

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-

436244 B.C. Ltd. (Operating as Cambie Hotel (Nanaimo))
(the Employer)

-of a Determination issued by-

The Director of Employment Standards
(the Director)

ADJUDICATOR: Hugh R. Jamieson

FILE NO.: 1999/40

DATE OF DECISION: April 7, 1999

DECISION

OVERVIEW

This appeal was brought by the Employer on January 28, 1999, against a Determination by the Director dated January 5, 1999, wherein a penalty of \$500.00 was imposed on the Employer for a violation of Section 28 of the *Employment Standards Act* (the “Act”). The violation arose by the Employer’s failure to keep proper payroll records in accordance with Section 28 of the *Act*. The penalty was assessed pursuant to Section 28 of the *Employment Standards Regulations*, B.C. Reg. 396/95 (the “Regulations”). The basis for the appeal is the Employer’s contention that given the circumstances, the violation warrants only a written reprimand rather than a monetary penalty. The Tribunal decided that this appeal could be disposed of without an oral hearing.

ISSUES TO BE DECIDED

The issues here are whether the Director properly exercised the statutory discretion under Section 98 of the *Act* to impose a monetary penalty and, whether the Director can assess a penalty less than that prescribed by the *Regulations* when faced with a violation of Section 28 of the *Act*.

FACTS

On December 9, 1998, the Director demanded the production of payroll records relevant to the employment of a Mr. Chris Casson. On the production of these records it was discovered that they were incomplete in that daily records of the hours worked by Mr. Casson were not kept during the period from June 8, 1998 to October 26, 1998. Consequently, on January 5, 1999, the aforementioned Determination was issued imposing a \$500.00 penalty.

In its appeal, the Employer concedes that the records of daily hours were not kept during the period in question but went on to explain that Mr. Casson was hired originally in an apprenticing role at the Cambie Hotel in Vancouver to be trained for the management and direction of the kitchen/bakery at the Employer’s new location in Nanaimo. Daily hours were recorded for Mr. Casson during his training period. However, after he took over the salaried management position at Nanaimo, where he had no specified number of daily hours to work because of his role as a manager, the daily hours were inadvertently omitted from the payroll records. The Employer pleads that in the circumstances this “inadvertent omission” warrants only a written warning.

In response, the Director took the position that apart from the issue of Mr. Casson’s management status, which is apparently in dispute and had not been resolved at the issuance of the Penalty Determination, there is a clear obligation on the Employer under the *Act* to maintain proper payroll records for all employees, including managers. According to the Director, the

Employer's failure to comply with these statutory requirements jeopardizes Mr. Casson's rights to be properly compensated for the hours that he worked for the Employer.

ANALYSIS

For this appeal to succeed, the Employer needs to discharge its burden to show that the Director has somehow abused the powers to impose a monetary penalty or otherwise improperly exercised her discretion under Section 98 (1) of the *Act*. The Employer must also show that the penalty imposed is not in accord with Section 28 of the *Regulations*.

Section 98 (1) of the *Act* provides:

“98 (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under Section 100, the director may impose a penalty on the person in accordance with the schedule of penalties.”

Section 28 of the *Regulations* provides in part:

“28 The penalty for contravening any of the following provisions is \$500.00 for each contravention:

(a) sections 25(2) (c), 27, 28, 29, 37(5) or 48(3) of the Act: ...”

In the undisputed circumstances here, the Employer's admitted failure to maintain proper payroll records clearly falls within the scope of the Director's discretion under Section 98 to impose a monetary penalty where there is a violation of the *Act*. Looking at the appeal as a whole, there is just nothing there to ground a finding that the Director's discretionary powers have been abused in any way. What this appeal really boils down to is that the Employer disagrees with the imposition of a monetary penalty and pleads for leniency. These are simply not grounds for the Tribunal to disturb the Determination.

Moreover, as has been pointed out by the Tribunal in the past, there is no discretionary element involved in the assessment of a penalty under Section 28 of the *Regulations* in these situations. Once a violation of the *Act* has been established that falls within the ambit of Section 28 of the *Regulations* and, where the Director properly decides that a monetary penalty is warranted, the \$500.00 penalty is mandatory - see *Gasal Enterprises Inc.*, BC EST #D177/98.

There can be no doubt that the violation of the *Act* in question here is caught by the prescribed penalty of \$500.00 set out above in Section 28 of the *Regulations*. In the absence of anything from the Employer showing that the Director has acted improperly in the exercise of her discretion to impose a monetary penalty, there is no jurisdiction in the Tribunal to alter the penalty.

The appeal is dismissed accordingly.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated January 5, 1999, imposing a penalty of \$500.00 on the Employer is hereby confirmed.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal