

An appeal

- by -

BNN Enterprises Ltd.
("BNN")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2005A/48

DATE OF DECISION: May 27, 2005

DECISION

SUBMISSIONS

Ravi Sandhu

for the Director of Employment Standards

OVERVIEW

This is an appeal filed by BNN Enterprises Ltd. (“BNN”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). BNN appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on February 23rd, 2005 pursuant to which BNN was assessed a \$500 administrative penalty (the “Determination”). The penalty was levied in accordance with section 98 of the *Act* and section 29(1)(a) of the *Employment Standards Regulation*.

Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act* (“*ATA*”) including section 36 which states: “...the tribunal may hold any combination of written, electronic and oral hearings” (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). By way of a letter dated May 11th, 2005, the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held.

In BNN’s appeal documents, its legal counsel suggested that an oral appeal hearing might be required “due to the fact that accounting records and further evidence may be produced by the Minister and BNN Enterprises Ltd”. However, in my view, this appeal can be fairly and efficiently adjudicated solely on the basis of the parties’ written submissions. BNN has not produced (or even identified) what records it wishes to submit. In any event, if there are relevant records, those records should have been provided to the Director during the investigation and, if not provided, BNN should explain why it failed to produce relevant records when given the opportunity to do so during the course of the Director’s investigation. I have neither new records, nor an explanation for their absence, before me.

THE DETERMINATION

As noted above, the Director levied a \$500 administrative penalty against BNN. This penalty was imposed by reason of an alleged first contravention of section 17(1) of the *Act*. The Director’s “Reasons for the Determination”, also issued on February 23rd, 2005, indicate the following:

- On August 18th, 2004, a Director’s delegate issued a demand for production of payroll records [see section 85(1)(f) of the *Act*] for the period January 1st to August 15th, 2004;
- A delegate reviewed BNN’s records (which concerned 18 employees) and tentatively concluded that BNN failed to pay several of its employees all of their earned wages on at least a semi-monthly basis and within 8 days of the end of each pay period.
- On January 4th, 2005, a delegate wrote to BNN seeking their response to his preliminary findings (to be received by no later than January 14th, 2005). BNN did not respond in writing as requested.

- On February 4th, 2005, a BNN director, Baldev Dhuga, personally met with two delegates and during that meeting confirmed that BNN failed to pay some employees on a semi-monthly basis. Mr. Dhuga's position was that, apparently, some employees preferred to be paid monthly, rather than semi-monthly and, in any event, all earned wages were paid in full.

The Director's delegate then considered section 17 of the *Act* and section 40.1 of the *Employment Standards Regulation*:

Paydays

17. (1) At least semimonthly and with 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.

[Note: this provision does not apply to overtime wages paid to an employee's time bank or to vacation pay—see section 17(2)]

Exclusions from payday requirements for certain farm workers

40.1 Farm workers who hand harvest fruit, vegetable, flower or berry crops are excluded from subsection 17(1) of the Act on the condition that the employer must pay to the farm workers within 8 days after the end of each pay period

(a) at least 80% of wages earned in the first pay period in the month, and

(b) monthly, all wages earned in the month, less wages previously paid under paragraph (a).

The Director's delegate concluded, based on his review of BNN's own records (including cancelled payroll cheques) that BNN did not comply with section 40.1 of the *Employment Standards Regulation* and had, in fact, contravened section 17 of the *Act*.

The material portions of the delegate's reasons (at p. 3) are reproduced below:

After reviewing the payroll records and cancelled cheques provided by BNN, it is evident that employees were not paid all wages earned in accordance with Section 17(1) of the Act or Section 40.1 of the Regulation. The cancelled cheques, provided as proof of payment, reflect that employees were not paid all wages earned in a pay period on a semi-monthly basis. The employer has not provided any evidence that employees were paid on a semi-monthly basis, rather the employer has acknowledged contravening the Act. BNN's argument that its employees requested to be paid on a monthly basis it without merit. Section 17(1) of the Act requires all employees to be paid all wages earned at least semi-monthly and within 8 days of the end of the pay period. This is a minimum requirement of the Act and as such cannot be waived.

REASONS FOR APPEAL

BNN asks the Tribunal to cancel the Determination on the grounds that the Director erred in law, failed to observe the principles of natural justice in making the Determination and, finally, on the ground that new evidence has become available [see subsections 112(1)(a), (b) and (c) of the *Act*]. BNN's grounds of appeal are expanded in "Schedule A", appended to its appeal form, as follows:

1. [BNN] has complied with all requirements under Section 17 of the [*Act*] at all material times to the [Determination] and will continue to comply with the Act in the future.

2. BNN will provide further accounts and records evidencing its compliance with the Act.

3. Alternatively, if BNN has not strictly complied with the provisions of the Act, which is not admitted but strictly denied, any non-compliance was technical in nature and not to the disadvantage of any employee and has been or will be corrected, and therefore, it is not in the interests of justice to penalize BNN for the same.

Despite being specifically invited to do so (see the Vice-Chair's letter dated April 26th, 2005), BNN did not file any further submission or any other documents in support of its appeal.

I shall deal with each ground of appeal in turn.

ANALYSIS

As noted above, BNN did not file any further submission or documents other than the original appeal notice and "Schedule A" (reproduced in its entirety, above). I consider this appeal to be wholly devoid of merit and, indeed, frivolous and vexatious.

BNN says that it fully complied with section 17(1) of the *Act* but its *own records* put the lie to that assertion. BNN's brazen assertion in this regard reflects a good deal of chutzpah; however, it wholly lacks accuracy. I independently reviewed BNN's payroll records and they clearly indicate that most, if not all employees, were only paid on a monthly basis—a clear contravention of section 17(1) of the *Act*.

I am completely at a loss to understand how BNN was denied natural justice. The delegate demanded payroll records; the records were produced. On the face of things, the records indicated that BNN contravened section 17(1) of the *Act*. BNN was then requested (in writing) to explain its position. BNN failed to take advantage of that latter opportunity. Finally, when a BNN director met with the Director's delegates, that BNN official acknowledged having contravened the *Act*. What more could one ask of the Director in such circumstances?

The bare (and wholly uncorroborated) suggestion that the Director failed to observe the principles of natural justice in this case is patent nonsense. I would have expected a member of the bar—BNN's notice of appeal was signed by its legal counsel—to have conducted himself with a greater regard for his professional stature. Frivolous and wholly unsupported allegations that a public official failed to respect the rules of natural justice have no place in our system of administrative justice; lawyers, especially, should be wary of passing off such cavalier comments in circumstances where there is not even a hint of evidence to support the allegation.

BNN has not submitted *any* new evidence in support of its appeal, let alone explaining why it did not fully present its case to the delegate when it was expressly given an opportunity to do so.

Finally, I wish to observe that this is not a case, in my mind, where there was a "technical breach" of the *Act*. Employees are entitled to be paid their wages on a timely basis. It cannot be assumed that a failure to pay wages in a timely fashion cannot result in employee hardship. Many employees have bills to pay and expect their wages to be paid when they fall due so as to avoid falling into arrears in their credit obligations, incurring interest charges or otherwise facing some sort of disadvantage. Employers are expected to know their obligations insofar as the timely payment of wages is concerned. If it takes an administrative penalty to encourage employers to comply with the *Act*, then so be it.

ORDER

Pursuant to section 114(1)(c) and 115(1)(a) of the *Act*, I order that the appeal be dismissed and that the Determination be confirmed as issued in the amount of **\$500**.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal