Employment Standards TRIBUNAL

An appeal

- by -

Anchor Labour Enterprises Ltd.
(the "Appellant")

- 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: Philip J. MacAulay

FILE No.: 2007A/36

DATE OF DECISION: June 20, 2007

DECISION

SUBMISSIONS

Amarjit S. Mandal	on behalf of Anchor Labour Enterprises Ltd.
Reena Grewal	on behalf of the Director of Employment Standards

OVERVIEW

1. This is the appeal of Anchor Labour Enterprises Ltd. (the "Appellant") pursuant to section 112 of the *Employment Standards Act* (the "Act") from determination ER#132-810 (the "Determination") issued by the delegate of the Director of Employment Standards (the "Delegate") on March 19, 2007.

2. The Delegate found that the Appellant had contravened section 17 of the Act and section 40.2 of the Regulation to the Act and assessed a $2,500.00 Administrative Penalty with respect to each resulting in an Order that the Appellant pay a total penalty of $5,000.00. The Delegate had determined that each contravention was the second time the Appellant had breached those legislative requirements. Pursuant to section 79 of the Act, the Delegate also ordered that the Appellant cease contravening those sections of the Act and to comply with all the requirements of the Act and its Regulation.

3. The Appellant's appeal alleges that the Delegate erred in law in making the Determination and requests that the matter be referred back to the Director. While the Appellant also indicates that it believed an oral hearing of this Appeal was necessary, the Employment Standards Tribunal has, pursuant to its authority under section 36 of the *Administrative Tribunal Act*, as incorporated in section 103 of the Act, determined that an oral hearing is not required in this matter and that the appeal can properly be addressed through written submissions.

4. The Appellant is a licensed farm labour contractor under the Act. On June 5, 2006, the Appellant was issued a farm labour contractor license permitting it to employ a maximum of 16 employees. The Delegate noted that, as a result of the examination and licensing process, the Appellant would have been aware of the requirements of the Act regarding payment of wages.

5. Central to this appeal is section 17 of the Act which provides:

> "At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period."

6. As well, section 40.2 of the Employment Standards Regulation regarding farm workers states:

> "(1) In respect of the payment of wages to farm workers, farm labour contractors are excluded from section 20 of the Act
>
> (2) A farm labour contractor must pay all wages to farm workers employed by the farm labour contractor
>
> (a) in Canadian dollars, and
>
> (b) by deposit to the credit of the farm worker's account in a savings institution."

THE DETERMINATION

7. In the Determination of March 19, 2007 the Delegate found that the Appellant had, in contravention of section 17 of the Act, been paying its workers from 9 – 29 days late. As well, the Delegate found that none of the Appellant's workers had been paid by way of "deposit to the credit of the farm worker's account in a savings institution" contrary to section 40.2 of the Regulation. Instead, they had been provided with personal cheques issued by a payroll company.

8. On the question of the amount of the administrative penalties, the Delegate noted that the subject contraventions were not the first for the Appellant. The Appellant had earlier been found to have contravened section 17 of the Act and section 40.2 of the Regulation, each on June 16, 2006.

9. Section 29 of the Regulation provides that, if an employer contravened the same provision of the Act within 3 years of the first contravention, the fine is $2,500.00 for the second contravention rather than $500.00 for a first contravention. Thus, the total penalty is $5,000.00 under the subject Determination.

ISSUES

10. Did the Delegate err in law in finding that the Appellant contravened section 17 of the Act, 40.2 of the Regulation and in assessing total Administrative Penalties of $5,000.00?

APPELLANTS' POSITION

11. The Appellant does not dispute the principal findings of fact set out in the Determination, namely that, (a) the Appellant did not make its payment of wages within the time periods set out in section 17 and, (b) it did not comply with the requirements set out in the Regulation that wages be paid by direct deposit.

12. As noted in the Determination, it was found that the payment of wages was made anywhere from 9 – 29 days late. The Appellant had maintained that the payments were made on a bi-weekly rather than semi-monthly basis and that there had been delays made in the provision of the number of hours worked for each employee on a timely basis. The Delegate correctly, in my view, concluded that the wording of section 17 was unambiguous and that the Appellant did not properly fulfil an employer's responsibility "to ensure that employees are paid all of their wages earned on a semi-monthly basis and within eight days of the pay period ending."

13. On the question of the failure to make payment by way of direct deposit, the Appellant, again, did not dispute the Delegate's finding that it had not complied with section 40.2 of the Regulation. It had not made payment by direct deposit to the employees' accounts at a savings institution but had, rather, issued personal cheques through a payroll company.

14. In its appeal, the Appellant challenged the rationale of the requirements set out in the legislation without denying it had breached its provisions.

15. The Appellant argued that it had been told by its accountant that he had been advised by a person(s) from "the standards board in previous years" that "there is no problem in issuing cheques or direct deposit as long as payroll is generated by a payroll company."

16. The Appellant also stated that direct payments were better than direct deposits inasmuch as errors in payment could more easily be rectified and that, "sometimes you have a joint account with the spouse or children and when they get the direct their [sic] cheques direct deposited the person who worked for us does not get this money and he/she is penniless for the hard work. It is not fair for the worker."

17. Lastly, in its final submission to the Director's submission on the appeal, the Appellant alleges that it has "no money to pay for these fines". It also then makes allegations that Indo-Canadian officers of the Employment Standards Board have been selective in which companies were prosecuted for these sorts of violations and makes general allegations of "favouritism in the Indo-Canadian community." The Appellant closes with the statement that "there seems to be corruption in the Employment Standards Branch as a whole and it is about time that the media starts to investigate this and expose the corruption."

DIRECTORS RESPONSE

18. The Director maintains that all arguments by the Appellant were considered but found irrelevant. As well, the Appellant had been given an opportunity to respond to the allegations, which response confirmed, the Director says, the finding that both sections 40.2 of the Regulation and section 17 of the Act had been contravened.

DISCUSSION

19. It is clear from the Record, the Determination and through its appeal that the Appellant did not dispute its contraventions of the legislation, but, rather, argued that the requirements were not justified. In its appeal the Appellant also alleges favouritism and corruption in the administration of the Act by certain members of the Employment Standards Branch.

20. I agree with the Director that the requirements of the Act are unambiguous. I also agree that the Appellant's arguments against the requirements of the Act are irrelevant. As well, the facts are clear and undisputed.

21. Therefore, given the above, I cannot see that any error in law occurred when the Delegate found, on undisputed facts, that the requirements of the legislation had been contravened.

22. Moreover, the Appellant's position that administrative penalties should not be applied because the Appellant is without funds is also without merit. Ability to pay is not a consideration with respect to the mandatory assessment of penalties when the Act has been found to have been contravened. They must be assessed.

23. Likewise, it having been found that the subject infractions had been the second contravention of two sections of the Act or Regulation, the mandatory assessment of $2,500.00 for each contravention was correct under the provisions of section 29 of the Regulation. It has been found on numerous occasions that, once a contravention is found, there is no discretion in the Director as to whether an administrative penalty can be imposed. It must. As well, the amount of the penalty is fixed by the Regulation.

24. The original submission to the Director in response to the complaint was set out in a letter of March 5, 2007 from the Appellant's accountant on its behalf.

25. This letter includes the accountant's argument that all of his clients have "still been giving cheques" [as opposed to direct deposit] and that, therefore "until Employment Standards starts enforcing this to all" he would continue to advise his clients that they could use payroll company cheques to pay their employees rather than use direct deposit [as required by the Regulation]. Beyond that statement of an intention to continue to advise his clients that they do not have to comply with the Act, the accountant does not allege any favouritism or corruption within the Branch.

26. In its initial appeal, the Appellant states:

> "Our accountant did ask the standards board in previous years and an officer by the name of [specific name] and a person named [specific name] advised him that there is no problem in issuing cheques or direct deposit as long as payroll is generated by a payroll company"

27. The second named individual was the Delegate who first sent a Demand for Employee Records to the Appellant but was not the Delegate who issued the Determination.

28. In its final response to the Director's submissions, the Appellant says:

> "Our accountant does not wish to disclose the names of clients that he has now or that he had, that still issue cheques through a payroll company".

29. There is then a reference to an individual "Indo-Canadian officer" who had reviewed files of his relatives who had issued cheques but against whom no action was taken.

30. The inferences of bias raised by the Appellant are unsupported in any way by evidence that could lead to any findings of fact. The allegations of favouritism and/or corruption were not raised until the appeal. There are no allegations whatever against the individual Delegate who issued the Determination. Moreover, there is no dispute about the fact that the Appellant had contravened the legislative requirements of the Act and Regulation.

31. Having noted the above, I see no demonstration of a real likelihood or probability of there being any bias against the Appellant in this matter. There has been an independent determination by the Delegate that, indeed, the Appellant breached the Act. The Appellant's allegations of favouritism or corruption never rise above its own subjective suspicion.

32. As was stated in the 1998 decision of this Tribunal in *The Director of Employment Standards (Milan Holdings Ltd.* RD 313/98 in a case where it was determined that a delegate had given the impression of a reasonable apprehension of bias (though not actual bias):

> "In our view, the respect and integrity ascribed to the Director (and the Director's delegates) by employers and employees arise in no small part from the neutrality, impartiality and lack of bias with which complaints are investigated and determinations are made. Those qualities are crucially important to the effective implementation of the Director's statutory mandate."

33. Based upon the above statement, allegations of favouritism or corruption must be carefully considered. On the other hand, if one is to make such serious allegations it is incumbent upon the accuser to present cogent or credible evidence in support of their claim in a timely way. Unsupported allegations or statements of opinion not raised until appeal are not sufficient to demonstrate either actual bias or a reasonable apprehension of bias. I therefore reject those allegations in this case.

SUMMARY

34. The Delegate did not err in law in determining that the Appellant contravened section 17 of the Act and section 40.2 of the Regulation. The Delegate did not err in law in determining that, given the subject case was the second time the Appellant had contravened the two sections, there would be an administrative penalty assessed of $2,500.00 for each contravention totalling $5,000.00.

35. I find no reasonable basis for overturning any of the findings of the Delegate that the Appellant has contravened the Act in the unsubstantiated allegations of favouritism or corruption.

ORDER

36. Pursuant to section 115 of the Act, the appeal is dismissed and the Determination of the Delegate is confirmed.

Philip J. MacAulay
Member
Employment Standards Tribunal