

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

482313 B.C. Ltd. Operating as New Image Modeling
("New Image")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna A. Pawluk

FILE NO.: 96/711

DATE OF DECISION: January 2, 1997

DECISION

OVERVIEW

This is an appeal by 482313 B.C. Ltd., operating as New Image Modeling ("New Image") pursuant to section 112 of the Employment Standards Act (the "Act") against Determination CDET 0004613 of the Director of Employment Standards (the "Director") issued on November 8, 1996. In this appeal the employer claims that a fine levied against it by the Director does not comply with the Act and regulations.

ISSUE TO BE DECIDED

The issue is whether the fine levied by the Director is valid.

FACTS

On October 18, 1996, Lisa Rector filed a complaint with the Director, alleging that New Image had failed to pay her vacation pay owing her at the termination of her employment. A Demand for Records was served on New Image on October 29, 1996 by the Director. On October 30, 1996 a New Image representative, Cindy MacDonald, telephoned the Director to advise that a cheque for Ms Rector would be available for pick up on October 31, 1996. In a telephone conversation on October 30 with an officer of the Director, Ms Rector asked that the Ministry obtain her cheque. When the officer phoned Ms MacDonald to say that someone from the Ministry would pick up the cheque on November 1st, 1996, Ms MacDonald advised that the cheque would not be available as Ms Rector had cashed a cheque for \$598.40 which had a stop payment order put on it. On November 5, 1996, the officer asked Ms MacDonald to produce and deliver these records. The request was not complied with.

The officer determined that this was the second time New Image failed to comply with section 18(1) of the Act and pay vacation pay. He also determined that New Image failed to produce records in accordance with section 46 of the Employment Standards Regulations ("Regulations"). For these infractions he assessed a penalty of \$650.00, \$500.00 under section 46 of the Regulations and \$150.00 under section 29 of the Regulations. It is from this determination that New Image appeals.

In undated correspondence to "Province of B.C., Ministry of Labour, per Ken White" received by the Employment Standards Tribunal on November 28, 1996, Cameron McDonald, President of New Image, stated that a cheque for holiday pay had been made available for pick up. He went on to say that because another cheque, for the same amount, had been issued by "head office", there was a potential overpayment "of approximately \$1000".

He stated that "072-322's" file was "complete" except for the records pertaining to the cheque issued from head office and added:

Furthermore you were specifically informed that this matter would be cleared up upon confirmation from head office. Circumstances at the time made it difficult to obtain this information given the limited time frame given to deal with.
(reproduced as written)

He complained:

Your belligerent and confrontational attitude and failure to obtain all pertinent and relevant information regarding this matter to initiating action is somewhat disturbing.

This attitude, he said, "left us no recourse but to appeal the fine" and to lodge a formal complaint with the Department of Labour regarding Mr. White's "lack of professional conduct and improper behavior".

ANALYSIS

Section 18(1) of the Act requires an employer to "pay all wages owing to an employee within 48 hours after the employer terminates the employment". Section 58(2) makes vacation pay payable "at the time set by section 18 for paying wages". In this case, the Director's delegate determined that New Image did not pay Ms Rector vacation pay upon the termination of her employment, under sections 18 and 58. The Director sought an explanation from New Image of why this not done. In his letter, Mr. McDonald said:

It had been brought to my attention that there were in fact two (2) cheques issued to the above in the amount of \$598.40, one from our office as well as one from head office fraudulent attempts to cash both cheques in the same day were made by the above. We were unable to ascertain whether or not one or both of these cheques were in fact cashed, resulting in a potential overpayment of approximately \$1000.
(reproduced as written)

However, this explanation is unsatisfactory as it is premised on Ms Rector fraudulently attempting to cash two cheques for vacation pay, when the evidence shows that she did not receive two cheques. (The second cheque was not made available.) Thus Mr. McDonald's explanation lacks credibility and provides no justification for why vacation pay was not given to Ms Rector as required by section 18 of the Act.

The Director also asked New Image to produce relevant employment records under section 85(1)(f) of the Act:

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).

Section 46 of the Regulations requires anyone producing records under section 85(1)(f) of the Act to do so "as and when required". Here, the Director required New Image to deliver the records by November 5, 1996. These records were never delivered, nor was there an explanation offered as to why this was not possible. Mr McDonald also failed to produce a copy of the cheque issued by "head office" or any other documentation showing that the New Image liability to Ms Rector for vacation pay was discharged. Indeed, we were told nothing about "head office" or why a copy of the cheque could not be available in the given time frame.

Section 98(1) of the Act empowers the director to impose monetary penalties for non-compliance:

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.

In this case, the Director's delegate levied two penalties, one for failure to pay vacation pay (for a second time) and the other for failure to comply with an order to produce records.

Sections 28 and 29 of the Regulations set forth the quantum of penalties:

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

(a) section 25(2)(c), 27, 28, 29, 37(5) or 48(3) of the Act;

(b) section 3, 13 or 46 of this regulation.

29(1) In this section, "**specified provision**" means a provision or requirement listed in Appendix 2.

(2) The penalty for contravening a specified provision of a Part of the Act or of a part of this regulation is the following amount:

(a) \$0, if the person contravening the provision has not previously contravened any specified provision of that Part;

(b) \$150 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on one previous occasion; . . .

Appendix 2 specifies the provisions in the Act for which a penalty may be levied under section 29 and includes section 18(1), payment of wages when an employee is terminated.

Here, the Director's delegate levied a \$500.00 penalty under section 28 of the Regulations for an infraction of section 46 of the Regulations (failure to produce records) and a further penalty of \$150.00 under section 29 of the Regulations for a second failure to pay vacation pay as required by section 18 of the Act. This complied with all requirements of the Act.

ORDER

In summary, I order under Section 115 of the Act, that Determination CDET #0004613 be confirmed.

Lorna A. Pawluk
Adjudicator
Employment Standards Tribunal

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