

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-

Sound Contracting Ltd.

(“Sound Contracting”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/523

DATE OF DECISION: October 5, 1998

DECISION

OVERVIEW

This is an appeal brought by Sound Contracting Ltd. (“Sound Contracting” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on July 15th, 1998 under file number 080689 (the “Determination”).

By way of the Determination, the Director levied a \$NIL penalty against Sound Contracting under section 29 of the *Employment Standards Regulation*. The Determination was issued based on the employer’s failure to comply with sections 36(1)(b) and 40 of the *Act* (payment of overtime wages). These particular contraventions were more particularly described in a determination issued as against Sound Contracting on June 24th, 1998 under file number 080689. This latter determination--relating to various Sound Contracting employees’ overtime claims--was appended to the “penalty determination” that is now before me.

ISSUES TO BE DECIDED

The employer’s appeal was filed with the Tribunal on August 7th, 1998. Attached to the employer’s appeal form is a letter dated August 7th, 1998 addressed to the Tribunal which sets out the reasons for the appeal which may be summarized as follows:

- the Director did not have the authority to issue a penalty in relation to matters that were then under appeal to this Tribunal; and
- in any event, the employer fully complied with the overtime provisions of the *Act*.

ANALYSIS

With respect to the first ground of appeal, section 98 of the *Act* provides that the Director may impose a penalty, in accordance with a prescribed schedule, if “a person has contravened a requirement of [the] *Act* or the regulations”. There is nothing in section 98, or anywhere else in the *Act* that, in effect, suspends the Director’s authority to issue a penalty until such time as any appeal with respect to the underlying contravention has been adjudicated by the Tribunal. Of course, if the Tribunal ultimately held that a person did not contravene the *Act*, it would follow that a penalty issued solely on the strength of that contravention would be cancelled.

I might add that the Director issued the “penalty” determination now before me only *after* the Tribunal had, in fact, dismissed the employer’s appeal of the “overtime” determination--the

employer's request for reconsideration of that dismissal was similarly dismissed, albeit after the penalty determination was issued.

With respect to the second ground of appeal, it should be noted that the employer's position grossly misrepresents the effect of section 40 of the Act--an employer does not, as is asserted by Sound Contracting, have the "option" of paying either daily or weekly overtime. Although not specifically referenced in its appeal documents, the employer's argument on this point appears to stem from a misreading of section 28 of the former Act.

Under section 40 of the current *Act*, an employee is entitled to daily overtime after he or she has worked more than 8 hours in a day [section 40(1)] and is entitled to weekly overtime after having worked 40 hours in a week [section 40(2)]. These two obligations are independent; in other words, an employee's entitlement to daily overtime does not depend on his or her having worked more than 40 hours in a week; similarly, an employee could be entitled to weekly overtime even though he or she never worked more than 8 hours on any day of that week.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination be confirmed as issued.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal