



An appeal

- by -

Balwinder Khun Khun operating Khun Khun Orchards
("Khun Khun")

- 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: April D. Katz

FILE No.: 2001/611

DATE OF DECISION: October 22, 2001

THE FACTS

The Director's Agricultural Labour Compliance Team conducted a site visit to Khun Khun's orchard on March 7, 2001 and demanded the employee payroll records. The Demand for Records was issued on March 29, 2001 requesting all employees' records for the period January 1, 2001 to March 7, 2001.

Khun Khun was directed to bring the records to the Director's Delegate's office in Kelowna on April 23, 2001. Khun Khun attended with his fellow orchard owner but did not produce any records. Khun Khun was given an extension of time until June 12, 2001 to produce the records. A Punjabi speaking Employment Standards Officer called Khun Khun on June 15, 2001 to ask for the records. During the telephone conversation the officer told Khun Khun that if the payroll records were not produced a penalty of \$500 could be imposed. The officer gave Khun Khun an extension until June 22, 2001.

No records arrived and on June 22, 2001 the Delegate spoke to Khun Khun who told him the records were not available because the employees had not yet been paid. On June 29, 2001 Khun Khun delivered time sheets for 4 employees but no proof of payment. On July 18, 2001 the Punjabi speaking officer contacted Khun Khun by telephone to notify him that the records submitted were incomplete. Khun Khun came to the office with his fellow orchard owner the same day. Khun Khun produced two cancelled cheques for one employee. Khun Khun reported that the other employees had not been paid for their work from January to March 2001.

The fellow orchard owner and Khun Khun agreed they understood what information was missing and agreed to provide the missing records by August 2, 2001. No further records were provided.

The Delegate's Determination issued on August 3, 2001 found Khun Khun in violation of section 26 and 28 of the *Act* and assessed a penalty of \$500 pursuant to section 28 of the Employment Standards Regulations BC Reg. 396/95 and 359/99. The Determination sets out that Khun Khun was given the requirements for payroll records information sheets on August 31, 2000 and March 26, 2001.

In the materials filed after the Appeal 4 employees indicated in different letters that the reason for the delay in records was that they did not give their time sheets to Khun Khun in a timely fashion because they were busy. The letters state the time sheets were very late and Khun Khun should not be held responsible under section 28.

ANALYSIS

The onus of proving the Director has erred is on the appellant in an appeal to the Tribunal. Blue is appealing the Director's decision to assess a penalty. The Director's authority to issue a penalty is set out in section 98 of the *Act*, which provides as follows.

Monetary penalties

- 98 (1) If the director is satisfied that a person has contravened a requirement of this Act or 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.
- (2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes permits or acquiesces in the contravention is also liable to the penalty.
- (3) A person on whom a penalty is imposed under this section must pay the penalty whether or not the person
- (a) has been convicted of an offence under this Act or the regulations, or
- (b) is also liable to pay a fine for an offence under section 125.
- (4) A penalty imposed under this Part is a debt due to the government and may be collected by the director in the same manner as wages.

Section 28 of the Regulations provides that a penalty of \$500 may be assessed for every breach of section 28 of the *Act* or section 46 of the Employment Standards Regulation that requires production of records as and when required.

In *Narang Farms and Processors Ltd.* BC EST #D482/99 the Tribunal set out a three step process for assessing a penalty.

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.

(See also, *Re James Cattle Co. Ltd.*, BC ESE #D230/99).

Khun Khun's evidence is that he did not understand what was required because of the language barrier. The evidence shows that he brought an interpreter with him who had personal experience with this process and that the Delegate arranged for a Punjabi speaking officer to communicate with Khun Khun. I find that Khun Khun was made aware of what was required in writing twice and orally on three occasions. Khun Khun's translator could translate the meaning of the Notices and the Demand. The officer communicated what was needed.

The evidence in the appeal is that Khun Khun was waiting for his employees to produce records he was required to create and maintain under section 28. The delay could have been avoided if Khun Khun had complied with the responsibilities of an employer.

The undisputed evidence from Khun Khun is that only one employee was paid any wages for work performed from January 1, 2001 to March 7, 2001. The Delegate was unable to calculate any wages owed because the records were not provided.

The second step is the exercise of discretion. In dealing with the second step in Narang Farms the Tribunal stated that the Director must exercise her discretion reasonably.

The Director's authority . . . is discretionary: the Director "may" impose a penalty. The use of the word "may"--as opposed to "shall"-- indicates discretion and a legislative intent that not all infractions or contraventions be subject to a penalty. It is well established that the Director acts in a variety of capacities or functions in carrying out her statutory mandate: administrative, executive, quasi-judicial or legislative. In the case of a penalty determination, the Director is not adjudicating a dispute between two parties, an employer and an employee, rather the Director is one of the parties. As such, the Director is exercising a power more akin to an administrative rather than an adjudicative function. The Tribunal has had occasion to deal with appropriate standard for the Director's exercise of discretionary power in the context of an administrative function in a number of cases. . . .

It is not adequate to simply state that the person has contravened a specific provision of the Act or Regulation. This means that the Director must set out--however briefly--the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention. In this case, the Determination makes reference to a second contravention of the same Section. In my view, this is sufficient.

The Determination sets out all the steps taken by the Delegate to secure the records. The evidence is unrefuted that the Delegate provided translators and provided 4 extensions of time from the first demand to assist Khun Khun.

Section 28(b) of the Regulations sets out the penalty for breach of section 46.

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

- (a) section 25(2)©, 27, 28, 29, 37(5) or 48(3) of the Act;
- (b) section 3, 13, 37.6(2), 38.1 (I) to (k) or 46 of this regulation.

As stated in *Gain Suns Enterprises Ltd.* BCEST #D283/99 there is no discretion to change the amount of the penalty as it is prescribed in section 28.

On the basis of this analysis I do not find any new evidence to draw a conclusion that there is an error of fact in the Determination. There is no suggestion of error of law or fact in Khun Khun's appeal.

CONCLUSION

Based on the evidence presented I conclude that Khun Khun has failed to meet the evidentiary burden to support a successful appeal.

ORDER

Pursuant to section 115 of the Act, the Determination dated August 3, 2001 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal