

An appeal

- by -

N & G Retail Inc. operating as Petro Canada
(“N & G”)

- 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 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2005A/206

DATE OF DECISION: January 31, 2006

9. N & G also contends that, although it made a mistake in paying Ms. Peterson an average day's pay, the mistake was an honest one and it did not dispute the amount owed. Consequently, it contends that the administrative penalty for the contravention of section 45 of the Act is unfair in the circumstances.
10. N & G further contends that it had advised the delegate that it would pay Ms. Peterson any amounts that had not been paid for statutory holidays and overtime, and was at all times willing and co-operative with the process. It contends that the imposition of the penalty for this contravention is also unfair.
11. N & G submits that it uses Ceridian payroll in an effort to comply with the Act, and that the penalties are excessive and unnecessary. It says that, in instances where an employer is doing all it can to comply, and is co-operative with the investigative process, "fines" of this magnitude are unfair.
12. The delegate submits that the Director has no discretion in the imposition of penalties once a contravention has been found, and seeks to have the Determination confirmed.

THE FACTS AND ANALYSIS

13. It is unnecessary to set out the facts for the purposes of the appeal as they are undisputed. What is disputed is the imposition of administrative penalties on the basis that N & G is of the view that they are either in error, or unfair.
14. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - a) the director erred in law
 - b) the director failed to observe the principles of natural justice in making the determination;
or
 - c) evidence has become available that was not available at the time the determination was being made
15. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. Although N & G has identified this ground of appeal, in essence, the basis of their appeal is that the penalty imposition is unfair in the circumstances, that is, where it has taken all reasonable steps to comply with the Act, and, when advised of the contraventions, it has been fully co-operative, admitted its mistakes, and paid all amounts owing. I will address the reasons for the appeal on that basis, as the employer has advanced no arguments on the issue of a denial of natural justice.
16. It is the employer's responsibility to structure its affairs to comply with the *Act*, including maintaining records relating to employment and hours of work (*478125 B.C. Ltd. v. British Columbia (Director of Employment Standards)* BCEST D. 279/98).
17. I am unable to find, on a review of the record provided by the delegate, that the penalty impositions were in error or unfair.

18. Section 98 of the *Act* provides that a person in respect of whom the Director makes a determination and imposes a requirement under section 79 is “subject to” a monetary penalty prescribed by the Regulations:
- 1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.
 - (1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.
- ...
19. Section 29(1) of the *Employment Standards Regulations, B.C. Reg 396/95* sets out a schedule of monetary penalties for “a person who contravenes a provision of the *Act* or this regulation, as found by the director in a determination made under the *Act* or this regulation”.
20. Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation.
21. As the Tribunal noted in *Summit Security Group Ltd.* (BC EST #D059/04, Reconsidered BC EST #D133/04), administrative penalties under the *Act* are part of a larger scheme designed to regulate employment relationships in the non-union sector. The Tribunal determined that penalties are generally consistent with the purposes of the *Act*, and the design of the penalty scheme established under section 29 meets the statutory purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*.
22. It may appear that the penalty assessment against N & G is excessive in light of the fact that the failure to pay in compliance with the *Act* was based on mistakes, and the employer was cooperative with the delegate, and willing to pay any amounts owing once the mistakes were identified. I note however, following a review of the record provided by the delegate, that the employer’s initial response to the claim was a refusal to pay on the basis that it was “fraudulent”, and that several of the telephone calls made by the delegate to the employer regarding the amounts owing were not returned in a timely fashion.
23. Furthermore, in *Douglas Mattson* (BC EST #DRD647/01) the Tribunal found that it could not ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on its judgement about what is “fair” or “logical”. In *Actton Super-Save Gas Stations Ltd.* (BC EST #D067/04) the Tribunal concluded that the *Act* provides for mandatory administrative penalties without any exceptions: “The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme.”
24. The appeal is dismissed.

ORDER

25. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated October 25, 2005, be confirmed in the amount of \$2,750.00, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal