

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*, R.S.B.C. 1996, C. 113

- By -

Northland Properties Limited  
("Northland" or the Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE NO.:** 97/840

**DATE OF DECISION:** February 3, 1998

## DECISION

### APPEARANCES/SUBMISSIONS

Mr. K.R. (Ken) Johnston                      on behalf of Northland

Mr. David Oliver                                on behalf of the Director of Employment Standards

### OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against two Determinations of the Director of Employment Standards (the “Director”) issued on October 29, 1997 which imposed a penalty of \$500.00 on the Employer for “failing to produce or deliver records” and a penalty of \$500.00 for failing to keep proper records. The Employer claims that the Determinations are wrong and that penalties are improper in the circumstances. The Employer asks that the penalties be set aside.

### ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the Determinations should be varied, confirmed or cancelled.

### FACTS

**Determination #1** On April 1, 1997, the Employment Standards Branch received a complaint from an employee of Northland. Copies of wage statements were attached to the complaint. The Director’s delegate found that the statements did not state the employee’s wage rate, in accordance with Section 27(1) of the *Act*:

“Section 27(1)(h) of the *Act* requires that the wage statement show how the wages were calculated for the work the employee was paid for, if the employee was paid other than by the hour or by salary. Although Northland alleges that its employees are paid a variable hourly rate, depending on the job duties performed, the wage statements do not show different hourly rates for the specific jobs. Nor do they show an hourly rate was determined or how the employees wages were calculated.”

The Employer responds that it made the necessary changes to the wage statements as soon as it noticed the error.

**Determination #2** On July 14 and September 17, 1997, the Director's delegate issued a

Demand for Employer Records. Fairfax does not dispute that the Demand was issued. The Employer produced those records on July 25 and September 26, 1997. The Director's delegate determined that the records did not state the employee's wage rate, in accordance with Section 28(1)(c) of the *Act*:

“Ms. Robertson reviewed the records and discovered that the records do not show the employee's wage rate in accordance with Section 28(1)(c) of the Employment Standards Act. Although Northland alleges that its employees are paid a variable hourly rate, depending on the job duties performed, the records do not show the hourly rates for the specific jobs duties.”

## **ARGUMENT/SUBMISSIONS**

With respect to Determination #1, the Employer agrees that the wage statements did not comply with Section 27 of the *Act*. The Employer states that it made the necessary changes and says that it was “improper and unreasonable” to impose a penalty. The Employer argues that the Director's power is discretionary and, therefore, that it is not every infraction that requires the imposition of a penalty. In that regard, the Employer points to Section 79 of the *Act*. The Employer further argues that the Director “should have notified the company ... to comply with the requirements of Section 27 of the *Act*”.

The Director's delegate argues that she considered the Employer's information that there are different hourly rates for different classifications and that the employee was paid an average hourly rate; that the Employer failed to show rates for the different classifications or the calculations of the average hourly rate; and, therefore, that the employee could not determine whether he was paid correctly.

With respect to Determination #2, the Employer argues that it did in fact comply with Section 28.

The Director's delegate argues that she considered, as well, information from the Employer's site superintendent that he specified the hourly rates for the various work tasks as they were performed. Based on that information, an assistant calculated the pay rate for each pay period. The information was sent to “head office” from where it is no longer available. Northland's records

do not contain the number of hours each day at the various duties. Northland does not deny this but says that the employees were aware of their wage rates.

## ANALYSIS

Section 27(1) of the Act provides (in part):

“27. (1) On every payday, an employer must give each employee a written wage statement for the pay period stating all of the following:

(c) the employee’s wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;”

Section 28(1) of the Act provides (in part):

“28. (1) For each employee, an employer must keep records of the following information:

(c) the employee’s wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;”

With respect to Determination #1, the Employer agrees that the wage statement provided to the employee did not contain the information required by the *Act*.

With respect to Determination #2, the Employer argues that the records did contain the information required by the *Act*. However, Northland does not dispute the information set out in the submission of the Director’s delegate that Employer’s site superintendent specified the hourly rates for the various work tasks as they were performed and that an assistant subsequently calculated the pay rate for each pay period. The information was sent to “head office” from where it is no longer available. Northland’s records do not contain the number of hours each day at the various duties. Indeed, the “random sample” of payroll records submitted by the Employer confirm that the records are deficient. I agree with the submissions of the Director’s delegate that wage statements under Section 27(1)(c) and records under Section 28(1)(c), where the hourly rate is an average, or variable rate, derived from performing different duties at different wage rates, must expressly set out the wage rates for the different duties. Otherwise, an employee will not be able to determine if he or she is being paid correctly.

I agree with the Employer that the Director’s authority under Section 79(3) of the *Act* is discretionary. Section 98 of the *Act* provides the Director’s delegate with the discretion to impose a penalty in accordance with the prescribed schedule. Section 28 of the *Regulation* establishes a penalty of \$500.00 for each contravention of Section 27 or 28 of the *Act*. The Director, or her delegate, has no discretion to determine the amount of the penalty once she, or her delegate, has determined that a contravention of Section 27 or 28 of the *Act* has occurred (see Section 28 of the *Regulation*). There is nothing in Section 28 of the *Regulation* which limits the

authority of the Director's delegate to impose penalties only where contraventions are made knowingly. In other words, there is no requirement, as suggested by the Employer in this case, that the Director is obligated to give notice to employers that they must comply with the *Act* and *Regulation*.

In any event, that is not the end of the matter. I agree with my colleague in *Randy Chamberlin*, BCEST #D374/97, that Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it. Given that the power to impose a penalty is discretionary and is not to be exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. It is not adequate to simply state that the person has contravened a specific provision of the *Act* or *Regulation*. In my view, both Determinations, issued on the same date, go no further than stating that the Employer contravened the *Act*. Nothing in the Determinations explain why the Director's delegate elected to exercise her power to issue penalties. In the result, the Determinations should be set aside.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated October 29, 1997 be cancelled and the amounts of the penalties returned to the Employer together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

**Ib Skov Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**