

An appeal

- by -

Harnek Mann carrying on business as H Mann Trucking  
(“H Mann Trucking”)

- 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:** David B. Stevenson

**FILE No.:** 2011A/36

**DATE OF DECISION:** June 8, 2011

## DECISION

### SUBMISSIONS

Christopher C. Godwin

counsel for Harnek Mann carrying on business as H Mann Trucking

Alan Phillips

on behalf of the Director of Employment Standards

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Harnek Mann carrying on business as H Mann Trucking (“H Mann Trucking”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 18, 2011.
2. The Determination was made in respect of a complaint filed by Sukhvir Singh Johal, (“the complainant”) who alleged he was owed regular and overtime wages by H Mann Trucking.
3. The Determination found that H Mann Trucking had contravened Part 3, sections 17, 18, 27 and 28 of the *Act* and Part 7, section 37.3 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of the complainant and ordered H Mann Trucking to pay him wages and interest in amount of \$547.41. The Director imposed administrative penalties for the contraventions under Section 29(1) of the *Regulation* in the amount of \$2,500.00.
4. The Director also found H Mann Trucking had contravened Part 8, section 46 of *Regulation* by failing to respond in a timely way to a Demand for Employer Records issued under section 46 of the *Regulation* and imposed an administrative penalty for that contravention in the amount of \$500.00.
5. The total amount of the administrative penalties was \$3000.00 and the total amount of the Determination is \$3,547.41.
6. In this appeal, H Mann Trucking says the Director erred in law in the Determination by imposing six administrative penalties and seeks to have the Determination varied by cancelling five of the administrative penalties imposed.
7. The Tribunal has discretion whether to hold an oral hearing on an appeal. None of the parties has sought an oral hearing before the Tribunal and we have decided an oral hearing is not necessary in this case. The issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

### ISSUE

8. The issue in this appeal is whether the Director has erred in law in the circumstances of this case by imposing six administrative penalties.

## THE FACTS

9. A brief outline of the facts as they relate to the appeal is as follows:
1. The complainant started work for H Mann Trucking on July 2, 2010; he did not receive any wages until July 31, 2010. The Director found this circumstance to contravene section 17 of the *Act*.
  2. The complainant was a short haul truck driver, as that term is defined in section 1 of the *Regulation*, on several days worked in excess of nine hours a day and was, accordingly, entitled to overtime wages in accordance with section 37.3(3) of the *Regulation*. The Director found overtime was not paid and this circumstance contravened section 37.3(3) of the *Regulation*;
  3. The complainant terminated his employment on August 8, 2010, and was not paid all wages owed to him within six days of termination as required by section 18 of the *Act*. The Director found this circumstance to be a contravention of that section.
  4. The complainant was paid his wages by personal cheque from Harnek Mann. No statutory deductions were made and he was not provided with a wage statement as required by section 27 of the *Act*. The Director found a contravention of section 27 on these facts.
  5. H Mann Trucking did not keep a payroll record for the complainant as required under section 18 of the *Act*. The record for the complainant provided by H Mann Trucking did not show his wage rate, his gross and net wages, or the complainant's name, date of birth, occupation, telephone number and residential address. The Director found these circumstances to be a contravention of section 28 of the *Act*.
  6. H. Mann trucking failed to comply in a timely way to a Demand for Employer Records. The Director found this failure to be a contravention of section 46 of the *Regulation*.

## ARGUMENT

10. Counsel for H Mann Trucking submits the imposition of six administrative penalties for what was essentially a single set of circumstances is an error of law. He says the Director ought to have taken into account there were disputed facts when considering the administrative penalty assessment. He submits the Determination should be varied by cancelling five of the six administrative penalties.
11. In response to the appeal, the Director says no error of law was made. The Director says there were opportunities for H Mann Trucking to settle the claim during the complaint process and avoid the issuance of a Determination and the administrative penalties that were imposed. The Director says the employer was, in all probability, aware of the potential risk in having the Director issue a Determination and assumed that risk. The Director says the administrative penalties imposed were reasonable and correct in the circumstances, supported by provisions of the *Act* and consistent with the direction in the *Act* and *Regulation* relating to the imposition of administrative penalties. The Director notes six distinct contraventions of the *Act* and *Regulation* were found and that under the *Act* the imposition of administrative penalties for each of those contraventions is non-discretionary.

