

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 -

Gain Suns Enterprises Ltd.
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Mark Thompson

FILE NO.: 1999/147

DATE OF HEARING: June 24, 1999

DATE OF DECISION: August 26, 1999

DECISION

APPEARANCES

Edmund Lam	On behalf of Gain Suns Enterprises Ltd.
Diane H. Maclean	On behalf of the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Gain Suns Enterprises Ltd. (the "Employer") against a Determination issued on February 15, 1999 by a delegate of the Director of Employment Standards (the "Director"). In the Determination, the delegate found that the Employer had violated Section 46 of the Employment Standard Regulation by failing to produce proper payroll records. The Determination imposed a penalty of \$500 on the Employer.

The Employer argued that prior to the events leading to the Determination, it had not been the subject of any complaints from employees or former employees and that the penalty should be waived or reduced.

ISSUE TO BE DECIDED

The issue to be decided in this case was: whether the penalty imposed on the Employer was appropriate under the circumstances.

FACTS

The Employer was the subject of two complaints by former employees prior to the Determination under appeal. Douglas W. Wong ("Wong") filed the first complaint. He alleged that he should receive overtime and statutory holiday pay. The Director's delegate issued a Demand for Records on March 12, 1998. The Demand included payroll records for Wong. The records were to be produced by April 1, 1998. When she did not receive the records by April 1, the delegate contacted the Employer and was told that the Employer had no knowledge of the Demand for Records. The delegate then provided the Demand for Records by facsimile on April 14, 1998. The Demand stated that a failure to comply with the requirements of the *Act* could result in a \$500.00 penalty.

Jia Cheng Li ("Li") filed another complaint against the employer on August 6, 1998 claiming overtime pay for hours worked beyond 40 per week. The delegate issued a Demand for Records in respect of Li's complaint on November 16, 1998. On December 2, 1998, the Employer stated that it had not kept hours of work records for Li.

The delegate then issued two determinations against the Employer, both dated February 16, 1999. In respect of Wong's complaint, the delegate found that the Employer had violated sections 40 and 46 of the *Act* and ordered the Employer to pay Wong overtime wages and statutory holiday pay. In a second determination issued on the same date, the delegate found that had violated Sections 35, 40 and 58 of the *Act* and ordered it to pay Li holiday and overtime wages. The determination also imposed a zero dollar penalty with respect to the violations of the three provisions of the *Act*.

The Employer appealed each of the determinations to the Tribunal. In *Re Gain Suns Enterprises Ltd.* BC EST #D281/99, the Tribunal confirmed the determination issued for Li's complaint. In *Re Gain Suns Enterprises Ltd.* BC EST #D282/99, the Tribunal confirmed the determination issued for Wong's complaint.

ANALYSIS

The Employer pointed to its prior record with respect to the *Act* to support its argument that the penalty be reduced to eliminated. It had operated for 8 years before Wong's complaint without any complaint from an employee or former employee. It admitted that it had not kept adequate payroll records before receiving the complaints, but this was its first offense.

On behalf of the Director, the delegate pointed out that two Demands for Records had been issued, and the Employer was unable to produce proper records in either case. By April 14, 1998, the Employer was fully informed of the requirements of the *Act* regarding payroll records. Yet when the second Demand for Records was issued in November 1998, the Employer was still not complying with the *Act*.

The principles for reviewing penalty determinations are set out in *Re Narang Farms and Processors Ltd.* BC EST #D482/99. In that decision, the adjudicator set out a three-step process before issuing a penalty determination:

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*.

(See also, *Re James Cattle Co. Ltd.*, BC ESE #D230/99).

In this case, the Employer acknowledged that it had contravened the *Act*, so the first step is completed.

The second step addresses the exercise of the Director's discretion. Section 79(3) of the *Act* is discretionary. It states:

If satisfied that a person has contravened a requirement of this Act or the regulations, the director *may* do one of the following:

- (a) require the person to comply with the requirement;
- (b) require the person to remedy or cease doing an act;
- (c) impose a penalty on the person under section 98. (emphasis added).

Re Narang Farms and Processors Ltd., *supra* summarizes the Tribunal's position on the appropriate standard for the Director's exercise of her discretion. The central statement in that review is a quotation from *Re Takarabe et al.*, BC EST #D160/98 at p. 15:

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.

Further, *Re Narang Farms and Processors Ltd.* states that Section 81(1)(a) of the *Act* requires that the Director or her delegate must explain why she has chosen to exercise that discretion in a particular case.

The Determination under appeal was based on undisputed facts, i.e., that the Employer did not keep payroll records as required by Section 28 of the *Act*. Moreover, the Determination set out the facts of the Demand for Records arising from Wong's complaint, as well as the rationale for imposing a penalty in circumstances such as Wong's complaint. In her reply to the Employer's appeal, the delegate tied the two Demands for Records to the penalty.

The third step is the imposition of the penalty. The *Act* grants the Director the discretion to apply penalties of varying amounts against parties who have violated the *Act*. However, Section 29 of the Employment Standard Regulation requires a penalty of \$500 to be imposed for each contravention of Section 28 of the *Act*, among other provisions. This provision means that neither the Director nor the Tribunal can reduce the amount of the penalty imposed for failure to maintain payroll records, the Employer's violation in this case.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, I order the Determination dated February 15, 1999 be confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal