BC EST #D203/00

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 -

CDJ Enterprises Ltd. (the "Appellant")

- of a Determination issued by -

The Director of Employment Standards (the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/113

DATE OF DECISION: May 17, 2000

BC EST #D203/00

DECISION

APPEARANCES

Danny Zein	for the employer
Ed Wall	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Danny Zein on behalf of CDJ Enterprises Ltd. operating as Chillanos Restaurant & Bar (the "employer") from a Determination dated February 8, 2000. That Determination assessed a penalty of \$500.00 against the employer for contravening Section 28 of the *Act* and Section 46 of the *Employment Standards Regulation* by failing to maintain and produce proper payroll records.

ISSUE(S) TO BE DECIDED

Should the employer be relieved from its requirement to pay the \$500.00 penalty?

FACTS

The employer operates a restaurant & bar at 701 Lakeside Drive, Nelson, British Columbia. On December 17, 1999 a Delegate of the Director of Employment Standards issued a Demand for Records pursuant to Section 85(1)(f) of the *Act* to the employer. The Demand was necessary in order for the Director's Delegate to investigate a complaint that had been filed regarding a claim for overtime pay, statutory holiday pay and annual vacation pay. The delegate commenced an investigation. The inspection of payroll records including records, of daily hours worked, was relevant to that investigation.

The delegate's investigation was hampered because the records that were produced were incomplete. Rather than producing a payroll record or a record of daily hours worked the employer presented work schedules. Sometime later the employer provided the same schedules but had written the number of hours that he believed the complainant might have worked based on the time that the restaurant had closed and considering who else had worked on those days.

In its appeal the employer argues that the employee in question was initially hired as a manager. The employer states that it was not until it received the Demand for Employer Records that it had any inkling of a problem regarding the employee's pay. At this time the employer reviewed the definition of manager as outlined in the "Guide to the *Employment Standards Act*" and realized that the employee in question was improperly classified.

The employer submits that Section 85(1)(f) of the *Act* does not require the employer to keep records for managers as they are not covered by the *Employment Standards Act*. The employer argues that the employee in question was included on the work schedules but that his actual time

worked was not tracked in great detail. The employer argues that it did not purposely attempt to impede the investigation. Rather, the employer argues that because it thought the employee in question was a manager did not keep the detailed records required by the *Act*. The employer further argues that its attempt to fill in the hours worked after the fact was not an attempt to impede the investigation but rather was an attempt to cooperate with it by providing the information as best it could.

ANALYSIS

The employer argues that it had no intent to breach the requirements of the *Act* or impede the investigation. However the employer recognizes that once it had read the aforementioned guide it had improperly classified the complainant as a manager. The employer states that it commenced keeping proper records once it had realized its error.

The Tribunal does not recognize ignorance of the law as a defence to penalties imposed for failing to keep proper payroll records. (See Re: *Piete* BC EST #D032/99; *Skalenda* (*C.O.B. Fine Line Traffic Marking*) BC EST #D196/99). The assessment of a penalty under Section 46 of the *Regulation* for a breach of Section 28 does not require subjective intent by the employer. The test is objective. Did the employer fail to keep the proper records under Section 28 and did the employer fail to produce the information and records requested upon demand by the Director's Delegate? Unless a reasonable excuse is given for the failure to keep the records or comply with the demand the Director has the discretion to impose a penalty. The imposition of a penalty does not require a finding by the Director that an employer willfully or intentionally failed to keep or produce proper records.

The employer argues that its honest but mistaken belief that the complainant was a manager coupled with an assertion that it has kept proper records once it came to the conclusion that the complainant was not a manager should mitigate any prior non-compliance. I am not able to accept that argument as a basis to mitigate the penalty. The employee never was a manager – he was at all times an employee. Therefore the employer was required to keep proper payroll records.

The penalty for contravening a record requirement is set at \$500.00 by the *Act*. Section 28 of the *Employment Standards Regulation* reads:

- 28. Penalty for contravening a record requirement The penalty for contravening any of the following provisions is \$500.00 for each contravention:
 - (a) Section 25(2)(c), 27, 28, 29, 37(5) or 48(3) of the Act;
 - (b) Section 3, 13 or 46 of this regulation.

There is no element of discretion involved in assessing the penalty. The statute sets the penalty at \$500.00. The Tribunal has no discretion to reduce that amount once a breach of Section 28 of the *Act* or Section 46 of the *Regulation* is established.

ORDER

The Determination dated February 8, 2000 is confirmed.

E. Casey McCabe Adjudicator Employment Standards Tribunal