## ANAYLSIS

12. The matter of administrative penalties has been addressed in several decisions of the Tribunal: see, for example, *Douglas Mattson*, BC EST # RD647/01, *Actton Super-Save Gas Stations Ltd.*, BC EST # D067/04,

*Summit Security Group Ltd.*, BC EST # RD133/04, *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST # D160/04, and *Kimberly Dawn Kopchuk*, BC EST # D049/05 (Reconsideration denied BC EST # RD114/05).

13. What the cases have established is that that the administrative penalty provisions are generally consistent with the purposes of the *Act*, the design of the penalty scheme established under section 29 of the *Regulation* meets the statutory purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*, the words of the *Act* and *Regulation* are plain and clear, providing for mandatory administrative penalties without any exceptions, the legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme and the principle discussed by the Supreme Court of Canada in *Kienapple v. the Queen*, [1975] 1 S.C.R. 729 and more fully developed and articulated in *R. v. Prince*, [1986] 2 S.C.R. 480, does not apply to permit the Director to decline to impose an administrative penalty once a contravention has been found. The ability of the Tribunal to set aside administrative penalties is limited. I accept and agree with the following comments from *Kimberly Dawn Kopchuk*, *supra*:

In my view, absent circumstances amounting to bad faith or abuse of process (neither of which occurred here), once the Director or one of his delegates has found multiple contraventions of the *Act* or *Regulation*, then the Tribunal may only set aside these penalties to the extent that it can set aside the underlying contravention based on the grounds of appeal in s. 112 of the *Act*.

14. I add at this point that in this appeal there is no allegation, and no evidence, of bad faith or abuse of process in making the Determination. In the *Kimberly Dawn Kopchuk* decision, the Tribunal did comment on the potential for apparently disproportionate and unfair results, which is essentially what is argued in this appeal, in the Director's administration of the penalty scheme, stating:

. . . there is no doubt that the language used by the legislature in creating the present administrative penalty scheme creates the potential for disproportionate and unfair results. If the Director's interpretation of the *Act* is correct, he may impose a single penalty on an employer for concurrent violations of the *Act* affecting multiple employees (for example, in *Northern Hotel*, *supra*), but multiple penalties in situations such as in this case, or in *Virtu@lly Canadian*, *supra*, affecting only a single employee. Further, as the Tribunal noted in *Brother's Restaurant*, *supra*, under the present penalty scheme penalties bear no relation to the amount actually owing to an employee as a result of the employer's contraventions, and may be far in excess of that amount. Such results, which the legislature may not have had in mind when it enacted the present penalty scheme to require penalties to be imposed for contraventions, could be avoided by expressly permitting the Director not to impose administrative penalties where to do so would be unduly harsh. As the *Act* and *Regulation* stand, however, it seems to me that the Director can only avoid unduly harsh results by the rather fictitious expedient of finding fewer contraventions even where more contraventions are indicated on the facts.

15. More than six years have transpired since the above comments and the legislature has not made any appreciable or substantive changes to the *Act's* penalty scheme. One must accept the legislature has chosen to allow the administrative penalty provisions of the *Act* to operate as they have in this case.
16. H Mann Trucking does not challenge the findings of the Director that the contraventions for which the administrative penalties were imposed occurred. As indicated above, there is no indication that bad faith or abuse of process has occurred in this case. In the circumstances, no error of law has been established; I am unable to find any basis for interfering with the application of the mandatory penalty provisions effected by the Director.
17. Accordingly, the appeal is dismissed.

**ORDER**

18. Pursuant to section 115 of the *Act*, I order the Determination dated February 18, 2011, be confirmed in the amount of \$3,574.41, together with any interest that has accrued under Section 88 of the *Act*

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**