

An appeal

- by -

Park Lane Furniture Mfg. Ltd., aka Parklane Furniture Mfg. Ltd.,
aka Parklane Hotels-Motels Furniture Mfg. Ltd.

("Parklane")

- 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.: 2001/622

DATE OF DECISION: November 7, 2001



DECISION

SUBMISSIONS:

Sonny Chohan on behalf of Park Lane Furniture Mfg. Ltd. aka Parklane Furniture Mfg. Ltd. aka Parklane Hotels-Motels Furniture Mfg. Ltd.

Pat Douglas on behalf of the Director of Employment Standards

OVERVIEW

The Director assessed a penalty of \$500 against Park Lane Furniture Mfg. Ltd. aka Parklane Furniture Mfg. Ltd. aka Parklane Hotels-Motels Furniture Mfg. Ltd. (“Parklane”) an employer under the *Employment Standards Act* (“Act”). The penalty was assessed after the Director’s Delegate issued a Demand for Records and no material was provided within the time specified in the Demand or within the extension period granted by the Director’s Delegate.

ISSUE

The sole issue in this appeal is whether Parklane has shown the assessment of the penalty should be varied or cancelled.

ARGUMENT

Parklane argues that there should be no penalty because Parklane’s owner had injured himself and was unable to go to the factory to find the payroll records requested by the Director’s Delegate. The owner’s doctor had prescribed rest for the injury, which prevented the owner from going to the factory. The owner submits that the records were provided within a week of the deadline.

The Director argues that the Parklane had over a month to produce the records and failed to do so. The effect of Parklane’s failure to produce the records was to frustrate the investigation. The Delegate was unable to proceed with the investigation while Parklane failed to produce the payroll records. The Director argues that the *Employment Standards Act* (*Act*) requires an employer to have these records available for inspection. The Director indicates that when Parklane did produce some documents in late August the Delegate found them to be unreliable.

THE FACTS

The Director’s Delegate asked Parklane for payroll records for an employee who had filed a complaint. The records were requested by a faxed letter on July 12, 2001 and two phone messages on July 11, 2001 and July 12, 2001. When the requests did not produce any records



the Delegate issued the Demand for Records on July 18, 2001, which required the documents by August 1, 2001. When no documents were produced on August 1, 2001, the Delegate spoke to the manager about the owner's injury and granted an extension to August 15, 2001. No records were produced by August 15, 2001.

The Delegate spoke to the owner after phoning the factory and the owner referred the Delegate to Parklane's accountant. The accountant provided copies of the two cheques the employee had already produced. The accountant did not have any payroll records for the employee. The Determination was issued for failure to produce the records and the penalty assessed on August 17, 2001.

On August 24, 2001 a friend of the owner provided some timecards for the employee. The timecards were apparently signed by the employee but the employee's five signatures in the Delegate's presence did not resemble the signature on the timecards. The Delegate found that the timecards produced by Parklane were not signed by the employee. The timecards did not correlate to the employee's records of hours worked from October 23, 2000 to January 24, 2001. The Delegate found the employee's records as being more reliable in the assessment on the merits.

The Delegate's Determination issued on August 17, 2001 found Parklane in violation of section 28 and 85 of the *Act* and assessed a penalty of \$500 pursuant to sections 46 and 28 of the Employment Standards Regulations BC Reg. 396/95 and 359/99.

ANALYSIS

The onus of proving the Director has erred is on the appellant in an appeal to the Tribunal. Parklane 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).

Parklane's evidence is that it was keeping the records required in section 28 but that due to the owner's injury it could not produce the records in a proper form on August 15, 2001. Parklane states the records were produced on August 24, 2001 and the Delegate sets out that the records produced on August 24, 2001 were suspect.

The Director determined that the efforts to obtain the records in July and August were sufficient and that Parklane could have produced the records requested prior to August 15, 2001.

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 Director knew the efforts that the Delegate had made to secure the records and decided that based on the information available to her on August 17, 2001 that a penalty was appropriate.

The Director knew that Parklane's owner was at home recovering from his injury and could not go to the factory. The Director also knew that other employees were working in the factory.

In the Determination the Director's Delegate sets out that no reason for the records not being available was provided. The Delegate indicates that the delay frustrates the investigation and the purpose of the *Act* to provide fair and efficient procedures for resolving disputes and to contribute in assisting employees to meet work and family responsibilities. The penalty is disincentive to an employer for failing to produce records in a timely fashion.

CONCLUSION

Based on the evidence presented I conclude that the appellant has not shown that Parklane complied with the requirements of the Act or that the Director misdirected herself in imposing a penalty.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated August 17, 2001 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal