

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 -

Apogee Holdings Ltd.
("Apogee" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/252

DATE OF DECISION: July 10, 1998

“The Act allows the Director of Employment Standards, (the “Director”), to penalize a party for contravention of the Act. The Director will assess a penalty against a person who has contravened

the Act with a view to emphasize the importance of compliance with minimum employment standards, and will apply escalating penalties to provide a financial incentive to do so, if necessary.

The purpose of penalties is to put an employer on notice of the importance of compliance with the Act. The Director does not impose a penalty for every contravention of the Act. The Director exercises discretion by distinguishing between those employers who contravened the Act because of ignorance, and those who contravened the Act with knowledge of its minimum requirements. The Director also distinguishes between provisions of the Act. Further contraventions of parts of the Act respecting objective standards will result in escalating penalties being assessed. Objective standards include such entitlements such as payment of wages, provision of uniforms, hours of work and overtime, statutory holidays, annual vacation pay. The Director recognizes that many contraventions of Parts 6 (Leaves and Jury Duty) and Part 8 (Termination of Employment) occur unintentionally as a result of misinterpretation or misapplication of the Act around subjective issues such as termination of employment for just cause. Contraventions of these sections will be assessed on the following criteria:

- the facts are similar to those of a previous contravention.
- there is a pattern of non-compliance.
- the matter is not subjective in nature, for example, an employer refused to allow an employee an appropriate leave under Part 6.
- the termination is related to subjective issues surrounding just cause.

The exercise of discretion is not arbitrary, rather it is predicated on an assessment of the corrective nature of a penalty on the behaviour and conduct of an employer.

In this instance, the Director is of the view that a penalty will create a disincentive against repeat of a contravention of Section 44 of the Act and that such disincentive is needed to promote compliance with the Act.

Pursuant to Section 98 of the *Employment Standards Act* and Section 29 of the *Employment Standards Act Regulation* (sic), I have assessed a zero dollar (\$0.00) penalty. There is no requirement to pay any monies, however, should there be further contraventions of any sections within Part 3 of the Act, escalating monetary penalties will be imposed.”

The Employer appeals the Determinations.

ISSUES TO BE DECIDED

The issue to be decided in this appeal is whether the Determinations should be varied, confirmed or cancelled. More specifically, this boils down to whether Ms. Sawatzky was an employee of the Employer and whether it was appropriate, in the circumstances, to issue the penalty Determination.

ARGUMENT

The Employer argues that the Determinations are wrong. Ms. Sawatzky was a professional hygienist and an independent contractor. The Employer argues that hygienists have their own professional organization and can work independently of dentists. In many instances they own their own tools and their own offices. The Employer states that it did not control Ms. Sawatzky’s days of work or her hours which could be changed for the convenience of patients. The Employer agrees that it did take statutory deductions off Ms. Sawatzky’s pay cheque and, as well, that it paid for her attendance at a course. The Employee argues that she was hired to work as a part-time employee.

ANALYSIS

(1) Determination #1

The Employer’s appeal does not address the issues of employee status (see Section 1) in any significant manner and goes no further than stating its opinion that Ms. Sawatzky was an independent contractor. Section 112 provides that a person may appeal a determination by delivering a written request, which includes the “reasons for the appeal”, to the Tribunal. The appeal form utilized by the Tribunal clearly states that the appellant must give reasons why the Determination is wrong; why he or she is making the appeal; must state which facts are in dispute; and clearly state what remedy the appellant is seeking from the Tribunal. The appeal form also requires an appellant to attach “all documents which support” the appeal and warns that the Tribunal “may decide this appeal based solely on the documents submitted to it”. The only specific disagreements with factual underpinnings of the Determination is that, in the Employer’s view, it

did not control Ms. Sawatzky's days of work or hours. Even if that is true, the test applied by the Tribunal and the courts to determine whether person is an employee or an independent contractor, consider a number of factors, including control, ownership of tools, chance of profit and risk of loss. In other words, it is not sufficient-- *per se*--that Ms. Sawatzky had control over her days of work and hours.

In the result, I am not persuaded that the Determination is wrong with respect to the conclusion that Ms. Sawatzky was an employee and, as such, entitled to pay for statutory holidays.

(2) Determination #2

The Director's authority to impose a penalty under Section 79(3) of the *Act* is discretionary. Section 98 of the *Act* provides the Director's delegate with the discretion to impose a penalty in accordance with the prescribed schedule. The Tribunal has consistently stated, in *Randy Chamberlin*, BCEST #D374/97, and numerous other cases, that Section 81(1)(a) of the *Act* requires the Director to give reasons for the Determination to any person named in it. Given that the power to impose a penalty is discretionary and is not to be exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. It is not adequate to simply state that the person has contravened a specific provision of the *Act* or *Regulation*.

In this case, the penalty part of the Determination consists for the most part of a generic statement which explains the Director's discretion to impose a penalty and the matters considered by the Director in that respect. The only specific with respect to this case is the following:

“In this instance, the Director is of the view that a penalty will create a disincentive against repeat of a contravention of Section 44 of the *Act* and that such disincentive is needed to promote compliance with the *Act*.”

It is clear from Determination #1, which deals with the merits of this matter, that the delegate is of the view that Apogee contravened Section 44 of the *Act*. It follows from the analysis above that I agree. There is, however, little in the above which indicates, except in the most general sense, why the delegate elected to impose a penalty in this case. If the reasoning is that a penalty will create a disincentive against repeat of a contravention, then that may apply in all cases. Nothing in the Determination explain why the Director's delegate elected to exercise her power to issue penalties in the circumstances of this particular case. In my view, the delegate is required to provide reasons that relate to the particular circumstances, and a generic statement explaining the Director's discretion is not sufficient. In the result, the penalty Determination should be set aside.

ORDER

Pursuant to Section 115 of the *Act*, I order that:

1. the Determination in this matter (Determination #1), dated April 3, 1998 be confirmed and the amount of the Determination paid out to the Employee together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

2. the penalty Determination in this matter (Determination #2), dated April 3, 1998 (Determination #2) be cancelled.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal