



An appeal

- by -

637520 B.C. Ltd. operating as Mac's Convenience Store - # 2669

- 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:** John Savage

**FILE No.:** 2005A/84

**DATE OF DECISION:** July 6, 2005



## DECISION

### SUBMISSIONS

Mohammed Ali (Kara) Abdi, for the Appellant

J. Ross Gould, for the Director of Employment Standards

### OVERVIEW

1. This is an appeal by 637520 BC Ltd. operating as “Mac’s Convenience Store” (“Mac’s”) from a Determination of the Director of Employment Standards dated December 15, 2004.
2. A previous decision in this matter determined that Mac’s appeal should be heard: *Mac’s Convenience Store* BC EST # D066/05.
3. The Delegate of the Director in his Determination found that Mac’s had contravened the *Employment Standards Act* (the “Act”) and found that some \$2,399.85 in wages was owed Mohammed Ali Aden (“Aden”). In addition to the wages owing the Delegate of the Director assessed administrative penalties in the amount of \$2,000.
4. There were three issues before the Delegate.
5. The first issue, which formed the major basis of the complaint, is whether Aden was to be paid \$10.00 / hour as alleged by Aden or \$8.25 / hour as asserted by Mac’s. The Delegate based on conflicting evidence found Aden’s rate of pay to be \$10.00 / hour. This entailed that Mac’s underpaid overtime, and underpaid vacation pay.
6. The second issue before the Delegate was whether Aden was entitled to be paid Statutory Holiday pay for Christmas Day 2003 and New Years Day 2004. The Delegate found that he was not entitled to be paid Statutory Holiday pay for those days, but found that Aden was entitled to Statutory Holiday pay for Good Friday, April 09, 2004.
7. The third issue before the Delegate was whether Aden was entitled to compensation for length of service. Mac’s asserted that Aden quit. Aden asserted that he was told on April 15, 2004 that he would be terminated by April 30, 2004. The Delegate preferred the evidence of Aden.
8. Based on these issues, the Delegate found that \$2,399.85 was owed as wages. In addition to finding these contraventions, the Delegate assessed administrative penalties of \$2000 for four breaches of the *Act*.

### ISSUES

9. Did the Director err in law or breach the rules of natural justice in finding wages owing?
10. Did the Director err in law or breach the rules of natural justice in assessing the administrative penalties?



## APPEAL PROVISIONS

11. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
  - (b) the director failed to observe the principles of natural justice in making the determination;  
or
  - (c) evidence has become available that was not available at the time the determination was being made.
12. The burden of establishing that a Determination is incorrect rests with an Appellant: *Natalie Garbuzova* BC EST #D684/01.
13. In a number of decisions of the Employment Standards Tribunal, panels have adopted the definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.). That definition can be paraphrased as finding an error of law where there is:
- 1. a misinterpretation or misapplication of a section of a statute;
  - 2. a misapplication of an applicable principle of general law;
  - 3. acting without any evidence;
  - 4. acting on a view of the facts which could not reasonably be entertained; and
  - 5. adopting a methodology that is wrong in principle.
14. The principles of natural justice require that the parties be aware of the issues, know the case against them, and be given a reasonable opportunity to present their own case.

## RATE OF PAY

15. There was conflicting evidence before the Delegate of the Director regarding Aden’s rate of pay. Aden stated he was promised \$10.00 / hour. Mac’s says he was to be paid the same rate as the other employees, \$8.25 / hour.
16. The Delegate of the Director reviewed the pay advice notice for the first pay period and the pay advice notices for subsequent periods, together with the other documentary evidence before him. The Delegate reviewed the position of Mac’s but found it inconsistent with the documentary evidence. He found that Mac’s used a “reverse calculation process” which appeared to account for its results, but that the results of that process were not consistent with the Employer’s assertions.
17. In the circumstances, in my opinion, there is no demonstrable error in law. While the parties have differing views on the wage terms of the contract of employment, preferring the evidence of one party over that of another where there is conflicting evidence is not an error of law unless the findings are based on a view of the facts that could not reasonably be entertained. That is not the case here.



18. The weight of evidence is a matter for the Delegate and is, generally, a question of fact, not law: *Ahmed v. Assessor of Vancouver* (1992) BCSC 325; *Provincial Assessors of Comox, Cowichan and Nanaimo v. Crown Zellerbach Canada Ltd.* (1963) 42 WWR 449 at page 471. There is no merit to the appeal on this issue.

## OVERTIME

19. The Delegate's finding that the regular wage rate was \$10.00 per hour entails that \$15.00 per hour is the overtime rate. Section 40 of the *Act* provides that an employer must pay an employee at one and one half times the employee's regular wage for time over 8 hours in a day or 40 hours in a week. Section 40 reads as follows:

- 40 (1) An employer must pay an employee who works over 8 hours a day, and is not working under an averaging agreement under section 37,
- (a) 1 1/2 times the employee's regular wage for the time over 8 hours, and
  - (b) double the employee's regular wage for any time over 12 hours.
- (2) An employer must pay an employee who works over 40 hours a week, and is not working under an averaging agreement under section 37, 1 1/2 times the employee's regular wage for the time over 40 hours.
- (3) For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.
- (4) [Repealed 2002, c. 42, s. 19(b)]
- 1995, c. 38, s. 40; 2002, c. 42, s. 19.

20. The Delegate found that the outstanding wages due because of unpaid or insufficiently paid overtime was \$1,853.53. In the circumstances, the Delegate's finding with regard to the regular wage rate logically required the finding on the outstanding wages including overtime wages. As there was no error of law in the determination of the outstanding wages, there is no error of law in this determination.

21. In the circumstances, the Delegate found a breach of section 40 of the *Act* and imposed an administrative penalty of \$500.00. The *Employment Standards Regulation*, BC Regulation 396/95 ("*Regulation*") provides for mandatory administrative penalties. Subsection 29(1) of the *Regulation* provides 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 administrative penalty:
- (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.



22. The *Regulation* provides for mandatory penalties that escalate from \$500.00 to \$10,000.00 where there are contraventions of the *Act* or *Regulations*.
23. The *Regulation* provides that "...a person who contravenes a provision of this Act or this regulation, as found by the director in a determination made under the *Act*, must pay..." the indicated administrative penalties. This provision does not confer discretion on the Director. Subsection 29(1) expressly provides that a person who contravenes the Act or regulation "must pay" the indicated administrative penalty.
24. The provision is expressed in mandatory terms. This Tribunal has consistently held that, if the breaches are made out, it has no discretion to relieve against these penalties on appeal. For example, in *K Girn Enterprises* BC EST#D077/05 member Stevenson summarized the law as follows:

On the matter of the administrative penalties imposed by the Director, it is noted first that the Tribunal has indicated in *Summit Security Group Ltd.*, BC EST #D133/04 (Reconsideration of BC EST #D059/04), that the administrative penalty scheme in the *Act* is generally consistent with the purposes of the *Act*, relating to the purpose of ensuring employees receive at least basic terms and conditions of employment, encouraging open communication between employees and their employers and providing fair and efficient procedures for the resolution of disputes.

The Tribunal has confirmed in several other decisions that once a contravention of the *Act* has been found in a Determination, the imposition of an administrative penalty is mandatory (see, for example, *Virtually Canadian Inc. operating as Virtually Canadian Inc.*, BC EST #D087/04, *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST #D160/04, and *Kimberly Dawn Kopchuk*, BC EST #D049/05. In the *Marana Management Services* decision, the Tribunal stated:

Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. Penalty assessments are mandatory . . .

Girn has argued that it is unfair to impose administrative penalties in the amount of \$2000.00 where the company acted in good faith and made best efforts to comply with the *Act*. However, in considering an appeal of administrative penalties, as with an appeal of any other aspect of a Determination, an appellant is limited to the grounds of appeal set out in Section 112(1) of the *Act*, above. That provision does not include considerations of "fairness" or whether the employer has acted in "good faith" or with "best efforts" as providing grounds for appealing the mandatory administrative penalties imposed under Section 29 of the *Regulation* (see *Actton Super-Save Gas Stations Ltd.*, BC EST #D067/04).

25. As the Delegate correctly found there to be a breach of section 40, Mac's is liable for the administrative penalty of \$500.00 imposed by the Delegate.

## **ANNUAL VACATION**

26. Section 58 of the *Act* provides that Annual Vacation pay must be paid in the amount of 4% of gross earnings. Section 58 reads as follows:

- 58 (1) An employer must pay an employee the following amount of vacation pay:
- (a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;



(b) after 5 consecutive years of employment, at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay.

27. The Decision of the Director illustrates several examples where either no vacation pay was paid, or where insufficient vacation pay was paid. The Delegate also found that Mac's breached section 58 and imposed an administrative penalty.

28. There is no error made by the Director in these aspects of the Determination.

### **STATUTORY HOLIDAY PAY**

29. The issue before the Director and as set out in the Complaint was that Aden worked Christmas Day 25, 2003 and New Years Day, January 01, 2004 but was not paid at the Statutory Holiday pay rates for those days. The Delegate of the Director describes Aden's position on this issue thus:

"He (Aden) worked on Christmas Day, December 25, 2003 and on (New) Year's Day, January 01, 2004, but was not paid Statutory Holiday pay for those dates".

30. Regarding the argument of the Employer, the Delegate noted Mac's position as follows:

"The Complainant was not paid Statutory Holiday pay for Christmas Day 2003 or New Year's Day 2004 because he had not worked long enough so was not entitled".

31. On this Question the Delegate made the following finding:

"I find Mr. Aden was not entitled to Statutory Holiday pay in accordance with Section 44 of the Act, for working on Christmas Day 2003 and New Years' Day 2004, because he was not employed for at least 30 calendar days prior to both Statutory Holidays."

32. The Delegate did not, however, confine himself to the issue before him and went on to make the following observation:

"However within pay records provided by the employer, I find no evidence that paid Statutory Holiday pay in accordance with Section 44 of the Act for the holiday which occurred on Good Friday, April 09 2004. Therefore I find the employer is in violation of Section 46 of the Act and is liable for an administrative penalty".

33. The Delegate then went on to find a violation of section 46 of the *Act* and imposed an administrative penalty.

34. I have reviewed the record before the Delegate at some length. There is nowhere in the record that indicates that there was an issue before the Delegate of liability for Statutory Holiday pay for April 09, 2004. The only reasonable interpretation of the record and the decision of the Delegate is that the only issue before the Delegate was whether Statutory Holiday pay was payable for the two days referred to in the complaint and referred to in the submissions of the parties.

35. In my opinion it would be a breach of natural justice to impose liability on a person where the person is not given an opportunity to respond to an issue because there has been no notice of the specific complaint. As I have stated, there is nothing in the record to show that the question of Statutory Holiday pay was in issue except for the two days referenced in the reasons.



36. In the circumstances the Delegate erred in imposing liability on this issue. It also follows that the administrative penalty for the alleged breach cannot stand.

### **COMPENSATION FOR LENGTH OF SERVICE**

37. Aden worked for more than three months and then either quit or was terminated by Mac's. The evidence on this issue was conflicting and after careful analysis the Delegate concluded that Aden did not quit but was terminated. An administrative penalty was imposed because by not paying termination pay after 3 months of employment the Delegate found a breach of section 63 of the *Act*.

38. Subsection 63(1) reads as follows:

63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

39. An employer can discharge such liability in a number of ways including by giving written notice of termination as provided for in Subsection 63(3):

- (3) The liability is deemed to be discharged if the employee
- (a) is given written notice of termination as follows:
    - (i) one week's notice after 3 consecutive months of employment;
    - (ii) 2 weeks' notice after 12 consecutive months of employment;
    - (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
  - (b) is given a combination of written notice under subsection (3)(a) and money equivalent to the amount the employer is liable to pay, or
  - (c) terminates the employment, retires from employment, or is dismissed for just cause.

40. As on all accounts written notice was not given, Mac's liability for compensation for length of service is not discharged by Subsection 63(3)(a). With regard to Subsection 63(3)(c), based on conflicting evidence the Delegate found that Aden did not quit.

41. In my opinion there is no error in law or breach of natural justice shown by the Delegate's reasons or procedure on this issue.

### **SUMMARY**

42. The appeal is allowed, in part.
43. The Determination of the Director is confirmed that Mac's owes Aden wages for unpaid overtime in the amount of \$1,853.53.
44. The Determination of the Director finding a breach of section 40 and imposing an administrative penalty of \$500 is confirmed.
45. The Determination of the Director is confirmed that Mac's owes Eden wages for unpaid vacation pay in the amount of \$16.



46. The Determination of the Director finding a breach of section 58 and imposing an administrative penalty of \$500 is confirmed.
47. The Determination of the Director that there was statutory holiday pay owing and finding a breach of section 44 is set aside.
48. The Determination of the Director is confirmed that Mac's owes compensation for length of service in the amount of \$400.
49. The Determination of the Director that there was a breach of section 63 and imposing an administrative penalty of \$500 is confirmed.
50. In addition to the above, there is interest payable on the outstanding amounts in accordance with section 88 of the *Employment Standards Act*.

---

**John Savage**  
**Member**  
**Employment Standards Tribunal**