

An appeal

- by -

Carters Jewellers carrying on business as Your Dollar Store With More #143
("Carters")

- 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: David B. Stevenson

FILE No.: 2016A/114

DATE OF DECISION: October 13, 2016

DECISION

SUBMISSIONS

Baron Carter on behalf of Carters Jewellers carrying on business as Your Dollar Store with More #143

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Carters Jewellers carrying on business as Your Dollar Store With More #143 (“Carters”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 15, 2016.
2. The Determination found Carters had contravened Part 4, section 40 of the *Act* in respect of the employment of Brenda Cardinal (“Ms. Cardinal”) and ordered Carters to pay Ms. Cardinal wages in the amount of \$239.54 and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$739.54.
3. This appeal is grounded on the assertion that the Director failed to observe principles of natural justice in making the Determination.
4. In this appeal, Carters submits it was very unfair, in the circumstances, for the Director to have imposed an administrative penalty and seeks to have the Determination varied to have the administrative penalty cancelled and the amount of the Determination varied accordingly.
5. In correspondence dated August 25, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
6. The section 112(5) record (the “record”) has been requested from the Director and it has been provided to the Tribunal; a copy has been delivered to Carters, who has been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.
7. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, my review of the material that was before the Director when the Determination was being made and any additional evidence allowed to be added to the appeal. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*

- (a) *the appeal is not within the jurisdiction of the tribunal;*
- (b) *the appeal was not filed within the applicable time limit;*
- (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*

- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect that the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

8. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Ms. Cardinal will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

9. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *Act*.

THE FACTS

10. The particular facts relating to the complaint made by Ms. Cardinal are largely irrelevant as the appeal seeks only to affect the administrative penalty imposed.
11. It is helpful, however, to have some background.
12. Ms. Cardinal had filed a complaint against Carters alleging it had contravened the *Act* by failing to pay regular wages, overtime wages, annual vacation pay and compensation for length of service.
13. After the complaint was filed, Carters delivered a cheque to Ms. Cardinal in the amount of \$221.42. As of the date of the complaint hearing, the cheque was not cashed by Ms. Cardinal.
14. The Director conducted a complaint hearing. At the hearing, Ms. Cardinal abandoned her claim for regular wages and clarified that she was only claiming annual vacation pay on her claimed overtime wages.
15. The Director found Ms. Cardinal had quit her employment with Carters and was not entitled to compensation for length of service.
16. The Director found Ms. Cardinal was entitled to overtime wages in the amount of \$223.15 and annual vacation pay on that amount of \$8.93.
17. In making the finding that overtime wages and concurrent annual vacation pay were owed, the Director said:
- Although CJL attempted to pay Ms. Cardinal's unpaid overtime wages prior to the hearing, the amount that was sent was less than the amount I have calculated as owing to Ms. Cardinal. As such, I find CJL contravened section 40 of the Act when it did not pay Ms. Cardinal the overtime wages earned in the pay periods from February 22 to March 31, 2015, for which a penalty is assigned.

ARGUMENT

18. Carters submits the imposition of an administrative penalty was not warranted owing to the fact it tried to settle the overtime claim by providing a cheque for the amount it believed was owed and the dollar amount

difference between what was tendered and what was found is very small. Carters believes the process has operated very unfairly against it.

ANALYSIS

19. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*

- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was being made.*

20. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

21. Carters has grounded this appeal in an alleged failure by the Director to observe principles of natural justice in making the Determination. I am unable to find there was any failure by the Director to observe natural justice principles and, beyond the reference to unfairness, the appeal submission does not identify any natural justice principles that were not observed in the process applied by the Director in administering Ms. Cardinal's complaint.

22. To the extent it may be relevant to this appeal, I find Carters was accorded the procedural rights required by the principles of natural justice: see *Imperial Limousine Service Ltd.*, BC EST # D014/05, and *BWT Business World Incorporated*, BC EST # D050/96.

23. While Carters contends the process was unfair, that contention is not founded on any objective facts that might allow for a finding that, at law, there was a failure to observe principles of natural justice.

24. Carters view of the unfairness of the process includes the imposition of an administrative penalty for the section 40 contravention. The following excerpt from *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST # D160/04, at pages 5 – 6, provides a complete response to the arguments raised by Carter's in respect of the administrative penalty imposed:

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 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*.

It does appear that the penalty assessment against Brother's is excessive in light of the amounts owing to Mr. Joly, and thus, for essentially minor breaches, the cumulative penalties seem unfair. 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 judgment about what is "fair" or "logical". Further, in *Action 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."** [emphasis added]

25. The circumstances here are not dissimilar from those in *Marana Management Services Inc., supra*; it is irrelevant that the wage liability resulting from the section 40 contravention was minor. The legislative provisions relating to administrative penalties makes no distinction between minor and significant contraventions. The statutory preconditions for imposing that administrative penalty were met; the penalty was mandatory. The Tribunal may not ignore the clear language of the statute, making what was clearly intended by the legislature to be a mandatory administrative penalty scheme into a permissive scheme because the amounts found in the Determination to be owing are small or the imposition of such penalty seems unfair.
26. There is no statutory basis for this appeal.
27. I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *Act*.

ORDER

28. Pursuant to section 115 of the *Act*, I order the Determination dated July 15, 2016, be confirmed in the amount of \$739.54, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal