

An appeal

- by -

M KANJ Construction Ltd.
(“M KANJ”)

- 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.: 2014A/46

DATE OF DECISION: June 24, 2014

DECISION

SUBMISSIONS

Raghibir (Ronnie) Gill

on behalf of M KANJ Construction Ltd

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “Act”), M KANJ Construction Ltd. (“M KANJ”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 11, 2014.
2. The Determination found that M KANJ had contravened section 17 of the *Act* and, under section 29 of the *Employment Standards Regulation* (the “Regulation”), ordered M KANJ to pay an administrative penalty in the amount of \$500.00, which represents the total amount of the Determination.
3. This appeal alleges the Director failed to observe principles of natural justice in making the Determination.
4. In correspondence dated June 3, 2014, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
5. The section 112(5) “record” has been provided to the Tribunal by the Director and a copy has been delivered to M KANJ, who has been given the opportunity to object to the completeness of the section 112(5) “record”. There has been no objection and, accordingly, the Tribunal accepts it as complete.
6. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal and written submission made on behalf of M KANJ and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in that subsection, which states:

114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*

- (a) *the appeal is not within the jurisdiction of the tribunal;*
- (b) *the appeal was not filed within the applicable time limit;*
- (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director will be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed. In this case, I am looking at whether there is a reasonable prospect the appeal will succeed.

ISSUE

8. The issue to be considered at this stage of the proceeding is whether there is any reasonable prospect the appeal can succeed.

THE FACTS

9. M KANJ was, at the relevant time, a Farm Labour Contractor (“FLC”) operating under a licence issued by the Director under section 7 of the *Regulation* for a period from May 1, 2013, to April 30, 2014.
10. The Determination notes that, as part of the FLC licensing process, applicants – which would have included M KANJ – are required to pass a written examination in order to satisfy the Director of their knowledge of their obligations under the *Act* and the *Regulation*. Section 17 of the *Act* is a requirement explained during licensing process and is a matter about which the FLC must have a sound understanding.
11. The facts relating to the appeal are as follows:
 1. On October 22, 2013, the Director issued M KANJ a Demand for Payroll Records (the “Demand”) pursuant to section 85(1) (f) of the *Act* to ensure there was compliance with the *Act* and *Regulation*;
 2. M KANJ delivered all the daily logs, payroll records, direct deposit summaries and cancelled cheques as required by the Demand;
 3. A review of the records showed several employees were not paid in accordance with section 17 of the *Act*;
 4. M KANJ was provided an opportunity to respond to the observations made by the Director of the records;
 5. M KANJ provided a response, acknowledging there were brief delays in paying several employees on two occasions, which Ms. Gill, on behalf of M KANJ, explained as being an issue with the Customer Automated Funds Transfer in one case and an issue with payment from a customer in another; and
 6. M KANJ also acknowledged payment to one employee was delayed on two occasions, for substantial periods, which Ms. Gill attributed to the employee in question at first not providing the banking information and then later not providing correct information.
12. The Director found the circumstances demonstrated a failure to comply with section 17 of the *Act* by failing to pay wages to ten employees within eight days after the end of the pay period, the contravention of the *Act* was clear and required the imposition of an administrative penalty of \$500.00 for the contravention. The Director did not accept the explanations provided by M KANJ as excusing the contravention, indicating that, notwithstanding the circumstances raised in the explanation provided by M KANJ, there was a statutory responsibility to ensure employees were paid within the time period specified in section 17.

ARGUMENT

13. M KANJ submits the Director's decision to impose an administrative penalty was a draconian (my term, but I think it fairly summarizes the essence of the complaint being raised in the appeal) response to what M KANJ submits were circumstances of simple human error and matters outside of their control.
14. The appeal submission is critical of the Director for imposing "rigid guidelines" and "policy criteria" without regard to the particular merits of the situation and, as a consequence, for failing to exercise discretion that ought to have invoked an examination of the merits of each individual circumstance.

ANALYSIS

15. While not without some sympathy for the employer in the circumstances of this case, the appeal cannot succeed. There is no dispute that there was a contravention of section 17 of the *Act*. That is admitted by M KANJ.
16. 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.
 - ...
17. Section 29(1) of the *Regulation* sets out a schedule of monetary penalties for persons who have contravened requirements of the *Act* and provides for escalating administrative penalties. The amounts of the administrative penalties are fixed by the *Regulation*.
18. M KANJ argues the Director ought to have exercised discretion in the circumstances and not imposed an administrative penalty. However, the Tribunal has confirmed in several decisions that once a contravention of the *Act* has been found in a Determination, the imposition of an administrative penalty is mandatory, that is, the Director has no discretion: see, for example, *Virtu@lly Canadian Inc. operating as Virtually Canadian Inc.*, BC EST # D087/04, *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST # D160/04, and *Kimberly Dawn Kopchuk*, BC EST # D049/05. In the *Marana Management Services* decision, at page 5, the Tribunal stated:

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. Penalty assessments are mandatory . . .
19. Also, as the Tribunal noted in *Summit Security Group Ltd.*, 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 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*. Neither the Director nor the Tribunal may ignore or override the objectives and purposes of the *Act*.

20. Even if the Tribunal believed the imposition of an administrative penalty to be unfair, we have no direct authority to alter the penalty imposed in the absence of a reviewable error being established. In *Douglas Mattson*, BC EST # RD647/01, the Tribunal found that it could not ignore the plain meaning of the words of the *Act* and substitute its view of the legislative intent based solely on its judgement about what is “fair” or “logical”. Further, in *Acton 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.” This view has been consistently confirmed and applied in many decisions of the Tribunal.
21. M KANJ has alleged a failure by the Director to observe principles of natural justice. The burden is on M KANJ to show that failure and that burden has not been met; the appeal neither demonstrates nor addresses an alleged failure by the Director to observe principles of natural justice in making the Determination. At all times during the investigation, M KANJ was provided with the opportunity to know the case against it and to respond to the concerns raised by the Director. M KANJ did provide a response explaining the concerns observed by the Director, but it was not accepted as showing the *Act* had not been contravened. If it is not already apparent from what I have said above, the Director had no discretion and no alternative in the circumstances, but to impose the administrative penalty.
22. In sum, I find there is no reasonable prospect this appeal can succeed and I do not find the purposes and objects of the *Act* would be served by requiring the other party to respond to it.

ORDER

23. Pursuant to section 115 of the *Act*, I order the Determination dated March 11, 2014, be confirmed in the amount of \$500.00.

David B. Stevenson
Member
Employment Standards Tribunal