

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Performance Development Ltd.
("Performance")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/052

DATE OF DECISION: March 14, 1997

DECISION

OVERVIEW

This is an appeal by Performance Development Ltd. (“Performance”), under Section 112 of the *Employment Standards Act* (the “*Act*”), against the Determination which was issued by a delegate of the Director of Employment Standards on January 3, 1997. The Determination imposed a penalty of \$500.00 on Performance Development Ltd. due to a finding that it had contravened Section 28 of the *Act* by “...failing to keep proper payroll records.”

ISSUE TO BE DECIDED

Should the Determination be varied, cancelled or confirmed?

FACTS

The following facts are set in the Determination:

On December 9, 1996, a Demand for Employer Records was issued by Wayne Mackie, Employment Standards Officer. On December 27, 1996, you faxed those records to Wayne Mackie (Employment Standards Officer).

Wayne Mackie reviewed the records and discovered that the records did not show the hours worked by the employees on each day.

These are the only facts which were set out in the Determination. However, documents submitted by the Director’s delegate to the Tribunal and disclosed to Performance show that the complaint under investigation concerned the payment of overtime wages.

The Director’s delegate determined that Performance contravened Section 28 of the *Act* and imposed a \$500.00 penalty.

Performance gives the following reasons for its appeal:

1. The Determination is wrong because the Company had not contravened the *Employment Standards Act* before. This is the first offense.
2. This appeal is made because the Determination is unfair and unjustified, based on Section 29(2)(a) of BC Reg 396/95.

3. The facts in dispute are that the employer was not aware of the provisions of the *Act* re daily record keeping for 1995 and 1996. As soon as he was made aware all record keeping was rectified to comply with the *Act*.
4. We seek a remedy reversing the Determination and any further Determinations relating to keeping of records for daily hours for 1995 and 1996, based on Section 29(2)(a) of BC Reg 396/95.

Performance argues that it maintained accurate records of the number of hours worked by each employee for each bi-weekly pay period. In addition, Performance argues that it was not "...trying to defraud anyone, as soon as we realized we were in contravention of the *Act* we created a form that is filled in for each employee on a daily basis to record their hours worked." In summary, Performance argues that imposing a \$500.00 penalty for a first offence is contrary to the purposes of the *Act* which are set out in Section 2.

ANALYSIS

Section 28 of the *Act* requires employers to keep detailed payroll records for each employee. Specifically, Section 28(1)(d) requires the employer to record "the hours worked by an employee on each day, regardless of whether the employee is paid on an hourly or other basis."

Section 85(1)(c) of the *Act* describes the powers given to the Director of Employment Standards to inspect any records that may be relevant to an investigation under Part 10 of the *Act*. Section 85(1)(f) permits the Director to:

require a person to produce, or to deliver to a place specified by the Director, any records for inspection under paragraph (c).

Section 46 of the *Regulation* (B.C.Reg. 396/95) states:

A person who is required under section 85 (1) (f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required.

The penalty was imposed by the Director's delegate under authority given by Section 98 of the *Act* and Section 28 of the *Regulation*.

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 a contravention of Section 28 has occurred.

Section 29(2) of the *Regulation* sets out the penalty for contravening a provision or requirement listed in Appendix 2 of the *Regulation*. In particular, Section 29(2)(a) of the *Regulation* imposes a \$0 penalty for contravening a "specified provision" for the first

time. However, Section 28 of the *Act* is not a “specified provision”. I conclude from this that the Legislature intended that a \$500.00 penalty would be imposed for **each** contravention of Section 28 of the *Act*.

It is important to note that the complaint which was under investigation by the Employment Standards Officer concerned the payment of overtime wages. The absence of payroll records showing the hours worked by employees on each day makes it very difficult to determine if overtime wages are owed. This difficulty arises because the entitlement to overtime wages occurred when an employee works more than 8 hours a day (cf Sections 35 and 40 of the *Act*).

I accept the arguments made by Performance that it was not aware of its responsibility under 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.

ORDER

I order, under Section 115 of the *Act*, that Determination be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal