

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 -

James Cattle Co. Ltd.
("James")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NOS.: 1999/131 and 1999/132

DATE OF HEARING: May 26, 1999

DATE OF DECISION: June 4, 1999

DECISION

APPEARANCES

Lyle James	on behalf of James Cattle Co. Ltd.
Helen James	on behalf of James Cattle Co. Ltd.
Jeff Huberman	counsel for Francis Sam
Francis Sam	on his own behalf
Elsie Char	on behalf of Francis Sam
Scott Bernard	on his own behalf via telephone conference

OVERVIEW

This is an appeal by James Cattle Co. Ltd. (“James”), under Section 112 of the *Employment Standards Act* (the “Act”), against two Determinations dated February 12, 1999 issued by delegates of the Director of Employment Standards (the “Director”). James alleges that the delegate of the Director erred in the first Determination by concluding that wages were owed to Francis Sam (“Sam”) and further erred by concluding that Scott Bernard (“Bernard”) was an employee with wages owing.

James further alleges that the delegate of the Director erred in the Penalty Determination by imposing a penalty without providing sufficient warning that the penalty may be imposed and further the delegate of the Director erred by imposing the penalty in circumstances in which there was no demonstrated contempt for the power of the Branch. James finally alleges that the delegate of the Director erred by failing to take into account the realities of the ranching industry with respect to the ability of the appellant to record daily hours of work.

ISSUES

The issues to be decided in this appeal are:

1. Are wages owed to Sam ?
2. Was Bernard an employee and, if so, are wages owed ?
3. Was the penalty imposed appropriate in the circumstances ?

FACTS

I will not attempt to reproduce all of the evidence provided by the parties rather, I will refer only to the evidence relevant to the matters in dispute.

The following facts are not in dispute:

- Sam was employed by James as a ‘farm worker’ from May 15, 1997 to October 31, 1997;
- Bernard performed work for James from October 10, 1997 to April 4, 1998;
- the rate of pay for both Sam and Bernard was \$1,200 per month;
- pay days were the 15th and the end of each month;
- no wage statements were provided by James;
- the delegate of the Director, during the course of investigating complaints filed by Sam and Bernard against James sent by Certified Mail a “Demand for Employer Records” dated December 3, 1998;
- the Demand required James to disclose, produce and deliver all payroll records for Sam and Bernard by 10:00 a.m. on December 29, 1998;
- noted at the bottom of the Demand was the statement “*Failure to comply with a record requirement may result in a \$500 penalty for each contravention as stated in Section 28 of the Regulations*”;
- James provided by fax on December 22 a summary of days worked, days off and cheques issued to Sam;
- James further provided a letter dated December 21, 1998 but not received till January 4, 1999 which contained a summary of payments made to Bernard;

Both Lyle James and Helen James (collectively referred to as the employer “James”) testified on behalf of the employer and stated that:

- Sam was told at the time of his hire that housing and utilities were a part of his wage package;
- Sam asked if James would pay an outstanding telephone bill for Sam in the amount of \$282.65 and then just take it off his wages;
- James did pay that telephone bill for Sam and produced the cancelled cheque;
- Sam was paid for 18.5 days that he did not work and they felt that this compensated Sam for his holidays;
- James provided a replacement washing machine for Sam’s residence;
- James has a complete record of days Sam did not work;

- Sam was told in early October 1997 that James could not keep him employed any longer, however Sam asked if it was possible to stay till the end of the month and he did;
- James further states that they believed that the records provided were sufficient as those records were a summary of the records James compiled for their payroll purposes;
- James further provided to the panel the documents from which the summaries were prepared;
- James kept a daily diary in which the daily activities were recorded and as well James kept a record of which days employees worked;
- Bernard had worked for James in the past and was well aware that the wage package was \$1,200 per month plus housing and utilities. Bernard confirmed this understanding with the delegate of the Director;
- Bernard had agreed to work as a “contractor” and therefore no deductions were taken from his pay for E.I., C.P.P. or Income Tax;
- it was company policy to only work a 1/2 day on statutory holidays;
- Some of the hours Bernard submitted as work were in fact hours spent obtaining firewood to heat his accommodations;
- Bernard was hired primarily to drive the silage truck;
- Bernard gave notice that he was quitting and while he did not work to the end of his notice period, he was paid for his entire notice period;

In response to questions from the other parties on cross examination, James stated that:

- while their intention was to hire Bernard primarily to drive the silage truck, he did perform other work;
- they are not sure exactly what day Sam was advised about the housing and utilities being a part of the wage package but Sam would have been told as all new employees are told;
- they are not sure if anyone else was present when Sam was hired and told of the wages and housing;
- they have no explanation as to why the daily records provided to the panel were not submitted to the delegate of the Director in response to the Demand for Employer Records;
- they had daily contact with the employees so are able to confirm when they worked;
- Sam received a number of advances throughout his period of employment;
- while Sam may have worked late on some days, most of the time he left for home at the same time;
- they never said anything to Sam or Bernard about the hydro but it had to be paid;
- it was a mistake to not put any value for the housing and utilities on the t-4 slip issued to Sam;

- they now concede that Bernard was an employee and it was a mistake to attempt to consider him a contractor;
- they are not able to explain the discrepancy in the days worked recorded for Sam on their daily sheets and the days worked submitted to the delegate of the Director in the summary.

Sam testified and stated:

- sometimes he would phone and ask for an advance;
- sometimes he would pick up his cheque and at other times Elsie Char (“Char”) his spouse would pick up the cheque;
- he contacted James by telephone to see if there was any work available;
- James advised that there might be some irrigation work and for Sam to come out to see him;
- he, Char and his nephew Truman drove out to the ranch to talk to James;
- he and Char were standing together when James explained the work and when asked about accommodations, James said a trailer which was shown to them;
- James never spoke to him about the wage rate nor about house and utilities being a part of the wage package;
- he became aware that the wage was \$1,200 per month from another employee;
- he worked until at least 6 p.m. each day;
- on September 24 he wanted to leave at 6 p.m. because there was a party planned for his grandson’s birthday but he had to work late and didn’t get home till 9 p.m.;
- on one occasion while working at Pigeon ranch, had to stay till 8 p.m. and then hitch hiked home;
- he gave the vehicle to his nephew Dwayne Samson and he did not have any discussions with James in regard to vehicle storage fees;

Char testified and stated that:

- she recalls going with Sam to meet James;
- nephew took them out to the ranch;
- she was present when James spoke to Sam about the job;
- there was no discussion about a house being included as a part of the wages;
- the cheques she picked up for Sam did not have any stub or statement attached;
- she recalls the occasion of their grandson’s birthday when Sam came home quite late;
- Sam came home late quite a number of times and one time he had to hitch hike home;

- the washing machine in the trailer was leaking oil and water and when she brought this to James' attention, they provided another washing machine;
- she kept track on a calendar on the kitchen wall every day that Sam worked or had time off;
- she made the marks on the calendar each day;

Bernard testified and stated that:

- when he took the job he was only intending to stay for the winter;
- he was never told he was only being hired to drive the silage truck, he did a number of different jobs at the ranch;
- there were a lot of late nights, after the feeding was finished at the home ranch, they would go up to Mountain and Pigeon ranches to feed there;
- the firewood that they cut was a part of the job as the firewood was for all the wood burning residences at the ranch;
- when he became aware that those employees who had not worked on Christmas were paid for Christmas he began to check into what the rules were supposed to be;
- he had agreed to work as a contractor at the request of James and all he was told was that he would be responsible for his own income tax;
- when he finally raised the issues with James, that was the last day he worked.

The delegate of the Director states in the Penalty Determination that the records submitted by James in response to the Demand for Employer Records were reviewed and it was determined that they failed to meet the requirements of Section 28 (1) of the Act. It was further noted that no hourly records nor other payroll information was provided. The delegate of the Directory further states that *“Failure to deliver a record, at the very least, delays investigation. It may deny an employee a minimum employment standard. The records demanded were relevant to an investigation, the employer was aware of the demand for productions of records, and insufficient records were delivered. No reasonable explanation for the failure to comply was given. If one had been given, the Director would have exercised her discretion and not issued a penalty. If there are no disincentives against employers who fail to keep and provide records, then such conduct may be repeated. In order to create a disincentive against employers who frustrate investigation through failure to keep and provide records, the Director issues a penalty for such conduct.”*

The delegate of the Director finally states in the submission dated March 11, 1999 that *“James was well aware of the requirements to supply evidence and in fact, he supplied the incomplete records in advance of the required date. He (James) still has not shown a commitment to comply with the record keeping requirements of the Act, but rather, he only argues that it's not practical for his industry.”*

ANALYSIS

DETERMINATION for WAGES OWING

The burden of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, James.

The requirement for an employer to keep certain records in respect of each employee is found in Section 28 of the *Act* which provides:

Section 28, Payroll records

(1) For each employee, an employer must keep records of the following information:

- (a) the employee's name, date of birth, occupation, telephone number and residential address;*
- (b) the date employment began;*
- (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;*
- (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;*
- (e) the benefits paid to the employee by the employer;*
- (f) the employee's gross and net wages for each pay period;*
- (g) each deduction made from the employee's wages and the reason for it;*
- (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;*
- (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;*
- (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.*

(2) Payroll records must

- (a) be in English,*
- (b) be kept at the employer's principal place of business in British Columbia, and*
- (c) be retained by the employer for 7 years after the employment terminates.*

The records kept by James do not meet the minimum requirements as set forth in Section 28 as outlined above. The records submitted by James to the delegate of the Director contain some inconsistencies when compared with the records submitted to the panel. In the absence of proper records being kept or supplied by James it is appropriate to consider the records kept by Sam and Bernard when determining if wages are owed.

Char testified that she kept daily records of when Sam worked throughout his period of employment. Bernard kept daily records for a portion of his period of employment. Where the records kept by Char and Bernard differ from the records provided by James, I accept the records of Char and Bernard.

