

An appeal

- by -

Marana Management Services Inc. operating as Brother's Restaurant
("Brother's")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/65

DATE OF DECISION: September 9, 2004

DECISION

SUBMISSIONS

Dorothy Gaudry and Ron Eichler,

Eichler Caldwell, Barrister & Solicitors on behalf of Brother's Restaurant

Lynn Egan and Stephanie Newman on behalf of the Director of Employment Standards

Lorraine Proulx and Yvon Joly on behalf of Francis Joly

OVERVIEW

This is an appeal by Marana Management Services Inc. operating as Brother's Restaurant ("Brother's"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued March 18, 2004. The Director found that Brother's contravened Sections 40, 46 and 58 of the *Employment Standards Act* in failing to pay Francis Joly overtime, statutory holiday pay and annual vacation pay. The delegate determined that Mr. Joly was entitled to wages and interest in the total amount of \$299.17.

The Director also imposed a \$500 penalty for each of the three contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.

The employer's appeal is only against the imposition of the administrative penalties.

ISSUE TO BE DECIDED

Whether the Director erred in assessing administrative penalties in the total amount of \$1,500 for the employer's contraventions of the Act.

FACTS

The facts are not in dispute.

Mr. Joly was employed as a server at Brother's from May 17, 2003 until August 15, 2003. He later filed a complaint alleging that he had not received his final pay cheque.

The delegate held a hearing on February 1, 2004. Mr. Joly had moved away from British Columbia and did not appear at the hearing. Brother's advised the delegate that a cheque for Mr. Joly's final wages had been mailed to his Quebec address on or about August 23, 2003. Some time later, Brother's received a telephone call from Mr. Joly's father indicating that Mr. Joly had not received his final pay cheque. Brother's put a stop payment on the first cheque, and on December 15, 2003, issued a replacement cheque. The replacement cheque was cashed on January 14, 2004.

At the hearing, the delegate noted that Mr. Joly's payroll records were incomplete, and determined that she would conduct an audit to determine whether Mr. Joly had been paid all wages he was entitled to.

After a review of Brother's records, the delegate determined that Mr. Joly's regular wages had been paid. She also determined that her jurisdiction was not limited to investigating issues raised in the complaint, noting that the Director was mandated to ensure that employees receive their full entitlement to wages pursuant to the *Act*. The delegate concluded that Brother's had contravened the overtime, statutory holiday pay and annual vacation pay provisions of the *Act*, and that a further \$291.27 was owed to Mr. Joly, reflecting \$30.00 in overtime wages, \$124.07 in statutory holiday pay, and \$137.20 in annual vacation pay.

The delegate imposed a \$500 administrative penalty for Brother's contraventions of each of the sections of the *Act*, for a total of \$1,500.00.

ARGUMENT

Although Brother's does not dispute the delegate's finding that it had contravened the *Act*, it seeks to have the administrative penalty cancelled.

Brother's submits that, as a result of financial problems, it had a skeleton staff during the summer period. It further submits that the amount owed to Mr. Joly was relatively small, and that the payroll problem that led to it represented clerical errors or a lack of attention to detail. It submits that the largest amount, \$137.20 owing for vacation pay, was due to communication problems regarding Mr. Joly's forwarding address. Further, Brothers' contends that the accountant was not well during the period of Mr. Joly's employment, and that her medical problems, which ultimately resulted in surgery on April 19, 2004, affected her ability to perform her work.

Brother's contends that the problems were not deliberate, and that Mr. Joly was a good worker and had a good relationship with management. Brother's contends that the administrative penalty is disproportionately harsh in light of the nature of the contraventions and the restaurant's financial situation.

The director submits that there is no discretion with respect to the administrative penalties, and therefore, they must stand.

In light of the issues raised on appeal, on June 21, 2004, the panel sought additional submissions from the parties on the following issues:

1. Does Section 98 of the *Act* require the Director or her delegate to impose a monetary penalty in every case where a determination is made that a person has contravened the *Act* or *Regulations*?
2. Does the Regulation require the Director to impose a penalty for every provision contravened, or does the director have any discretion with respect to the imposition of "multiple" penalties based on a single set of circumstances? What happens where a set of circumstances could be characterized as a contravention of multiple provisions (e.g. Sections 40, 46 and 58) or as a contravention of a single provision (e.g. Section 18, the obligation to pay "all wages owing" to an employee on termination of employment)

The Director contends that both section 98 of the *Act* and section 29 of the *Regulation* require the Director or her delegate to impose a penalty where there has been a Determination that a provision of the Act has been contravened, and that the Director has no discretion in this regard.

The Director submits that, where there are a set of circumstances that could be characterized as a contravention of multiple provisions or a contravention of a single provision, it is the Director's position that the officer is required to determine whether the contravention is a "stand alone" contravention versus one that is automatically subsumed in the finding of another contravention. The Director takes the position that

a determination will not include a finding of a contravention of a provision when it is automatically subsumed in the finding of another contravention. To do so would result in effectively penalizing the employer twice for the same circumstance.

The Director says that, where an employer had correctly paid annual vacation pay but failed to pay overtime wages, the determination would include a finding that the obligation to pay overtime had been contravened, but it would not also include a finding that the obligation to pay vacation pay had been contravened because that amount was included in the calculation of the overtime provision.

In the case before the Tribunal, the Director submits that Brother's failed to pay overtime, statutory holiday pay and annual vacation pay over the course of several pay periods, not just the final pay period, thereby contravening sections 40, 46 and 58 of the Act. The Director submits that, because the contraventions occurred over several pay periods rather than one, Brother's engaged "in a continuing and persistent practice of failing to pay various distinct statutory entitlements to which the employee was entitled". The Director submits that the Determination should be upheld.

Counsel for Brother's submits that the owners of Brother's were preoccupied with other matters at the time of the hearing and thus the company was not properly represented. He further submits that no mediation was attempted, and that, given that Brother's has no objection to the substantive part of the award, there is no basis for "an award of costs". Counsel further submits that, if costs are mandatory, then the entire award should be set aside, and the matter remitted back for mediation. Brother's counsel did not make submission on any of the questions posed by the panel.

The Director submits that the delegate decided to adjudicate the complaint against Brother's in light of the fact that Brother's had been educated on the Act on prior occasions, had the opportunity to comply with the Act, and had entered into a previous settlement agreement but refused to comply with the terms of that agreement. Furthermore, the Director submits that Brother's had been provided with a written request for payment of wages by Mr. Joly. The Director further submits that, in a telephone conversation with the delegate in December, 2003, Brother's refused to forward the amount being claimed by Mr. Joly to either Mr. Joly or the Director, not because the wages were not owed, but because Brother's did not see a reason to pay an employee who had left the country.

Ms. Proulx and Yvon Joly say that, upon leaving his employment, Mr. Joly left his parents' address with Brother's in order that his final paycheque could be sent to him. Ms. Proulx and Yvon Joly contend that they made 22 telephone calls to Brother's between the end of August and December 2003 in an attempt to ensure Mr. Joly's final payment was received. They say that, after receiving initial assurances that Mr. Joly's cheque had been mailed, subsequent telephone calls were not responded to. They further say that, in November, 2003, Yvon Joly sent Brother's a pre-addressed, pre-stamped envelope to guarantee payment.

ANALYSIS

Section 2 of the *Act* outlines the purposes of the *Act*. Those include ensuring that employees in British Columbia receive at least basic standards of compensation and conditions of employment and promoting the fair treatment of employees and employers. It is against these principles that other sections of the *Act* are interpreted.

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.

...

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”.

The section provides for escalating penalties for subsequent contraventions:

(a) if the person contravenes a provision that has not been previously contravened by that person, or that has not been contravened by that person in the 3 year period preceding the contravention, a fine of \$500;

(b) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under that paragraph occurred, a fine of \$2 500;

(c) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under paragraph (b) occurred, a fine of \$10 000.

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. Penalty assessments are mandatory and are thus not subject to mediation. Furthermore, penalty assessments do not constitute costs. This is not a matter that can be, as suggested by Brother’s counsel, “remitted back” for mediation.

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*.

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 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.”

The Director states that only one administrative penalty will be imposed in respect of a single contravention, for concurrent violations, or several contraventions of the Act arising out of the same circumstances. This appears to be in accord with the “Keinapple principle” (*R. v. Keinapple*, [1975] 1 S.C.R. 729), which prohibits multiplicity of convictions in respect of the same factual incident or transaction.

The undisputed evidence is that Brother’s repeatedly breached several provisions of the Act with respect to overtime, statutory holiday pay and annual vacation pay. The Tribunal has concluded that the penalty scheme is in accordance with the purposes of the Act, and is not subject to fairness considerations, provided the penalties are not imposed for several contraventions arising out of the same circumstances. Although Brother’s claimed that the violations arose as a result of clerical errors and lack of attention to detail, the Tribunal notes that Mr. Joly’s final paycheque was not sent to Mr. Joly despite his parents’ repeated telephone calls until after Mr. Joly filed his complaint with the Employment Standards Branch. Brother’s claim that the breaches were due to clerical errors or a lack of attention to detail rings hollow in light of this evidence.

Therefore, the appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated March 18, 2004 be confirmed, together with any interest that might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal