have those records. Super Save's position has been consistently been that the complainant drivers were employed by Actton, that Actton have the records and that they may be available, subject to jurisdiction. It cannot be said, therefore, that Super Save did not, as suggested by the Director, failed to respond. Its response has been consistent over time.

On that note, while I appreciate Actton's position that it is federally regulated, and not subject to provincial labour standards, I find it difficult to understand the apparent reluctance on the part of the Branch to investigate and determine that claim.

In any event, if the party to whom a Demand is addressed does not, in fact, have the records in question, I find it difficult to accept that it is proper for the Director to issue a penalty for failing to produce those records. It is, of course, open to the Director to further investigate and determine the validity of an assertion by a party that it does not have the records. It is, as well, open to the Director to investigate the merits of a complaint in accordance with the *Act*, including Section 77, which provides for an opportunity to be heard, and make a determination. It may well be the outcome of such an investigation that a "person" is an employer and, therefore, should have kept the records required by the *Act* (Section 28). The Director then has the discretion to impose a penalty for the failure to keep records (Section 28(a) of the *Regulation*).

I agree with counsel for the Director that the constitutional-jurisdictional argument has not been fully developed. In my view, the reason for this is that what is before me is not really a jurisdictional issue. As I understand it, Super Save is not taking the position that it is a federally

regulated company. It is simply an issue of whether the Director properly imposed a penalty in the circumstances where the party (Super Save) to whom the Demand for records was directed states, and there is nothing before me to contradict that, that it does not have the records demanded. Super Save states, as it has consistently in the past, that it is not the employer. In short, in the circumstances, I agree that Super Save, in the circumstances had a reasonable explanation for the failure to produce the records in question.

Second, the Determination characterizes Super Save as the "employer" of the complainant drivers. It is clear that Super Save consistently has taken the position that it is not the employer. Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it. While some of the evidence before me at the hearing could support a conclusion that Super Save is the employer, for example, the trucks with the Super Save name; there was also evidence to contradict such a conclusion, for example, the T-4 slips. None of that evidence is apparent on the face of the Determination. In fact, what strikes me about the Determination is the complete lack of reasoned analysis of the basis for characterizing Super Save as the "employer" of the complainant drivers. The failure to give reasons for the "conclusion" with respect to a fundamental aspect strikes at the heart of the Determination.

I emphasize that I do not decide the issue of whether or not Super Save is, in fact, the employer of the complainant employees. I simply say that the characterization of Super Save in the Determination as the "employer" does not, on its face, appear to be supported by any reasoned analysis. From the correspondence, which includes the brief conclusions of HRDC that Super Save was the employer, it could well be argued or suggested that the Delegate simply adopted those conclusions as his own. The Delegate, of course, is not bound by the determination--such as it is--of HRDC, he has to conduct his own investigation and reach his own conclusions.

The Director argues that because Super Save is a part of, what I have loosely termed, the "Actton group," the penalty is appropriate. It is, therefore, "the employer" or "person" in a broader sense. I disagree with that analysis. *Prima facie*, the evidence is that Actton and Super Save are separate corporate entities. It is clear that the Actton group is a highly complex corporate structure. If the Director is seeking to associate companies, the proper route is through a determination under Section 95, following an investigation in accordance with the *Act*. There is nothing in the Determination to even suggest that the delegate considered the application of Section 95.

I do not need to deal with the third aspect of the test in any great detail (see *Narang Farms*, *above*). 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 is 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 upheld and the Determination is cancelled and set aside.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated April 5, 2001 be cancelled and set aside.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal