Employment Standards TRIBUNAL

An appeal

- by -

607730 B.C. Ltd. operating English Inn & Resort
("English Inn")

- 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

TRIBUNAL MEMBER: Ian Lawson

FILE No.: 2005A/5

DATE OF DECISION: April 13, 2005

DECISION

SUBMISSIONS

Maria Hernandez	on behalf of 607730 B.C. Ltd. operating as English Inn & Resort ("English Inn")
Terry Hughes	on behalf of the Director
Helen Nielsen	on her own behalf

OVERVIEW

This is an appeal by 607730 B.C. Ltd. operating as English Inn & Resort ("English Inn") pursuant to section 112 of the *Employment Standards Act*. The appeal is from Determination ER#102-616 issued by Terry Hughes, a delegate of the Director of Employment Standards on December 2, 2004. The Determination required English Inn to pay compensation for length of service, vacation pay and interest to Helen Nielsen ("Nielsen") in the total amount of $529.51. Administrative penalties were imposed in the amount of $3,500.00.

English Inn filed its appeal on January 10, 2005. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

English Inn operates a hotel in Victoria, and employed Nielsen on July 14, 2003. The Determination is silent as to the nature of her position there. The hotel was closed for renovations on January 15, 2004, and it re-opened in May, 2004. English Inn employees, including Nielsen, were given a notice of layoff prior to January 15, 2004. Nielsen was given a record of employment indicating "temporary layoff due to renovation." Nielsen, however, was not called back to work when the hotel re-opened. She was not given any notice of termination.

Nielsen filed a complaint with the Director that she was owed compensation for length of service and vacation pay. A complaint hearing was held by the delegate on November 22, 2004. The delegate found that as Nielsen was laid off for longer than 13 weeks, she was deemed to have been terminated under section 63(5) of the Act. The delegate further found that English Inn had failed to pay vacation pay, noting English Inn's explanation that it had suffered a breakdown in its accounting department resulting in CPP remittances not being made for employees for some time. Nielsen was entitled to vacation pay of $454.04, but $386.50 of which had been remitted by English Inn all at once, on account of CPP remittances owing. The delegate found English Inn owed Nielsen a further $84.92 in vacation pay.

A Demand for Employer Records had been sent to English Inn on November 2, 2004, some 20 days before the complaint hearing was to be held. The Demand required English Inn to deliver the records by November 12, 2004. English Inn delivered some payroll records to the delegate on November 22, 2004, the date of the complaint hearing. Those records, however, consisted only of the record of employment form, a statement of Nielsen's total wages earned, and some basic personal information on Nielsen.

English Inn did not deliver payroll records relating to Nielsen's hours of work and wages earned in each pay period, or relating to vacation pay earned or paid. As a result, the delegate imposed an administrative penalty of $500.00.

A further administrative penalty of $500.00 was imposed for English Inn's breach of section 58 of the *Act* (failure to pay vacation pay). Regarding the failure to pay compensation for length of service, the Determination contains no explanation for the imposition of a $2,500.00 administrative penalty as a "second" occurrence.

English Inn's notice of appeal claims as a ground of appeal that new information has become available that was not available at the time the Determination was being made. The notice of appeal also indicates a cheque for the amount found owing to Nielsen under the Determination had been issued to her (although it appears the cheque was not mailed until sometime in March, 2005). In its four-paragraph written submission attached to the notice of appeal, English Inn states:

> During the time span of the offences in question we had a payroll audit that brought to our attention a CPP payment error initiated by a fault in our accounting computer program. We immediately submitted both our required CPP contribution plus the payments required by the affected employees. The auditor informed us of our right to redeem this CPP payment from the employees, which caused some delay in processing from the payroll department. The accounting personnel present during this period has since been replaced.
>
> In light of this experience we have restructured and improved our department. We have also appointed a senior Manager to review all payroll related processes. As our record had been perfect up until this one period we would hope that you may impart some leniency upon us with regards to the fines accrued especially since our first offence was still under appeal when the second determination was made.

English Inn does not identify what "new evidence" has become available that was not available at the time the Determination was being made, and has filed no other submission. I presume English Inn is referring to its payroll problems as the new evidence, and I further presume from the content of its notice of appeal, that the only issue for decision is whether "leniency" can be granted to it in relation to the administrative penalties.

The Director filed a submission which contains the following passage:

> The employer indicates their record has been perfect up until this point. This seems to imply this employer has had an excellent record of complying with the various requirements of the Act, and perhaps co-operation with the Employment Standards Branch. Given this submission, I feel there is a need to provide some perspective on this matter generally.
>
> This employer is owned and managed by the same individuals as another employer in Victoria: Hernandez Hotels Corporation operating Dominion Hotel and other businesses. Our Branch has dealt with numerous complaints and many issues over the years with this employer. Until very recently this employer has exhibited little co-operation with our Branch, and did not attend mediations or adjudications. There is also a history of this employer not providing payroll records when required. ...
>
> This employer has recently demonstrated a greater willingness in subscribing to the minimum employment standards, as well as actively participating in the Branch's dispute resolution processes. This is quite likely due to the administrative penalties issued in this and other

> Determinations. It is our hope this co-operation will continue and that future such [*sic*] administrative penalties will not be necessary.

ISSUE

Whether the delegate made any error in imposing administrative penalties in the total amount of $3,500.00 against English Inn.

ANALYSIS

Section 98 of the *Act* reads in part as follows:

> **98** (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 regulation.
>
> (1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.
>
> (1.2) A determination made by the director under section 79 must include a statement of the applicable penalty.

Section 29 of the *Employment Standards Regulation* reads in part as follows:

> **29** (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, a person who contravenes a provision of the Act or this regulation, as found by the director in a determination made under the Act, must pay the following:
>
> (a) if the person contravenes a provision that has not been previously contravened by that person, or that has not been contravened by that person in the 3 year period preceding the contravention, a fine of $500;
>
> (b) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under that paragraph occurred, a fine of $2,500;
>
> (c) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under paragraph (b) occurred, a fine of $10,000.
>
> (2) The penalties imposed under subsection (1) apply to the person only in respect of the location where the contravention occurred.
>
> (3) Despite subsection (2), if an employer dispatches an employee from one location to another worksite, a contravention that occurs at that other worksite is considered to be, for the purposes of subsection (1), a contravention at the location from which the employee was dispatched.

The effect of these new provisions (since November 30, 2002) was considered in *Marana Management Services Inc. operating as Brother's Restaurant*, BCEST #D160/04, where the employer received a total of $1,500.00 in administrative penalties for failing to pay overtime wages, statutory holiday pay and

vacation pay to an employee in the total amount of $299.17. The employer appealed the imposition of these penalties, which it argued were disproportionately harsh in light of the nature of the contraventions. Adjudicator Roberts noted that the penalties assessed against the employer did seem excessive in light of the amounts owing to the employee, and the imposition of cumulative penalties for essentially minor breaches seemed to be unfair. This Tribunal, however, has held that it cannot ignore the plain meaning of a statute and substitute its own view of the legislative intent based solely on its judgment about what is "fair" or "logical" (*Re Douglas Mattson*, BCEST #DRD647/01). The Tribunal has also held that the new mandatory administrative penalty regime does not recognize fairness considerations as providing exceptions to the imposition of mandatory penalties (*Re Actton Super-Save Gas Stations Ltd.*, BCEST #D067/04). Adjudicator Roberts therefore found there was no place for fairness considerations (such as "disproportionate harshness" or "leniency") in an appeal respecting penalties.

A Reconsideration Panel recently made the following observations on the administrative penalty regime generally, in *Director of Employment Standards (Re Summit Security Group Ltd.)*, BCEST #RD133/04:

> As noted by the Tribunal in *Royal Star Plumbing, Heating & Sprinklers Ltd.*, BC EST #D168/98, administrative penalties generated through provisions of the *Employment Standards Regulation* are part of a larger scheme designed to regulate employment relationships in the non-union sector. Such penalties are generally consistent with the purposes of the *Act*, including ensuring employees receive at least basic standards of compensation and conditions of employment and encouraging open communication between employers and their employees. The design of the administrative penalty scheme under Section 29 of the *Employment Standards Regulation*, which provides mandatory penalties where a contravention is found by the Director in a Determination issued under the *Act*, meets the statutory purpose providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*. Such an interpretation and application of the *Act* is also consistent with the modern principles of, or approach to, statutory interpretation noted by Driedger, *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983, p. 87ff. and the nature and purpose of employment standards legislation as explained by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.,* [2001] 2 S.C.R. 460, which was cited by the Tribunal in *J.C. Creations Ltd. O/a Heavenly Bodies Sport,* BC EST #RD 317/03 (Reconsideration of BC EST #D132/03).

It is abundantly clear, therefore, that the Tribunal may not interfere with the imposition of an administrative penalty on the grounds of "leniency" as sought by English Inn. For example, even if I believed the imposition of a $500.00 penalty for failing to produce records upon barely 7 business days' notice was excessive and unfair in the circumstances, I have no power whatsoever to relieve English Inn from that excessiveness and unfairness.

In considering the Determination under appeal, however, I see that no reference is made to English Inn's alleged earlier transgressions which the Director now enumerates in his submission. I also note the Director's submission appears to be referring to contraventions made by another employer (Hernandez Hotels Corporation operating as Dominion Hotel – albeit apparently guided by the same principals who operate English Inn). While English Inn also refers to an earlier Determination which is under appeal, it is not clear whether that Determination was issued against English Inn or against Hernandez Hotels Corporation. This raises the question whether the nature of the "second" contravention has been adequately set out in the Determination.

Section 98(1.2) of the *Act* requires that Determinations made under section 79 "must include a statement of the applicable penalty." Section 81 of the *Act* states:

> **81** (1) On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:
>
> (a) [repealed]
>
> (b) if an employer or other person is required by the determination to pay wages, compensation, interest, a penalty or another amount, the amount to be paid and how it was calculated;
>
> (c) if a penalty is imposed, the nature of the contravention and the date by which the penalty must be paid;
>
> (d) the time limit and process for appealing the determination to the tribunal.
>
> (1.1) A person named in a determination under subsection (1) may request from the director written reasons for the determination.

The legislature therefore intended that at a minimum, Determinations which impose administrative penalties must include a "statement" of the applicable penalty, and must indicate how the amount of the penalty is calculated. While the implication in section 81(1.1) is that reasons may not always be required when the Director issues Determinations, this Tribunal has held that inadequate reasons could be a breach of the principles of natural justice (see, for example: *Fraser Irvine*, BCEST #D427/00; *Richard Thomas*, BCEST #D115/03; *Hub-City Boat Yard Ltd.*, BCEST #D027/04).

The Determination under appeal contains no information at all regarding why a penalty of $2,500.00 was imposed as a second contravention of section 63 within three years. I reproduce the penalties part of the Determination in its entirety:

> **VII. ADMINISTRATIVE PENALTY**
>
> Section 29(1) of the Employment Standards Regulation, B.C. Reg. 396/95, as amended, imposes an administrative penalty on a person who is found by the Director of Employment Standards to have contravened a provision of the Act or the Regulations.
>
> As I have found you have contravened the following provisions of the Act and Regulations the administrative penalty imposed pursuant to section 29 of the Employment Standards Regulation, B.C. Reg. 396/95 is:

Contravention	Work Location	Occurrence (within 3 years)	Amount
Section 63 Act	429 Lampson Street	Second	$2,500.00
Section 58 Act	429 Lampson Street	First	$500.00
Section 46 Reg.	429 Lampson Street	First	$500.00
Total Administrative Penalty Amount:			$3,500.00

I find the word "second" to be an insufficient statement of the applicable penalty and an inadequate explanation of how $2,500.00 was calculated as an administrative penalty. This word alone does not in any way assist English Inn to understand the Determination issued against it, and the absence of

explanation works to prevent English Inn from mounting any effective appeal. More important, the lack of information prevents this Tribunal from determining whether or not the penalty was correctly imposed. These problems are similar to those arising from inadequate reasons in *Richard Thomas*, BCEST #D115/03 and *Hub-City Boat Yard Ltd.*, BCEST #D027/04. I am therefore of the view that the imposition of an increased penalty in this circumstance, without adequate explanation, is a breach of the principles of natural justice.

I am aware of the information provided in the Director's submission made after English Inn's appeal was filed. In my view, the breach of natural justice occasioned by this Determination cannot be cured by a written submission made well after the appeal period has expired (even though English Inn did in fact appeal). In other words, if a breach of natural justice has occurred, the filing of an appeal and of written submissions cannot remedy the breach.

When I consider the Director's submission, however, my concern about the correctness of the increased penalty deepens: the "first" contravention seems to have been committed by a completely different person: Hernandez Hotels Corporation. English Inn's written submission (quoted early in this decision) refers to its "first offence" as being under appeal when the present Determination was issued. This could be a reference to the case of *Hernandez Hotels Corporation*, BCEST #D020/05, decided by Adjudicator Savage on January 27, 2005 (which dealt with a Determination that Hernandez Hotels Corporation had contravened section 63), but I do not know whether that contravention is the one which the delegate treated as the "first." This illustrates the problem created by inadequate reasons for the increased penalty. If the earlier contravention of section 63 had indeed been committed by Hernandez Hotels Corporation, and had this information been included in the Determination itself, English Inn might have been better able to point out this problem in its appeal, and this Tribunal would certainly have been better able to decide whether the increased penalty was lawful. If it is correct that the first contravention of section 63 was committed by Hernandez Hotels Corporation, then the present contravention of section 63 by English Inn can only be treated as English Inn's "first" and the increased penalty imposed is simply incorrect. There has not been any Determination that Hernandez Hotels Corporation and English Inn are associated corporations under section 95 (at least none has been brought to my attention). It would be an error to interpret the penalty provisions so broadly as to allow English Inn to suffer an increased penalty for a contravention committed by Hernandez Hotels Corporation. Even if the two corporations were found to be associated, section 95 does not refer to penalties in rendering the corporations jointly and separately liable, but I leave that question to be decided when it is necessary for the Tribunal to decide.

The nature of the first contravention raises yet another issue. As reproduced above, subsections (2) and (3) of section 29 of the *Regulation* create a geographic component to the imposition of penalties. The Lieutenant-Governor in Council has deemed it necessary to specify that a penalty applies to a person "only in respect of the location where the contravention occurred." Further, even if an employee is dispatched to another worksite where a contravention occurs, "that other worksite is considered to be, for the purposes of subsection (1) [*which sets out the amount of the penalty to be imposed*], a contravention at the location from which the employee was dispatched." While there may be many reasons for this geographic specification, one reason might be to avoid a multiplicity of penalties for contraventions that occur at different worksites of the same employer. Even if it could be argued that Hernandez Hotels Corporation is one and the same as English Inn (which I doubt could be argued successfully), I impute from this geographic specification that penalties could not be imposed for the same contravention at two different worksites of the same employer. It follows, to my mind, that the Director could not treat as a "second" offence a previous contravention of the same employer that occurred at a different workplace.

This again illustrates the problem created by inadequate reasons for the increased penalty: the Determination does not say at which worksite the "first" contravention occurred.

For any and all of the above reasons, I must allow the appeal and vary the Determination to reduce the administrative penalty imposed for English Inn's contravention of section 63 from $2,500.00 to $500.00.

ORDER

Pursuant to section 115(1)(a) of the *Act*, the appeal is allowed and Determination ER#102-616 issued on December 2, 2004 is hereby varied, by reducing the administrative penalty imposed for English Inn's contravention of section 63 of the *Act* from $2,500.00 to $500.00.

Ian Lawson
Member
Employment Standards Tribunal