

An appeal

- by -

Adagio Ventures Ltd. operating as Direct Buy of Vancouver
("Direct Buy")

- 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: Carol L. Roberts

FILE No.: 2005A/107

DATE OF DECISION: August 11, 2005

DECISION

SUBMISSIONS

Terry Litt on behalf of Adagio Ventures Ltd.
Elaine Phillips on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Adagio Ventures Ltd. operating as Direct Buy of Vancouver ("Direct Buy"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued May 13, 2005.
2. Terence Neill filed a complaint alleging that Direct Buy contravened the Act in failing to pay him regular and overtime wages, and annual vacation pay.
3. After conducting a hearing into the complaint, the delegate determined that no wages were owed to Mr. Neill. However, the delegate found that Direct Buy contravened the *Employment Standards Act* in failing to issue wage statements that complied with Section 27 of the Act, and imposed a \$500 penalty for the contravention, pursuant to section 29(1) of the *Employment Standards Regulations*.
4. Although Direct Buy does not dispute the finding that the payroll statements did not comply with the Act, it submits that the imposition of the penalty is unfair.

ISSUE

5. Did the Director fail to observe the principles of natural justice in making the Determination by imposing an administrative penalty?

THE FACTS AND ARGUMENT

6. The facts relevant to this appeal are as follows.
7. Direct Buy engages the services of Ceridian, a payroll provider, to prepare its payroll documents. Mr. Neill provided the delegate with two of his wage statements at the hearing into his complaint. Although there was a space on the wage statement for the hourly rate, it was not shown on either statement. The statements did contain the total amount paid and the number of hours worked. The hourly rate was easily calculated by dividing the total amount paid by the number of hours worked. In Mr. Neill's case, that worked out to \$11.00 per hour for both statements.
8. Direct Buy also provided the delegate with copies of the two payroll registers made by Ceridian. The documents showed that Mr. Neill was paid \$11.00 per hour.
9. The delegate found that the two wage statements issued by Direct Buy did not contain Mr. Neill's hourly rate as required under section 27(1)(c) of the Act, and concluded that Direct Buy had contravened the Act.

10. Direct Buy contends that the payroll was prepared by Ceridian, and that it doesn't control what is or is not contained on the payroll documents. Direct Buy submits that every employer in British Columbia using Ceridian is in violation of the *Act*, and that the imposition of the administrative penalty is "petty". It says that the hourly rate can be obtained by simply dividing the gross pay by the number of hours worked.
11. The delegate says that one of the issues complained of by Mr. Neill was his hourly rate. She submits that, had it been clear on the wage statements, it might not have become as much an issue it was.
12. The delegate also submits that the requirements of section 27(1) are mandatory, and do not provide that those matters can be omitted "so long as the total wages earned can be divided by the total hours worked", or similar words.
13. Finally, the delegate submits that, whether or not an employer engages the services of a payroll company, the onus remains on an employer, not a payroll provider, to ensure that the company is meeting all the requirements of the *Act*.
14. In reply, Mr. Litt says he spoke to Ceridian, which advised him it was unaware of the requirements of the *Act*, but that it was changing Direct Buy's payroll statements.

ANALYSIS AND DECISION

15. 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
16. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker.
17. Although the decision seems to Mr. Litt to be "petty", or unfair, that, in and of itself does not constitute a denial of natural justice. The record discloses that Mr. Litt appeared at the hearing, and had full opportunity to know and respond to the case against him.
18. I will, however, consider the appeal on the basis that the delegate erred in law in imposing an administrative penalty given the facts of this case.
19. Section 27 of the *Act* provides as follows:
- (1) On every payday, an employer must give each employee a written wages statement for the pay period stating all of the following:
 - ...
 - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
 - ...
 - [my emphasis]

20. As I have emphasized, the language of the *Act* is mandatory. The employer has no discretion as to whether the wage statement may or may not be given, or which of the items enumerated in section 27(1) may or may not be included on the statement.
21. Direct Buy does not dispute the delegate's conclusion that it failed to maintain records in accordance with section 27(1)(c), even though it says that the records were prepared by a professional payroll company.
22. It is the employer's responsibility to structure its affairs to comply with the *Act*, including maintaining records relating to employment and hours of work (*478125 B.C. Ltd. v. British Columbia (Director of Employment Standards)* BCEST D. 279/98). Direct Buy has apparently discussed the payroll deficiencies with Ceridian directly. That is a matter for the parties to resolve between themselves. Nevertheless, Direct Buy cannot excuse its failure to comply on Ceridian.
23. Section 98 of the *Act* provides that a person in respect of whom the Director makes a determination and imposes a requirement under section 79 is "subject to" a monetary penalty prescribed by the Regulations:
- 1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.
 - (1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.
- ...
24. Section 29(1) of the *Employment Standards Regulations, B.C. Reg 396/95* sets out a schedule of monetary penalties for "a person who contravenes a provision of the *Act* or this regulation, as found by the director in a determination made under the *Act* or this regulation".
25. 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.
26. As the Tribunal recently noted in *Summit Security Group Ltd.* (BC EST #D059/04, Reconsidered BC EST #D133/04), administrative penalties under the *Act* are part of a larger scheme designed to regulate employment relationships in the non-union sector. The Tribunal determined that penalties are generally consistent with the purposes of the *Act*, and the design of the penalty scheme established under section 29 meets the statutory purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*.
27. It does appear that the penalty assessment against Direct Buy is excessive in light of the fact that, in all other respects the wage statement was in compliance, and the hourly rate was easily calculated from all of the other information contained on the face of the statement.
28. However, in *Douglas Mattson* (BC EST #DRD647/01) the Tribunal found that it could not ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on its judgement about what is "fair" or "logical". Further, in *Actton Super-Save Gas Stations Ltd.* (BC EST #D067/04) the Tribunal concluded that the *Act* provides for mandatory administrative penalties without any exceptions: "The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme."

29. The appeal is dismissed.

ORDER

30. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated May 13, 2005, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal