# 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 -

Pro-Tru-Tec Investments Ltd., operating as McDonald Trucking
(the " Employer ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

**ADJUDICATOR:** Mark Thompson

**FILE No.:** 2000/093

**DATE OF DECISION:** May 25, 2000

## DECISION

### OVERVIEW

Pro-Tru-Tec Investments Ltd. (the "Employer") appealed a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 25, 2000 pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"). The Determination found that the Employer owed Cory Bailey ("Bailey") $1,254.66 for unpaid wages, vacation pay, statutory holiday pay, compensation for length of service and interest. An accompanying Determination imposed a zero dollar penalty on the Employer.

The Employer appealed the Determination on the grounds that it did not consider the circumstances of Bailey's termination, that the Determination gave undue weight to Bailey's memory and imposing a penalty without adequate grounds.

This decision was based on written submissions from the parties.

### ISSUE TO BE DECIDED

The issues to be decided in this case are: has the Employer met its burden of demonstrating that the Determination contains an error of fact or law; and whether adequate grounds existed for imposing the penalty.

### FACTS

Bailey worked for the Employer as a truck driver from April 25, 1998 until October 7, 1998 at the rate of $15.50 per hour. On October 1, 1998, a customer of the Employer gave notice that it was terminating its business relationship with the Employer. According to the Employer, employees were shown a copy of this letter or were told about it. Bailey informed the Director's delegate that he had heard rumors a few days before he was laid off. He asked Mr. Walter McDonald, the owner of the company and was told to wait until his foreman returned to work. Ultimately, he was laid off effective October 7.

The Determination also found that the Employer had not paid Bailey for work performed on April 25 and 27, 1998 and failed to pay him for two statutory holidays during his term of employment. The Employer did not appeal either of these findings.

The Director's delegate informed the Tribunal that three previous complaints had been filed against the Employer, and two were resolved by voluntary compliance. This record was the basis for the imposition of a zero dollar penalty on the Employer.

### ANALYSIS

The Employer's appeal contained several elements. It alleged that the delegate failed to give sufficient weight to the reason for the termination of Bailey's employment and failed to consider

that Bailey received notice of termination at least 6 days prior to his termination and that Bailey worked during his notice period. The appeal further alleged that the Determination imposed a greater penalty than required by the one day of the notice period not worked.

The Employer appealed the imposition of a penalty on the grounds that the delegate had not allowed the Employer to rebut previous allegations and not providing any factual basis for the decision to impose a penalty.

The *Act* covers the first ground for appeal squarely. Section 63(3)(a) of the *Act* states:

> *The liability [for compensation for length of service] is deemed to be discharged if the employee*
>
> *(a) is given written notice of termination as follows:*
>
> *(i) one week's notice after 3 consecutive months of employment;*
>
> *(ii) two weeks' notice after 12 consecutive months of employment;*

In this case, no written notice of termination was given to Bailey. The Employer stated, without any proof, that notice was given six days prior to termination. The law is clear: notice must be in writing. The delegate found that no written notice was given, and the appeal contains no evidence of any such notice. Nor did the appeal present any evidence to refute the delegate's evaluation of the circumstances of Bailey's termination. The length of the period when the Employer alleged that Bailey knew of his possible termination is not relevant when no written notice is provided.

The Employer also argued that the delegate had not considered Section 65(1)(d) of the *Act*. This provision states that Section 63 does not apply to an employee:

Employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of *Bank Act* (Canada) or a proceeding under an insolvency Act.

The exception to compensation for length of service contained in Section 65(1)(d) is to be used cautiously. Employers face changes in the marketplace, and employees have little recourse other than to seek other employment if they are terminated. The requirements for notice are intended to shield employees from some of the consequences of changes in an employer's business, See *Re ARFI Holdings Ltd.* BC EST #D054/97. In this case, the Employer presented no evidence about the circumstances leading to Bailey's termination other than the cancellation of a contract with a customer. In particular, it did not explain why it would not have been possible to give Bailey the one week's notice required by the *Act*.

The Employer also argued that the compensation for length of service should be reduced because Bailey found other employment during the notice period. It presented no evidence of Bailey's work history after he ceased to work for the Employer. Section 63(3)(b) of the *Act* permits an employer to discharge its obligations for compensation for length of service by a combination of employment and monetary payment. In this case, no notice was given, so the exemptions to length of service do not apply. Even if written notice had been given, the Employer would be

required to produce evidence that a former employee was not available for work when it offered work to reduce its liability under Section 63(3).

The Employer appealed the zero dollar penalty on the grounds that it had not been given the opportunity to rebut allegations against it. The Director's delegate stated that two previous complaints against this Employer had been settled under voluntary compliance. In those cases, there was nothing to rebut. Complaints were filed, and the Employer acknowledged its obligations. If the Employer had evidence that the earlier complaints were incorrect, it had opportunities to present its case to the delegates responsible for those cases. Penalties are intended to alert employers of their obligations under the *Act*. Section 98 gives the Director broad discretion in imposing penalties. The imposition of the penalty contained the rationale for it, *Re Bistro! Bistro! Restaurants Ltd.* BC EST #D386/98. No evidence or legal argument has been presented here to interfere with the Director's exercise of her discretion.

## ORDER

For these reasons, the Determination of January 25, 2000 is confirmed, together with any additional interest that has accrued pursuant to Section 88 of the *Act*.

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**Mark Thompson**
**Adjudicator**
**Employment Standards Tribunal**