Employment Standards TRIBUNAL

An appeal

- by -

466131 B.C. Ltd. operating as Caffe Barney
("Appellant")

- 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

ADJUDICATOR: Ib S. Petersen

FILE No.: 2002/193

DATE OF DECISION: June 25, 2002

DECISION

SUBMISSIONS

Mr. Bao Pham — on behalf of the Appellant

Ms. Elaine Bellamore — on behalf of the Director

OVERVIEW

This is an appeal by 466131 B.C. Ltd., pursuant to Section 112 of the *Employment Standards Act* (the "Act"), of a Determination of the Director of Employment Standards issued on March 15, 2002, which imposed a $500.00 penalty. The Determination concluded that the Employer had contravened Section 28 of the Act by failing to "keep" certain information required.

FACTS AND ANALYSIS

The Appellant takes issue with the Determination and wants it cancelled. As the Appellant, it has the burden to persuade me that the Determination is wrong.

The material facts are relatively straight-forward and largely not in dispute. Over a four month period, the investigating delegate, who was investigating a complaint brought by an employee of the Appellant, sought to obtain records to aid in the investigation. Records were produced. However, certain information was missing. The correspondence from the investigating delegate to the Appellant (or its accountant) indicated that a penalty could be imposed for failure to keep or produce records.

In *Narang Farms and Processors Ltd.*, BC EST # D482/98, I summarized the penalty process as follows:

> "... the 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."

To an extent the Appellant is focussing on the wrong issue, the failure to provide information. There is, in this case, no real dispute that the Appellant did not keep the required information. The records were "merely missing the proper indication of months and years," as the Appellant puts it. In short, the information kept was incomplete and the Appellant contravened the *Act* (see Section 28). While I appreciate the Appellant's position that it is "small business" and "cannot afford to hire extra help just to perform detailed administrative work as in a large company," the *Act* does not distinguish between small and large employers. As noted by the delegate who performed the investigation, in his letters, the *Act* does not make such a distinction. The *Act* provides for minimum standards that applies to all employers. In my view, as well, it cannot seriously be argued that it would be an undue burden on an employer to identify the "months and years" worked. The record keeping requirements in Section 28 are clear. As well, Section 28 of the *Regulation* provides that the penalty is $500.00 in the circumstances at hand. The

penalty in this case was the amount provided by legislation. It cannot, therefore, be argued that the delegate erred in this aspect of the Determination.

The Director's authority under Section 79(3) of the *Act* is discretionary. Section 81(1)(a) of the *Act* requires the Director to give reasons for the Determination to any person named in it. The Determination details the Delegate efforts to obtain the proper records from the Appellant and the impact on the investigation of the Employer's failure to keep the proper records. The documents that were provided, were provided late. In addition, as noted in the Determination, the penalty is a disincentive for further contraventions of the *Act* and *Regulation*. In brief, but for the following, there is sufficient explanation for the exercise of the Director's discretion. The Determination states:

> "The employer was allowed one final opportunity to resolve this matter. In a faxed letter ... [the investigating delegate] suggested to the accountant that within 8 days of that letter he needed to have written assurances of future record keeping improvement from the employer in conjunction with the Act and suggested payment of $200.00 for [the complainant employee]. If this suggested file resolution was not viewed as a consideration then a records penalty would be a recommendation here...."

The only argument in this appeal that, in my view, merits attention is the allegation that the penalty was imposed an improper purpose.

The appellant says that it disagreed with the "award" of $200 to the employee. In the last letter to the Appellant's accountant, dated February 28, 2002, before the Penalty Determination was issued, the investigating delegate charged with the investigation of the complaint (not the Delegate who signed and issued the Penalty Determination) wrote, clearly frustrated with the lack of cooperation on the part of the Appellant, that he was *recommending* a $500 penalty based on the incomplete records. He went on to propose that this could be avoided if the Appellant would provide written assurances that it would comply with the recording requirements in the future and a settlement of the employees claim. The delegate continued:

> "If the aforementioned is not a possible scenario amounts payable using existing records for [the employee] as well as her own records will help determine what is payable in addition to the penalty. It is fairly clear based upon my review of information and records received to date that the employer has failed to properly pay overtime and may also owe for unpaid or improperly paid statutory holidays. Within 8 days from the date of this letter please advise the employer intentions here."

There was no "award" of $200 to the employee as suggested by the Appellant. The delegate performing the investigation suggested a settlement that, in effect, would bring closure to the matter.

In *Takarabe et al.* (BC EST # D160/98) the Tribunal observed:

> In *Jody L. Goudreau et al* (BC EST # D066/98), the Tribunal recognized that the Director is "an administrative body charged with enforcing minimum standards of employment..." and "...is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate." The Tribunal also set out, at page 4, its views about the circumstances under which it would interfere with the Director's exercise of her discretion in administering the Act:
>
> > The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in

> construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
>
> > a general description of the things that must not be done.
> >
> > For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Associated Provincial Picture Houses v. Wednesbury Corp. [1948] 1 K.B. 223 at 229.
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> In Boulis v. Minister of Manpower and Immigration [(1972), 26 D.L.R. (3d) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for bona fide reasons, must not be arbitrary and must not base her decision on irrelevant considerations."

There can be no doubt that the first part of the proposed settlement meets the standards for exercise of statutory discretion discussed above in *Takarabe*. The Appellant would simply undertake to comply with the statutory requirements. Such an undertaking, particularly in the circumstances where there are good reasons to suspect that records are not kept properly, makes sense and is tied in with the Director's mandate to enforce the *Act*.

I have some difficulty with the second part of the proposed settlement, namely the payment to the complainant employee. In my view the penalty provisions cannot properly be used simply to compel, or attempt to compel, an employer to pay an employee money that is not owed under the *Act*. The delegate, who did the investigation, was of the preliminary view that money was owing on account of overtime and statutory holidays. This was not without some justification. The Appellant's correspondence to the investigating delegate, in effect, acknowledged practices likely to contravene to the *Act*:

> "Ms. Rae has been employed on a fixed shift schedule from 9:00 to 4:30. However, we have been flexible in allowing our employees to trade shifts between themselves for their convenience, as long as sufficient staff was on hand. This has been our practice with the understanding that employee who work over 80 hours bi-weekly due to traded shift hours were not paid the overtime rate unless specifically requested by management to do so (sic.)."

At one level, what the investigating delegate did could be regarded simply as a practical attempt to secure a settlement of the matter before him. The delegate sought to make the settlement attractive to the Appellant. Importantly, however, the power to issue a penalty is discretionary. That power cannot be exercised unreasonably. One of the safeguards are set out in Section 117(2) which provides:

> 117.(2) the director may not delegate to the same person both the function of conducting investigations into a matter under section 76 and the power to impose penalties in relation to that matter.

In short, I am of the view that the investigating delegate crossed the line when he proposed the settlement in favour of the employee. The purposes of the *Act*, includes not only insuring that employees receive

basic standards of compensation but also providing fair and efficient procedures for resolving disputes over the application and interpretation of the Act (Section 2).

The Delegate, who imposed the penalty, was a different delegate. It appears from the Determination that she accepted the recommendation of the investigating delegate. It follows, in my view, that the imposition of the penalty, in part, at least, was unreasonable and based on improper considerations, the Appellant's refusal to pay $200 to the complainant employee. On that basis, I am prepared to set aside the Determination.

Briefly put, I am persuaded that the Delegate erred.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated March 15, 2002 be cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal