



An appeal

- by -

432623 B.C. Limited

- 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: Ian Lawson

FILE No.: 2005A/154

DATE OF DECISION: November 22, 2005

DECISION

SUBMISSIONS

Kulwant Sangha for 432623 B.C. Ltd.
J. Ross Gould for the Director of Employment Standards
Leigh Heska on her own behalf

OVERVIEW

1. This is an appeal by 432623 B.C. Ltd. pursuant to section 112 of the *Employment Standards Act*. The appeal is from Determination ER#061-555 issued by J.R. Gould, a delegate of the Director of Employment Standards on July 21, 2005. The Determination required 432623 B.C. Ltd. to pay wages and interest to former employee Leigh Heska (“Heska”) in the total amount of \$874.27. Administrative penalties were imposed in the amount of \$1,500.00.
2. 432623 B.C. Ltd. filed its appeal on August 29, 2005. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS AND SUBMISSIONS

3. 432623 B.C. Ltd. operates a motel in Kamloops, and employed Leigh Heska (“Heska”) between October 1, 2004 and November 14, 2004. Heska filed a complaint with the Director that 432623 B.C. Ltd. owed her regular wages, overtime wages, vacation pay and statutory holiday pay. She also complained that 432623 B.C. Ltd. had made illegal deductions from her wages and had not given her a payroll advice notice so she was unable to reconcile wages earned to the hours she worked. The delegate conducted a complaint hearing by telephone on March 9, 2005, at which evidence was heard from Heska, her witness Gwendolyn Schaffer, and from Paul Sangha (“Sangha”), a principal of 432623 B.C. Ltd. Sangha produced a “work schedule” which the delegate found was not an accurate record of hours worked by Heska, and in the absence of any other information, found 432623 B.C. Ltd. had contravened section 28 of the *Act* respecting an employer’s obligation to keep and maintain records of employment. However, the delegate also found Heska’s evidence as to the hours she worked to be unreliable, and that her witness was biased in her favour. The delegate concluded there was no basis to find Heska was owed regular wages or overtime wages. The delegate found Heska had been paid the correct amount of vacation pay, and found there was no evidence to support her claim that she was owed statutory holiday pay.
4. The delegate found 432623 B.C. Ltd. had deducted sums of money from Heska’s pay to cover the cost of a guest room, which was done without her written authorization as required by the *Act*. 432623 B.C. Ltd. was ordered to return \$850.00 to Heska.
5. Finally, 432623 B.C. Ltd. did not provide pay stubs or any type of written wage statement to Heska on each payday, as required by section 27 of the *Act*. The delegate therefore found the company had contravened that section.

6. The appeal form filed by 432623 B.C. Ltd. seeks to set aside the administrative penalties imposed in the Determination, on the basis that evidence has become available that was not available at the time the Determination was being made. In its submission in support of its appeal, 432623 B.C. Ltd. says the penalties are unconscionable and unwarranted. It is further submitted:

Paul Sangha was the representative present at the hearing for Alpine Motel, as he is the owner/employer. We believe that the hearing did not give an adequate chance for all evidence to be stated, the payroll clerk was not allowed to participate, nor was Mr. Sangha allowed to ask her any questions regarding the subject matter. A miscommunication took place, Mr. Sangha alleges that the presence of his wife, who is responsible for all payroll bookkeeping was approved and verified by Karen, an employee at the Prince George headquarters. At the time of the hearing, Mrs. Sangha was not allowed in the hearing and the director cited that she was not allowed to participate because her name was not on the list of people cited to be at the hearing. We have now, included all paperwork to support our claims, along with written testimony from our employees to show that our establishment is in compliance with the Employment Standards.

We believe with this evidence included as well as looking at the surrounding circumstances, the employment standards tribunal will also find the total amount of sanctions of \$2,374.27 unconscionable and unwarranted.

7. 432623 B.C. Ltd. submits that when the delegate questioned Sangha about deductions from Heska's pay, he requested to call evidence from Mrs. Sangha, but that request was refused.
8. In its submission, however, the company admits Heska was not provided with a wage statement on her paydays, and states "Alpine Motel was not entitled to provide her with a duplicate wage statement which is acceptable under subheading 4." The company seeks to present evidence that it gave wage statements to all of its other employees, and argues that the \$500.00 administrative penalty imposed for its contravention of section 27 is unwarranted.
9. With regard to the delegate's finding that it failed to keep proper records, 432623 B.C. Ltd. submits that it keeps a record book at the front office, in which employee hours of work are recorded and which all employees are required to sign before the leave for work each day. It is submitted Heska neglected to sign the record book or otherwise record her hours in it, which it was her responsibility to do. The company submits the \$500.00 administrative penalty recorded for this contravention is therefore unwarranted and unconscionable.
10. Respecting the company's allegation Sangha was not able to present the evidence he wished to present at the hearing, the Director's delegate states:

No time limits or constraints were imposed on the appellant which could have prevented him from presenting all his arguments and evidence. In addition, he was granted a 30 minute recess at his request. Before the hearing concluded the appellant was invited to summarize his case and he was informed he could introduce any evidence or testimony he might have missed. The appellant did not provide any new evidence or information and did not raise any concern with the delegate about not having had an adequate opportunity to present his whole case....

Regarding Mrs. Bal Sangha, the delegate, at the pre-hearing conference, instructed the appellant and complainant to exchange with each other, lists of their witnesses names and what they would say. The appellant provided witness will-say statements from Ms. Colleen Shutter and Ms.

Lourdes Valencia but he did not name Ms. Bal Sangha as a potential witness and she did not provide a will-say statement.

The appellant told the delegate at the start of the hearing that he, not Ms. Sangha, would present the employer's case. The appellant did not make a representation to the delegate that Ms. Sangha would be an instructing witness consequently she was excused from the hearing unless and until she was needed. Mr. Sangha did not call Ms. Sangha as a witness.

ISSUES

11. The chief issue arising in this appeal is whether the administrative penalties imposed in the Determination were unwarranted or unconscionable. I find a secondary issue has arisen, however, in relation to whether 432623 B.C. Ltd. was unable to present evidence at the complaint hearing it wished to present and so whether a breach of the principles of natural justice occurred at the hearing.

ANALYSIS

12. It is now well-settled in the Tribunal's jurisprudence that the Tribunal cannot interfere with the imposition of administrative penalties merely on the basis that the penalties are disproportionately harsh, unfair or "unconscionable." As decided in *Marana Management Services Inc. operating as Brother's Restaurant*, BCEST #D160/04, even though cumulative penalties for essentially minor breaches of the *Act* might seem excessive or unfair, this Tribunal may not ignore the plain meaning of a statute and substitute its own view of the legislative intent based on its own judgment about what is "fair" or "logical" (see also *Actton Super-Save Gas Stations Ltd.*, BCEST #D067/04). In the *Marana Management* case, administrative penalties of \$1,500.00 were imposed in relation to the employer's failure to overtime wages, vacation pay and statutory holiday pay in the total amount of \$299.17.
13. As a Reconsideration Panel stated in *Director of Employment Standards (Re Summit Security Group Ltd.)*, BCEST #RD133/04:

As noted by the Tribunal in *Royal Star Plumbing, Heating & Sprinklers Ltd.*, BC EST #D168/98, administrative penalties generated through provisions of the *Employment Standards Regulation* are part of a larger scheme designed to regulate employment relationships in the non-union sector. Such penalties are generally consistent with the purposes of the *Act*, including ensuring employees receive at least basic standards of compensation and conditions of employment and encouraging open communication between employers and their employees. The design of the administrative penalty scheme under Section 29 of the *Employment Standards Regulation*, which provides mandatory penalties where a contravention is found by the Director in a Determination issued under the *Act*, meets the statutory purpose providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*. Such an interpretation and application of the *Act* is also consistent with the modern principles of, or approach to, statutory interpretation noted by Driedger, *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983, p. 87ff. and the nature and purpose of employment standards legislation as explained by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, which was cited by the Tribunal in *J.C. Creations Ltd. O/a Heavenly Bodies Sport*, BC EST #RD 317/03 (Reconsideration of BC EST #D132/03).

14. I am therefore unable to accede to 432623 B.C. Ltd.'s submission that the \$1,500.00 in administrative penalties imposed against it is "unconscionable."

15. Having carefully reviewed the record and all submissions, I do not find any merit in 432623 B.C. Ltd.'s submission that it did not contravene sections 27 or 28 of the *Act*. As I have noted, the company admits in its submission that it did not feel obligated to provide Heska with a wage statement with each of her paycheques. The delegate found the one-page excerpt from the company's record book relating to Heska to be insufficient compliance with the records it is required to keep pursuant to section 28 (that document contains two handwritten entries for the period "Oct. 16-31/04", one dated October 25 and another dated November 11). I note the company tenders the same document with its submissions on appeal, and even though its appeal form claims new evidence has become available which was not available when the Determination was being made, the company has presented no other record relating to Heska in support of its appeal on this ground.
16. The company's appeal respecting the administrative penalty for its illegal deductions from Heska's wages raises the secondary issue, whether Sangha was prevented from calling the evidence he wished to present at the complaint hearing. No recording is made of the complaint hearing, which renders it extremely difficult to determine whether 432623 B.C. Ltd. is correct in saying it was not allowed to present the evidence of Mrs. Sangha, or whether the delegate is correct in saying Sangha expressed no desire to call that evidence at the appeal hearing. I must say it seems implied in the delegate's submission that Sangha was told he could not call evidence from Mrs. Sangha because he had not identified her as a witness or provided a will-say statement of her intended evidence. The delegate also admits that he had excluded Mrs. Sangha from the hearing as she was not an instructing witness. To that extent, the delegate's submission confirms the company's submission that something happened at the hearing to prevent the calling of evidence from Mrs. Sangha, whom the company considered to be an important witness.
17. While it is an excellent practice at a pre-hearing conference to require parties to identify in advance the witnesses they intend to call at the complaint hearing, and to exchange will-say statements, I do not agree that a party's failure to do so ought to prevent them from calling that witness at the complaint hearing. The solution to such a problem is to adjourn the hearing, require production of the will-say statement and then convene at a later date, when the other parties are prepared to deal with that witness's evidence. It is not clear, however, that the delegate actually prevented Sangha from calling Mrs. Sangha – it may be that Sangha was admonished for failing to identify her as a witness and exchange her will-say statement, which caused Sangha to feel he was unable to present her evidence.
18. In any event, I am of the view that the result would not have been any different had the delegate heard from Mrs. Sangha. I come to that conclusion, because 432623 B.C. Ltd. does not present any evidence or argument that calls into question the delegate's conclusion on the company's contravention of section 21 of the *Act*, that it could not make any deduction from Heska's wages without her written authorization. Had the company possessed such authorization and had Mrs. Sangha been unable to tender it in her evidence, I would have concluded a breach of the principles of natural justice occurred and the company ought now to be able to tender such written authorization into evidence. In the absence of any written authorization, however, the deductions from Heska's wages were contrary to the *Act*, no matter what Mrs. Sangha might have wished to say in her evidence. For all of the above reasons, I have concluded 432623 B.C. Ltd.'s appeal must be dismissed.

ORDER

19. Pursuant to section 115(1)(a) of the *Act*, the appeal is dismissed and Determination ER#061-555 issued on July 21, 2005 is confirmed, with interest pursuant to section 88.

Ian Lawson
Member
Employment Standards Tribunal