

An appeal

- by -

Dr. Bean Cafe Inc.
("Employer")

- 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: Robert Groves

FILE No.: 2009A/19

DATE OF DECISION: May 5, 2009

DECISION

SUBMISSIONS

Andres Barker

on behalf of the Director of Employment Standards

BACKGROUND

1. This is my Decision arising from a referral back to the Director contained in a disposition I made in BC EST #D017/09 on January 30, 2009 (the "Original Decision")
2. The Original Decision was issued in respect of an appeal brought on behalf of Dr. Bean Cafe Inc. (the "Employer") by one of its principals, Maida Valkenier, challenging a determination (the "Determination") issued by a delegate of the Director of Employment Standards on October 3, 2008. The delegate had concluded that one Jaspreet Bhatti ("Bhatti"), a former employee of the Employer, was owed wages, annual vacation pay, compensation for length of service and accumulated interest totaling \$1,279.35 pursuant to sections 18, 58, 63 and 88, respectively, of the *Employment Standards Act* (the "*Act*").
3. In addition, the delegate had concluded that the Employer's failure to pay wages, to provide Ms. Bhatti with wage statements, or to deliver records when required justified the imposition of three administrative penalties of \$500.00 each. The total found to be owed in the Determination was therefore \$2,779.35.
4. The Employer did not question Ms. Bhatti's entitlement to the amount the delegate found to be owed for wages, vacation pay, compensation for length of service, and interest. It followed that the Employer could mount no substantive challenge to the imposition of the administrative penalty arising from its failure to pay wages.
5. The Employer, did, however, dispute that administrative penalties were warranted in respect of its alleged failure to provide wage statements, or to deliver records when required by the delegate. Regarding the latter two administrative penalties, the Employer asserted that no notice of the delegate's investigation was ever effectively communicated to it, or to its representatives, prior to the delegate's issuing the Determination. As it was unaware that an issue regarding wage statements had been raised, or that a Demand for Records had been forwarded, the Employer argued that no administrative penalties in respect of them should have been imposed.
6. Following a review of the record, and the submissions of the parties, I decided in the Original Decision that the Employer had rebutted the presumption of deemed service of the Demand for Records contained in section 122 of the *Act*. In the result, I cancelled that part of the Determination which imposed an administrative penalty for the Employer's failure to respond to the Demand for Records.
7. As the Employer had had no notice that a failure to provide Ms. Bhatti with wage statements was being investigated, I ordered that the part of the Determination which imposed an administrative penalty for this alleged contravention be referred back to the Director for further investigation, pursuant to section 115 of the *Act*.

FACTS

8. The Director has now delivered a submission of another delegate (the "Delegate") dated March 4, 2009 in response to the referral back. That correspondence reveals that following receipt of my Original Decision the Director invited the Employer to make representations concerning Ms. Bhatti's allegation that she had not received wage statements as required by section 27 of the *Act*. Ms. Valkenier subsequently informed the Delegate by telephone that the paycheques delivered to Ms. Bhatti would usually be accompanied with a print-out of an online payroll calculation outlining the deductions made from her gross pay, while her hours of work would be written on the cheque.
9. Following receipt of this information, the Delegate spoke with Ms. Bhatti, who confirmed that she did receive payroll print-outs on occasion, but not consistently. The Director's submission reports that Ms. Bhatti's comments were provided to Ms. Valkenier by letter, but that Ms. Valkenier delivered no further reply.
10. The Director's submission contends that the further investigation demonstrates a failure on the part of the Employer to provide the wage statements as required. As the Employer did not keep its own record of the wage statements delivered to Ms. Bhatti, did not provide to the Director copies of the cheques issued to her, and did not deliver for the Director's review a sample of the payroll print-out described, it is impossible, the Director says, to determine conclusively whether the information section 27 requires to be included in a wage statement actually appeared on the statements said to have been given to Ms. Bhatti.
11. The Director further contends that even if Ms. Bhatti did receive a payroll print-out in combination with the other information written on her paycheque, this cannot amount to proper compliance with section 27 because the section contemplates that a wage statement will be a single document, rather than a combination of several. The Director also submits that a wage statement needs to be a permanent record that an employee can keep, which a cheque containing wage statement information cannot be, as it must be relinquished in order for the payment of the wages contemplated by it to occur.
12. Finally, the Director asserts that since Ms. Valkenier conceded she "usually" provided wage statement information to Ms. Bhatti on paydays, the inference to be drawn is that this did not happen on every payday as section 27 requires, and so the administrative penalty must be upheld on that basis alone.
13. While it appears that the Tribunal made contact with Ms. Valkenier, and granted the Employer an extension to deliver a submission on the referral back, it appears that no further submission was received.

ISSUE

14. Having regard to the submission made on the referral back, is there any basis for my deciding that the part of the Determination which imposes an administrative penalty for the Employer's failure to provide wage statements to Ms. Bhatti must be varied or cancelled, or referred back to the Director for consideration afresh?

ANALYSIS

15. As the Director's submission points out, section 27 of the *Act* requires an employer, on every payday, to give to each employee a wage statement for the pay period containing several listed items of information. The provisions of the section are mandatory, the only exception appearing in section 27(4), which states that if a wage statement would be the same as the wage statement given for the previous pay period, another wage statement need not be given until a change occurs.

16. The Director has found as a fact that even if it could be said that the Employer complied with its statutory obligation to provide wage statements some of the time, it did not do so consistently, with the result that there were occasions when Ms. Bhatti was paid on which no proper wage statement was provided to her. Furthermore, no evidence appears to have been presented by the Employer which would suggest that on the occasions when wage statements were not provided, the Employer was excused from its obligation because of the application of section 27(4).
17. In order for me to decline to accept the Director's assertion that wage statements should have been provided to Ms. Bhatti at times, but they were not, I would need to be persuaded that the Director has made an error of fact which amounts to an error of law. For the Employer to demonstrate that the Director has made such an error, it must show what the authorities refer to as a palpable and overriding error, which involves a finding that the Director's conclusions on the facts, or the inferences drawn from them, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for those conclusions, and so they are perverse or inexplicable. Put another way, the Employer will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to those conclusions (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).
18. Here, the Director's factual conclusions are supported by the evidentiary record. Both Ms. Valkenier and Ms. Bhatti informed the Delegate that there were paydays on which the Employer did not provide Ms. Bhatti with a wage statement. There was no evidence tendered by the Employer, or otherwise made available to the Director, which suggests that the occasions on which wage statements were not provided were rendered unobjectionable because of the operation of section 27(4), that is, because the wage statement in question would have been the same as the wage statement given for the previous pay period.
19. In the circumstances, I cannot conclude that the Director has made an error of fact amounting to an error of law in determining that there were occasions when the Employer should have provided a wage statement to Ms. Bhatti but did not do so. It follows that the Employer's appeal regarding the imposition of the administrative penalty for the failure to provide wage statements must fail.
20. This suffices to dispose of the appeal. In light of the conclusion I have reached, I make no comment regarding the statements in the Director's submission on the referral back to the effect that a wage statement delivered pursuant to section 27 must be a single document, and that it must be in a permanent form capable of being kept as a record by the employee.

ORDER

21. Pursuant to section 115 of the *Act*, I order that the part of the Determination which imposes an administrative penalty for the Employer's failure to provide wage statements to Ms. Bhatti, as required by section 27 of the *Act*, be confirmed.

Robert Groves
Member
Employment Standards Tribunal