

An appeal

- by -

Intercon Security Limited
(“Intercon”)

- 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

ADJUDICATOR: Michelle Alman

FILE No.: 2000/701

DATE OF DECISION: February 7, 2001

DECISION

OVERVIEW

This decision addresses an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Intercon Security Limited ("Intercon") from a Determination issued September 19, 2000 by a delegate of the Director of Employment Standards ("the Director"). The Determination concluded that Intercon had contravened section 28 of the *Act* by failing to keep proper payroll records for its employee, Alvin Koh ("Koh"). The Determination issued following Intercon's provision of incomplete and irregular payroll records in response to a June 5, 2000 Demand for Employer Records concerning Koh's employment. Pursuant to section 28(a) of the *Employment Standards Regulation* (the "*Regulation*"), the Director's delegate ordered Intercon to pay a \$500.00 penalty for failing to maintain required payroll records.

Intercon appeals from the Determination's finding that it produced incomplete records, alleging that it supplied all required records available, other than those which had become illegible through fading during storage, or those which Intercon was unable to find. Intercon also appeals from the issue of incompleteness on the ground that its human resources employee ceased attempting to locate the missing records in reliance upon an alleged statement from the Director's delegate to the effect that the missing records were "not a concern," as other records were available.

Intercon appeals additionally from the Determination's finding that it failed to keep payroll records showing the employee's name, hours worked in each pay period, and pay period dates in all instance. While Intercon admits it supplied some records for another employee in error, it alleges that the error was mere oversight and should not have been grounds for issuance of a Penalty Determination because "at no time were we given a chance to resubmit the information." Intercon essentially argues, too, that its use of an employee number rather than an employee name in certain of the supplied computerized records should have been sufficient to identify the employee. Intercon alleges that certain of the supplied records did include pay period dates and dates of payment, while others supplied the pay period by reason of some of the pay period dates being hand written onto the printouts of the computer pay screens. Intercon argues in this regard that by supplying "a complete schedule of pay dates and the days worked they cover," it met its payroll record requirement to indicate pay period dates. Lastly, Intercon asserts that its submitted records clearly show "the missing hours worked" by reason of the information shown in the "Curr Hrs." category on certain of the printouts of the computer pay screens, or the "Current Amount" category on certain others of those printouts.

The parties made written submissions in these appeals. Intercon offered no reply submissions further to the Director's submissions.

ISSUE

The issue to be decided is whether Intercon violated section 28 of the *Act* by failing to maintain required payroll records, and if so, whether it must pay a penalty of \$500.00 pursuant to section 98(1) of the *Act* and section 28(a) of the *Regulation*.

THE FACTS AND ANALYSIS

Koh worked for Intercon as a security guard from an unspecified start date until January 13, 2000. He apparently did not receive a letter of termination and his final pay until on or after June 19, 2000. On February 11, 2000, Koh made a complaint about his wages. In order to determine what wages, if any, might be owing to Koh, the Director's delegate issued a Demand for Employer records on June 5, 2000. The Director's delegate sought Intercon's payroll records for Koh for a two-year period prior to February 11, 2000, pursuant to section 85 of the *Act*. The Demand required that the records be produced by no later than 3:30 p.m. on June 19, 2000, and clearly warned that failure to comply might result in a \$500 penalty. Copies of sections 28 and 85 of the *Act*, and section 28 of the *Regulation* were attached to the Demand.

The Demand contained an incorrect end date for the payroll records sought from Intercon. The Director's delegate and an Intercon human resources employee spoke about the matter on or about June 13, 2000. The main points of their conversation are reflected in the June 13, 2000 fax the Director's delegate sent to Intercon's human resources employee. A copy of that document was attached to the Director's submissions and was not addressed by Intercon in reply. The fax text reads in relevant part:

This is a follow up to your request for clarification of records I require relating to Mr. Koh. I require payroll records and any records of daily hours, ie. [sic] time sheets, relating to Mr. Koh's employment during the period February 12, 1998 to February 11, 2000....Please forward your response to the complaints...and the records relating to Mr. Koh for the 2 year period indicated above, by the deadline of June 19, 2000, as set out in my previous letter to you.

The underlining of the delivery deadline in the fax reflects that on June 13, 2000 the Director's delegate clarified the sought records' end date and in no way relaxed her Demand's terms. Contrary to Intercon's allegations that the Director's delegate told Intercon's representative that the records were not necessary, the fax demonstrates that there was clearly a continuing requirement for the production of records in accordance with the Demand. The Demand contained a large, plain warning of the possibility of a \$500 penalty for failure to produce demanded records. I find that the fax is proof that there was no statement misleading the Intercon human resources representative about the continuing need to produce the demanded records. Intercon admits plainly in its submissions that it did not have all the

required documents because they "had faded in storage and were illegible." Intercon's submissions also admit that its human resources employee "was having difficulty locating all the records." By its own admissions, Intercon did not have all of the required records. Intercon's first ground of appeal fails.

Section 28 of the *Act* states in relevant part:

Payroll records

(1) For each employee, an employer must keep records of the following information:

(a) the employee's name...;

...

(d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;

...

(f) the employee's gross and net wages for each pay period...

Where the Director finds a violation of the *Act* or *Regulation*, section 98 of the *Act* states:

Monetary penalties

98 *(1) If the director is satisfied that a person has contravened a requirement of this Act of the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.*

The relevant section of the *Regulation* here is:

Penalty for contravening a record requirement

28 *The penalty for contravening any of the following provisions is \$500 for each contravention:*

(a) section ...28...of the Act;

In its appeal submissions Intercon says in closing,

At no time did Intercon Security try to mislead the Employment Standards Branch. Our paperwork was not up to their standards and we realize that we do need to supply different information.

This is a plain statement that Intercon realizes it did not keep payroll records for Koh in the manner required by section 28 of the *Act*. Intercon, by its own admission, failed to supply the demanded records for Koh when it instead delivered payroll records for another

employee for part of the period in question. Intercon further admitted in its submissions that its payroll records used an employee number rather than the employee name until April 12, 1999. The later addition to the pay screen printout of a pay period date does not cure the failure to have the required information in the payroll records indicating Koh's daily hours of work and pay. Intercon attempts to argue that it supplied alternate means of identification of the employee's name and the pay period dates. Those means do not meet the requirements of section 28 of the *Act*, as Intercon openly acknowledges. Intercon's second ground of appeal also fails.

Intercon is an employer with a long history of dealings with the Employment Standards Branch. The Director's delegate appended to her submissions a four-page listing of dozens of complaint investigations and variance requests concerning Intercon. In light of this history, the Director's delegate exercised her discretion and assessed a penalty. I find that the Director's delegate here properly applied the 3-step analysis described in *Narang Farms Ltd.*, BC EST #D482/98, by finding in this case a contravention of section 28 of the *Act*, exercising her discretion to determine whether a penalty was appropriate in the circumstances; and determining that a \$500.00 penalty was owed in accordance with the provisions of section 28 (a) of the *Regulation*.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination issued September 19, 2000.

MICHELLE ALMAN

**Michelle Alman
Adjudicator
Employment Standards Tribunal**