James has not provided any substantive proof that accommodations and utilities were to be considered as a part of the wage package. In fact, James did not indicate any taxable benefit for Sam on his T-4 slip, nor did James communicate to either Sam or Bernard what the value of this benefit was to be. James further stated that the values they placed on this benefit were merely estimates.

James has not provided any evidence that statutory holiday pay, minimum wages or vacation pay were paid as required to Sam and Bernard.

Sam did acknowledge that James must have paid the telephone bill as he has never received any further notice from the telephone company that the amount is still outstanding. To permit Sam to receive reimbursement for the amount of the telephone bill which he acknowledges must have been paid by James would, in my view, be contrary to the purposes of the *Act* as set forth in Section 2 (b) *to promote the fair treatment of employees and employers*. I therefore conclude that the amount of the telephone bill **\$282.65** is to be deducted from the amount of wages determined to be owing to Sam.

Bernard did not dispute James' evidence that the final pay included all wages up to the date given by Bernard as his last day of work. James is therefore not liable for the payment of compensation for length of service for the balance of the notice period as calculated by the delegate of the Director. The amount of **\$118.62** is to be deducted from the wages owing to Bernard.

James argues that the length of time taken by the delegate of the Director to do the investigation and issue the Determinations has unfairly resulted in excess interest being assessed on the wages owing. I am of the view that this argument is without merit as, the failure of James to keep the required records contributed to the length of time to properly investigate the allegations made by Sam and Bernard.

With respect to issue number 1, for all of the above reasons and on the balance of probabilities, I conclude that wages are owed to Sam for statutory holiday pay, minimum wage, and annual vacation pay in the amount calculated by the delegate of the Director **less** the amount of the telephone bill paid by James on Sam's behalf. The amount of wages owing to Sam is therefore **\$1,037.60**.

With respect to issue number 2, for all of the above reasons and on the balance of probabilities, I conclude that Bernard was an employee as defined in the *Act* and that wages are owed to Bernard for minimum wage, overtime, statutory holiday pay, annual vacation pay in the amount calculated by the delegate of the Director **less** the amount of

\$118.62 which had been calculated as compensation for length of service. The amount of wages owing to Bernard is therefore **\$1,581.82**.

PENALTY DETERMINATION

With respect to the criteria to be used when considering if the imposition of a Penalty Determination was appropriate, I concur with the reasoning set forth in *Narang Farms Ltd. BC EST # D482/98* where the adjudicator states:

In my view, penalty determinations involve a three-step process. First, the Director must be satisfied that a person has contravened the Act or the Regulation. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the Regulation.

The requirement which permits the Director to request records is found in Section 85 (1) (c) and (f) of the *Act* which provides:

Section 85, Entry and inspection powers

(1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:

(c) inspect any records that may be relevant to an investigation under this Part;

(f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).

The provision which requires a person to produce records requested by the Directory pursuant to Section 85 is found in Section 46 of the Employment Standards Regulation (the "*Regulation*") which provides:

Section 46, Production of records

A person who is required under section 85 (1) (f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required.

The requirement which authorizes the Director to impose a penalty is found in Section 98 of the *Act* which provides:

Section 98, Monetary penalties

(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 prescribed schedule of penalties.

(2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

(3) A person on whom a penalty is imposed under this section must pay the penalty whether or not the person

*(a) has been convicted of an offence under this Act or the regulations, or
(b) is also liable to pay a fine for an offence under section 125.*

(4) A penalty imposed under this Part is a debt due to the government and may be collected by the director in the same manner as wages.

The provision which sets forth the penalty for contravening a record requirement is Section 28 of the *Regulation* which provides:

Section 28, Penalty for contravening a record requirement

The penalty for contravening any of the following provisions is \$500 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.*

James did not offer a reasonable explanation as to why, when they had used their records to compile the summaries provided to the delegate of the Director, they did not simply provide those records in response to the Demand for Employer Records.

James was made aware by the statement on the Demand for Employer Records that failure to provide records could result in a penalty being imposed.

James acknowledged that they did not keep records as required by the *Act*, however, they argued that the realities of the ranching industry impairs their ability to record daily hours of work.

After careful review of the material submitted and the evidence provided, I conclude that:

1. The Director was satisfied that James had contravened the *Act* and the *Regulation*;
2. The Director provided reasons for the decision to exercise her discretion and impose a penalty;
3. The penalty imposed was in accordance with the requirements set forth in Section 28 of the *Regulation*.

For all of the above reasons, I conclude that the imposition of a penalty in this matter was an appropriate exercise of the Director's discretion.

The appeal by James with respect to the amount of wages owing is allowed in part as set forth above, and the appeal with respect to the penalty imposed is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated February 12, 1999 with respect to wages owing be varied to be in the amount of **\$2,619.42** (**\$1,037.60** for Sam and **\$1,581.82** for Bernard) together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

I further order that the Penalty Determination dated February 12, 1999 be confirmed in all respects.

Hans Suhr
Adjudicator
Employment Standards Tribunal