Employment Standards TRIBUNAL

An appeal

- by -

Summit Security Group 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

TRIBUNAL MEMBER: W. Grant Sheard

FILE No.: 2004A/10

DATE OF DECISION: April 6, 2004

DECISION

SUBMISSIONS

Jeff DeFehr — on behalf of the Appellant Employer

Alan Phillips — on behalf of the Director

No one appearing on behalf of the Employee

OVERVIEW

This is an appeal based on written submissions by Summit Security Group Ltd. (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on December 19, 2003 wherein the Director's Delegate (the "Delegate") found that the Respondent was entitled to regular wages, overtime wages, annual vacation pay and interest totaling $128.25 and two administrative penalties for contraventions of Section 18 and 40 of the *Act* in the amount of $500.00 each for a total amount payable of $1,128.75.

ISSUES

1. Is an administrative penalty payable pursuant to Section 29(1) of the Employment Standards Regulation ("the Regulation") for a contravention which was inadvertent or unintentional?

ARGUMENT

The Appellant's Position

In an appeal form and one page written submission dated January 23, 2004 and filed the same date the Appellant says that the Director failed to observe the principles of natural justice in making the Determination and seeks to cancel it. The Appellant says that it is not appealing the Decision concerning the wages payable to the Employee, but does appeal the administrative penalty assessed for the alleged contravention of Section 18 of the *Act* (regular wages).

The Appellant says "we paid (the Respondent) all wages that were owed to her by my records at the time of termination; it was not until the Employee submitted the self-help kit that I was aware of her being short any hours. The Employee did not include any time sheets of her own upon termination or with the self-help kit. In fact I still to this date do not have a time sheet from her for the last pay period worked. It was not our intention to withhold payment of any amount, it was simply a matter of not having the accurate information, I paid her to the best of my records at the time of termination."

The Delegate's Position

In a written submission dated February 20, 2004 and filed the same date Delegate says that the Director concurs with the Appellant's statement that the contravention of Section 18 of the *Act* occurred "as a result of a 'lack of communication on both parties' (assumed to be the Employer and the Employee)". The Delegate says that, during the hearing conducted by the Delegate, the Employer agreed he owed the complainant regular wages because she had not informed him of some time she had worked. As a result, the Employer was found to have contravened Section 18 and the Delegate had no latitude in imposing the administrative penalty for the wages owed.

The Delegate added. "Although not stated, it is assumed the Appellant is not appealing the penalty imposed and wages owed as a result of contravening Section 40 of the *Act*" (regarding overtime wages).

THE FACTS

The Appellant operates a security business which employed the Respondent as a security guard from June 19, 2003 to August 24, 2003 at the rate of pay of $9.00 per hour. The Employer terminated the employment of the Respondent who then filed a complaint under the *Act.* The Employer provided a record of the hours the complainant worked and the wages she was paid. The parties had entered into an averaging agreement signed by the parties after the Employee commenced her employment. Consequently, the Delegate found that Employee was entitled to overtime wages worked before that agreement was signed on July 19, 2003. The Employee was entitled to 12 hours of overtime for which she had been paid regular time with a net amount due to her of $54.00. That finding is not in dispute.

Both parties agreed that, after evidence presented by the Respondent to the Delegate that she was entitled to 2.5 hours of regular time for travel and 5 hours of regular pay as a result of miscalculation due to the Employer having paid the complainant based on hours she was supposed to work according to her schedule rather than hours that she actually worked.

The Delegate imposed $500.00 administrative penalties pursuant to Section 29 of the Regulation for contraventions of each of Section 18 (regular wages) and 40 (overtime wages).

ANALYSIS

In an appeal under the *Act* the burden rests with the Appellant, in this case, the Employer, to show that there is an error in the Determination such that the Determination should be cancelled or varied.

In the case of C.S.Q. Foods Ltd. (c.o.b. Bill Bailey's Family Restaurant) (Re) BCEST #D118/97 March 24, 1997 G. Crampton, Adjudicator, it was held regarding Section 28 of the Regulation (now Section 29) as follows:

> "Section 28 of the Regulation establishes a penalty of $500.00 for each contravention of Section 28 of the Act and Section 46 of the Regulation. Thus, the Director has no discretion concerning the amount of the penalty to be imposed once she has determined that Section 28 of the Act had been contravened.
>
> I am sympathetic to the argument made by C.S.Q. that it did not knowingly contravene Section 28 of the Act. However, Section 28 of the Regulation does not give the Director (or her delegate) the discretion to impose a penalty only if the contravention was made knowingly."

The facts of the present case are, however, distinguishable in that the present case did not involve a failure to keep records.

In *The Interpretation of Legislation Canada*, Coté P.A., Les Editions Yvon Blais Inc., Cowansville, Quebec 1984 the author referred to the "Golden Rule" of statutory interpretation saying the following:

> "Lord Wensleydale, in *Grey v. Pearson*, (1857), 6 H.L.C. 61, 106, 10 E.R. 1216, 1234 stated the principle which would later become known as the "Golden Rule" of interpretation:
>
> I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but not farther."

Section 18 of the *Act* provides that "an employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment". *Black's Law Dictionary* defines "owing" as "unpaid. A debt, for example, is owing while it is unpaid, and whether it is due or not".

I agree with the Delegate's submission that he had no latitude in imposing the administrative penalty and that he was bolstered in this position by the case of C.S.Q. Foods Ltd. (supra). However, I also find that interpreting the *Act* in this way leads 'to some absurdity, or some repugnance or inconsistency with the rest of the (*Act*)'. Section 2(b) of the *Act* provides that one of the purposes of the *Act* is to promote the fair treatment of employees and employers.

I find that, to impose an administrative penalty on the particular facts of this case, where the contravention of the *Act* was completely inadvertent and unintentional and where there is no suggestion that the Appellant was negligent or remiss in its record keeping or informing itself of the requirements of the *Act*, would lead to an absurdity, or some repugnance or inconsistency with the purposes of the *Act.*

The wages owed to the employee were owing, but I find on the particular facts of this case that the legislature must have intended the wages to be payable when they were due and owing. Although the wages were owing as soon as the work was performed, they did not become due until 48 hours after the employer terminated the employee and, in this case, the employer knew (or ought to have known) they were due.

Although the Delegate properly found that, based on information presented at the hearing, regular wages were owed, an employer cannot contravene Section 18 requiring the payment of wages owing for hours of work which it has no knowledge of and has not been remiss in keeping records for. Wages due and owing to an employee must be those the employer is aware of or ought reasonably to be aware of. Accordingly, I find that the Appellant did not contravene Section 18 of the *Act.*

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated December 19, 2003 and filed under number 98-946, be varied to cancel the administrative penalty payable in respect of Section 18 of the *Act*. Also, I note an apparent typographical error in the Determination wherein the Delegate found that $128.25 was due for wages plus an administrative penalty of $1,000.00 for a total amount due of $1,128.75 (erroneously raising the total amount due by $0.50). Accordingly, the Determination is varied to provide that wages payable to the Employee including interest are $128.25 and that there is an administrative penalty of $500.00 for the contravention contrary to Section 40 of the *Act* for a total amount payable of $628.25.

W. Grant Sheard
Member
Employment Standards Tribunal