

An appeal

- by -

The Blue Note Restaurant Inc. operating as Chivana Restaurant
("Blue")

- 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: April D. Katz

FILE No.: 2001/283

DATE OF DECISION: July 11, 2001

DECISION

SUBMISSIONS:

Tobias L. Der on behalf of The Blue Note Restaurant Inc.

Murray Superle on behalf of the Director

OVERVIEW

The Director assessed a penalty of \$500 against The Blue Note Restaurant Inc. (“Blue”) an employer under the *Employment Standards Act* (“Act”). The penalty was assessed after the Director’s Delegate issued a Demand for Records and was not satisfied with the material provided.

ISSUE

The sole issue in this appeal is whether Blue has shown the assessment of the penalty should be varied or cancelled.

ARGUMENT

Blue argues that there should be no penalty because the information required was being kept as a result of a new computer program purchased for that specific purpose. The information would have been provided if the software on his computer had responded as it should. The material was provided with the appeal as soon as the corrections to the computer were made.

THE FACTS

The Director’s Delegate asked Blue for payroll records for an employee by a letter dated January 15, 2001. Blue did not respond. On February 16, 2001 the Delegate mailed a Demand for Records which was received on February 19, 2001. Blue responded with a letter dated February 15, 2001, which the Delegate received on March 2, 2001 with some records. The letter stated that the employee’s hours were not disputed.

Blue had purchased a special software program to provide all the information the Director required but when the information was requested the computer did not produce the report. Blue contacted the technical support people but the correction was not made until the end of March.

On March 5, 2001 the Delegate noticed some information was missing and extended the time for Blue to produce more records until March 8, 2001. On March 5, 2001 the Delegate received the payroll records but not daily time sheets.

The Delegate's Determination issued on March 15, 2001 found Blue in violation of section 28 of the *Act* and assessed a penalty of \$500 pursuant to section 28 of the Employment Standards Regulations BC Reg. 396/95 and 359/99.

ANALYSIS

The onus of proving the Director has erred is on the appellant in an appeal to the Tribunal. Blue is appealing the Director's decision to assess a penalty. The Director's authority to issue a penalty is set out in section 98 of the *Act*, which provides as follows.

Monetary penalties

- 98 (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.

Section 28 of the Regulations provides that a penalty of \$500 may be assessed for every breach of section 28 of the *Act* or section 46 of the Employment Standards Regulation that requires production of records as and when required.

In *Narang Farms and Processors Ltd.* BC EST #D482/99 the Tribunal set out a three step process for assessing a penalty.

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).

Blue's evidence is that it was keeping the records required in section 28 but that due to a technical problem it could not produce the records in a proper form on March 5, 2001. The technical problem was not corrected before the Determination was issued. Therefore Blue was in breach of section 46 of the Regulation because the documents were not produced as a when required. The records were sent with the appeal and the Director's delegate did not comment on their adequacy so I accept them as sufficient if they had been produced on March 8, 2001.

The evidence in the appeal is that Blue was keeping the appropriate records but could not produce them in a timely fashion. That error has been corrected. At the time the records were not available Blue indicated a willingness to acknowledge the hours worked so that the investigation could proceed.

The second step is the exercise of discretion. In dealing with the second step in Narang Farms the Tribunal stated that the Director must exercise her discretion reasonably.

The Director's authority . . . is discretionary: the Director "may" impose a penalty. The use of the word "may"--as opposed to "shall"-- indicates discretion and a legislative intent that not all infractions or contraventions be subject to a penalty. It is well established that the Director acts in a variety of capacities or functions in carrying out her statutory mandate: administrative, executive, quasi-judicial or legislative. In the case of a penalty determination, the Director is not adjudicating a dispute between two parties, an employer and an employee, rather the Director is one of the parties. As such, the Director is exercising a power more akin to an administrative rather than an adjudicative function. The Tribunal has had occasion to deal with appropriate standard for the Director's exercise of discretionary power in the context of an administrative function in a number of cases. . . .

It is not adequate to simply state that the person has contravened a specific provision of the Act or Regulation. This means that the Director must set out--however briefly--the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention. In this case, the Determination makes reference to a second contravention of the same Section. In my view, this is sufficient.

The Director may have exercised her discretion reasonably based on the information available to her on March 16, 2001 but exercised her discretion differently with the information attached to the appeal.

If the Director had the benefit of knowing that Blue had taken steps to keep complete records as a result of a previous investigation, would she have reasonably imposed a penalty? Would she

have allowed a further 14 days for the records to be produced when the software problem was corrected before imposing the penalty. I do not know and I would refer the matter back to the Director to consider all the facts and decide if she wishes to impose a penalty.

In the Determination the Director's Delegate has not provided any evidence of previous determinations and directions to Blue. The basis of the penalty is that the Delegate had previous dealings with the employer but no evidence of the outcomes or timing is provided. The Director will have that information to assist her in determining if a penalty is appropriate.

CONCLUSION

Based on the evidence presented I conclude that the appellant has shown that Blue intended to be in compliance with section 28 of the *Act* and section 46 of the Regulations, was willing to take responsibility for paying the employee who complained.

This evidence was not available to the Director when she exercised her discretion. I refer the matter back for the Director to consider all the facts and determine if a penalty is reasonable in all of the circumstances.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated March 15, 2001 be referred back to the Director.

April D. Katz
Adjudicator
Employment Standards Tribunal