

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of two appeals pursuant to Section 112 of the

*Employment Standards Act*, R.S.B.C. 1996, c. 113

-by-

Lumas Enterprises Ltd.

(“Lumas” or the “employer”)

- of two Determinations issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE Nos.:** 1999/153 & 1999/154

**DATE OF HEARING:** August 9th, 1999

**DATE OF DECISION:** August 18th, 1999



penalty to be levied on a second contravention would be “\$150 multiplied by the number of employees affected by the contravention” [section 29(2)(b)].

## FACTS AND ANALYSIS

### *The Statutory Holiday Penalty*

The employer is a farm labour contractor. On December 8th, 1998, the Director, through her delegate, served a Demand for Production of Employment Records on the employer; in response, the employer produced certain payroll records on February 1st, 1999. These records do not indicate that Lumas employees were paid statutory holiday pay as directed by Part 5 of the *Act*--the employer's position was that statutory holiday pay was simply subsumed in the employees' general hourly wage rate.

The Director had previously, on August 24th, 1998, issued a \$0 penalty determination *for the very same contravention*, namely the failure to pay statutory holiday pay and this latter determination, I might add, specifically indicated how the employer could avoid future contraventions if it intended to include statutory holiday pay in the employees' hourly wage rate. Further, by way of this previous determination, the employer was also put on notice that a second contravention would result in a \$150 per employee penalty. The employer did not appeal the previous determination and thus the fact of a previous contravention is now a matter of *res judicata*.

I might add that the employer has been most generously treated by the Director. In fact, the payroll records show that some 59 employees were affected by the contravention--*i.e.*, a potential penalty of  $59 \times \$150 = \$8,850$ --but the Director, in the exercise of her discretion, chose to levy a penalty only with respect to one employee.

The employer did not produce any payroll records at the hearing, nor was any evidence tendered to show that Lumas employees were, in fact, paid statutory holiday pay in accordance with Part 5 of the *Act*. Indeed, the employer did not advance any defence at all and I have to wonder what was the point of its appeal other than, perhaps, a misconceived attempt to delay enforcement proceedings.

### *The Payment of Wages Penalty*

The Director's review of the same payroll records produced in response to the December 8th, 1998 Demand disclosed that the employer was not paying its employees semimonthly as mandated by section 17(1) of the *Act*.

The employer, in its submission dated March 15th, 1999 to the Tribunal (appended to its notice of appeal), *admits* its contravention of section 17(1):

“We deal mainly with farmers and at times they do not pay us on time for the labour supplied to them. This delay by the farmers causes us to delay our payments as well which includes payments to employees. This delay could be between two to three weeks. However, all our employees do understand this and do not mind if there is a little delay in payment of their wages.”

The above-quoted statement amounts to an admission of the contravention coupled with the suggestion that Lumas' employees nonetheless consented to the late payment of their wages. I am skeptical about the employer's assertions that its employees "do not mind" not being paid on time--assertions that are wholly unsubstantiated, I might add--but even if the employees consented to the late payment of their wages, such consent is null and void by reason of section 4 of the *Act* which prohibits any attempt by nonunion employers to "contract out" of the *Act*.

In a determination issued on August 5th, 1997 the employer was found to have contravened, *inter alia*, section 17(1) of the *Act*. Further, this previous determination put the employer on notice that a second contravention would result in a \$150 per employee penalty. The employer did not appeal the previous section 17(1) determination and thus the fact of a previous contravention is now a matter of *res judicata*. As the present contravention affects 11 employees--all identified by name in the determination now under appeal--a \$1,650 penalty was quite properly levied.

### **ORDER**

I consider the two appeals now before me to be entirely devoid of merit and, indeed, to be frivolous. The employer has not advanced any legitimate reason as to why either penalty determination ought to be varied or cancelled.

Therefore, and pursuant to section 115 of the *Act*, I order that the two Determinations now on appeal before me be confirmed as issued in the amounts of, respectively, \$150 and \$1,650.

**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**