

An appeal

- by -

Cosmo Motors Ltd. carrying on business as Richmond Kia
(“Kia”)

- 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: Shafik Bhalloo

FILE No.: 2010A/119

DATE OF DECISION: October 26, 2010

DECISION

SUBMISSIONS

Tyler Siegmann

on behalf of the Director of Employment Standards

OVERVIEW AND BACKGROUND

1. This is an appeal by Cosmo Motors Ltd. carrying on business as Richmond Kia (“Kia”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), against a determination of the Director of Employment Standards (the “Director”) issued July 20, 2010 (the “Determination”).
2. Kia operates a car dealership in Richmond, British Columbia, and employed Cody S. Hennebury (“Mr. Hennebury”) as a salesperson from August 28, 2009, to December 11, 2009.
3. On January 4, 2010, Mr. Hennebury filed a complaint, under section 74 of the *Act*, with the Director alleging that Kia contravened the *Act* by failing to pay him commission wages, statutory holiday pay, compensation for length of service and vacation pay (the “Complaint”). The delegate of the Director (the “Delegate”) investigated Mr. Hennebury’s complaint and received submissions from Mr. Hennebury and from Kia’s Office Manager, Linda Bourdon (“Ms. Bourdon”). The Delegate, after completing his investigation, concluded in the Determination that Kia had contravened Part 3, sections 17 and 18, and Part 7, section 58, of the *Act* in respect of the employment of Mr. Hennebury, and ordered Kia to pay Mr. Hennebury an amount of \$1,593.29, an amount which included wages and accrued interest pursuant to section 88 of the *Act*.
4. The Director also imposed three (3) administrative penalties of \$500 each on Kia under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for contraventions of sections 17, 28 and 58 of the *Act*.
5. The total amount of the Determination is \$3,093.29.
6. Kia, through Ms. Bourdon, has filed a very limited appeal of the Determination requesting only “the penalty of \$500 under section 28 of the *Act* be waived”. Kia asserts that the Director erred in law in concluding in the Determination that Kia violated section 28 of the *Act* and therefore the administrative penalty under section 29(1) of the *Regulation* should be cancelled (although Kia has checked off the box in the Appeal Form requesting the Tribunal to “change or vary” the Determination).
7. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in section 103 of the *Act* and Rule 17 of the Tribunal’s *Rules of Practice and Procedures*, the Tribunal may hold any combination of written, electronic and oral hearings. None of the parties seek an oral hearing on this appeal and, in my view this appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUES

8. Did the Director err in law in concluding that Kia breached section 28 of the *Act* and levying an administrative penalty of \$500, under section 29(1) of the *Regulation*, against Kia?

FACTS

9. As the appeal is limited to the question of whether or not Kia violated section 28 of the *Act* which requires employers to maintain certain payroll records for each employee in their employment, I will only delineate under this heading facts pertinent to this issue and not any matters raised in Mr. Hennebury's Complaint or dealt with in the Determination which are not put in issue by Kia in its appeal.
10. Having said this, on April 26, 2010, the Delegate sent Kia a Demand for Employer Records pertaining to Mr. Hennebury. In particular, the Demand specifically requested Kia to produce by May 10, 2010, *inter alia*, "any and all payroll records relating to wages, hours of work and conditions of employment as specified in section 28 of the [Act]".
11. On May 10, 2010, Ms. Bourdon responded to the Demand by supplying payroll records of Kia, which consisted of commission tracking sheets, cheque stubs and employee records of earnings but not Kia's record of days and hours worked by Mr. Hennebury. When, in context of his investigation into Mr. Hennebury's claim for statutory holiday pay, the Delegate questioned why Kia did not produce a record of days and hours worked by Mr. Hennebury, Ms. Bourdon claimed that Mr. Hennebury's Sales manager at Kia, Max Bell ("Mr. Bell"), kept such a record. Kia then, on May 27, 2010, produced a calendar (the "Calendar") purportedly kept by Mr. Bell, containing check marks purportedly showing the days Mr. Hennebury worked but not the specific hours he worked. Kia relied upon the Calendar to claim that Mr. Hennebury was not entitled to statutory vacation pay.
12. In his Reasons for the Determination, the Delegate questioned whether the Calendar, which was not previously produced by Kia in context of the Demand for Employer Records, was "kept contemporaneously" by Kia and questioned its reliability in light of how it came to be produced by Kia stating:

I do not find the Employer's argument and evidence to be reliable. It is questionable whether the Calendar was kept contemporaneously. The Employer was required by the Demand to disclose, produce and deliver the employment records for Complainant. The Demand clearly specified to include records pertaining to hours worked each day. Ms. Bourdon's submission, on behalf of the Employer, in response to the Demand did not include the Calendar nor any sort of record pertaining to the days and hours worked. When questioned why such a record did not exist for the purpose of determining entitlement to statutory pay, Ms. Bourdon immediately advised that Mr. Bell kept a record. I found this comment to be out of the ordinary given that Ms. Bourdon did not submit a record of hours worked as required by the Demand, yet knew, without questioning Mr. Bell, that such a record existed. At this point, the Calendar's reliability was questionable at best given the sequence of events that occurred in producing the document.
13. The Delegate, after reviewing the Calendar and how it came to be produced by Kia together with the oral evidence submitted by Ms. Bourdon, noted the inconsistencies in Kia's evidence (which I need not reiterate here) and went on to place no weight on Kia's evidence in his decision on the issue. However, the Delegate also did not find Mr. Hennebury's evidence satisfactory on the issue as the latter's evidence lacked "supportive evidence to establish on a balance of probabilities that he worked or earned wages 15 to 30 calendar days preceding each statutory holiday." In the circumstances, the Delegate concluded that Kia was not liable to pay him for statutory holiday pay.
14. Having determined the matter of Mr. Hennebury's claim for statutory holiday pay, the Delegate then referred to section 28 of the *Act* noting that this section places on an employer an onus to keep payroll records for each employee. Payroll records are, *inter alia*, necessary to assist in resolving wage disputes or calculating employer liability under the *Act*. In this case, Kia failed to keep a record of hours worked by Mr. Hennebury.

SUBMISSIONS OF KIA

15. As previously indicated, Kia's appeal challenges the Delegate's determination that Kia contravened section 28 of the *Act*. Kia submits that the Delegate erred in law in making that determination and levying an administrative penalty of \$500 under section 29 of the *Regulation*. In support of its appeal, Kia, referring to the Calendar it submitted to the Delegate, submits that it "sent the documents ... showing the schedule Mr. Hennebury worked during his time with (Kia)." Kia also submits that "(t)his schedule (i.e. the Calendar) was pre-discussed between Mr. Hennebury & his supervisor to ensure proper coverage on the floor." Kia also submits "Mr. Hennebury was scheduled to work 8 hours per day."

SUBMISSIONS OF THE DIRECTOR

16. The Director denies that the Delegate erred in law in determining that Kia contravened section 28 of the *Act* and imposing on Kia an administrative penalty under section 29 of the *Regulation* for the said contravention.
17. The Director, referring to the pages in the reasons for the Determination containing the Delegates analysis of the evidence of Kia and particularly the Calendar adduced by Kia, states that the Delegate found Kia's "work schedule to be unreliable" and accordingly levied an administrative penalty under section 29 of the *Regulation*.
18. In the alternative, the Director submits:

In the event the work schedule provided by the Appellant was reliable, the delegate would have still been obligated to determine that section 28 of the Act had been contravened. Section 28 requires an employer to keep a record of the hours worked each day by an employee. A prearranged schedule does not reflect actual daily hours worked by the Respondent. ... Furthermore, the record provided by the Appellant clearly does not indicate the hours worked each day by the Respondent. A "check mark" does not denote specific hours worked each day. Accordingly ... the Appellant's work schedule does not meet the requirement of section 28(1)(d) of the Act.

SUBMISSIONS OF MR. HENNEBURY

19. Mr. Hennebury made no submissions in the Appeal.

ANALYSIS

20. Section 28(1)(d) of the *Act* provides:

Payroll records

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

...

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

21. Section 29(1) of the *Regulation* provides:

Administrative penalties

29 (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, the following monetary penalties are prescribed for the purposes of section 98 (1) of the Act:

(a) a fine of \$500 if the director determines that a person has contravened a requirement under the Act, unless paragraph (b) or (c) applies;

22. As indicated Kia argues that the Delegate erred in law in determining that Kia contravened section 28 of the *Act* and therefore the penalty of \$500 imposed under section 29 of the *Regulation* should be “waived”. I do not find any evidence or basis to conclude that the Delegate erred in law. I note that the Tribunal has consistently adopted the following definition of “error of law” set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* [1998] B.C.J. No. 2275 (B.C.C.A):
1. a misinterpretation or misapplication of a section of the *Act*;
 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 be reasonable be entertained; and
 5. adopting a method of assessment which is wrong in principle.
23. Having reviewed the record and submissions of the parties, I do not find any misinterpretation or misapplication of the *Act* or any applicable principles of general law on the part of the Delegate. In this case, on April 26, 2010, the Delegate made a request for Kia’s Employer Records pertaining to Mr. Hennebury. As indicated previously, the Demand specifically requested Kia to produce by May 10, 2010, *inter alia*, “any and all payroll records relating to wages, hours of work and conditions of employment as specified in section 28 of the [Act]”. Kia did not produce any records of days and hours worked by Mr. Hennebury by the required date. When Kia’s Ms. Bourdon was asked by the Delegate why Kia did not produce a record of days and hours worked by Mr. Hennebury, Ms. Bourdon claimed that Mr. Hennebury’s Sales manager at Kia, Mr. Bell, kept such a record and then, on May 27, 2010, produced the Calendar containing checkmarks purportedly showing the days Mr. Hennebury worked but not the specific hours he worked. I agree with the Director that while it was within the Delegate’s discretion and authority to assess the reliability of the evidence adduced by Kia and reject the evidence as unreliable, it is very clear that Kia never produced any employer records of hours worked by Mr. Hennebury each day at any time. Therefore, the Delegate correctly determined Kia was in contravention of section 28(1)(d) of the *Act*. Section 29(1) of the *Regulation*, in such case, mandates imposition of a fine of \$500 and the Delegate imposed such a fine accordingly.
24. I find the Delegate’s determination on this issue both rationally supported in the law and the evidence and Kia has failed to persuade me otherwise.
25. Accordingly, I reject Kia’s ground of appeal based in an error of law and dismiss Kia’s appeal.

ORDER

26. Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued together with whatever additional interest that may have accrued since the issuance of the Determination pursuant to Section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal