

An appeal

- by -

Ahead College Inc., formerly known as Ahead Institute of Technology Ltd.
("Ahead" or "Employer")

- 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: Paul E. Love

FILE No.: 2002/340

DATE OF DECISION: September 25, 2002

DECISION

OVERVIEW

This is an appeal by an employer, Ahead College Inc. formerly known as Ahead Institute of Technology (“Ahead” or “Employer”), from a Determination dated June 20, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”). The Delegate issued a Determination imposing a penalty in the amount of \$2500, for breaches of *Act* by the Employer, in particular, section 17(1) - failing to pay wages at least semi-monthly, section 18(2) - failing to pay wages within 6 days after an employee quits and section 58(3) - failing to pay accrued vacation pay upon termination. The Delegate determined that this was the fifth time Ahead had contravened Part 3 of the *Act*, and the third time Ahead had contravened Part 7 of the *Act*. Each violation involved multiple employees.

The Employer suggested that there was no violation of vacation pay provisions of the *Act*, but this is without foundation, given that the payment was made months after the employee terminated his employment for the employer’s non-payment of wages.

Since the Employer demonstrated no error in the penalty determination, I confirmed the Determination.

ISSUES:

Did the Delegate err in imposing a penalty in the amount of \$2500?

FACTS

I decided this case after considering the submission of the Employer and the Delegate.

The Employer, Ahead College Inc. formerly known as Ahead Institute of Technology (“Ahead” or “Employer”), is an educational institution offering computer courses to the public. This case involves penalties assessed by the Director for violations of the wage payment provisions of the *Act* for three employees, who were instructors with Ahead. Huai Liang Huang and Kevin Wang filed complaints after leaving employment with Ahead. These employees complained that their wages were in arrears for several months, and that they had received NSF cheques on more than one occasion. Eventually both of these employees were paid all the wages to which they were entitled.

With regard to an employee, Robert Liang, who continued to be employed by the Employer as of the date of the Determination, as of June 6, 2002 Employer was 10 weeks in arrears in the payment of wages. On June 6, 2002 the Delegate sent a letter to Ahead requesting that the Employer respond to the allegation or pay the outstanding balance. On June 7, 2002 Mr. Liang received a partial payment of wages for the periods January 1-13, 2002, April 8-21, 2002 and April 22 - May 5, 2002, and a promise by the Employer that the balance of the wages were paid by June 21, 2002. Mr. Liang received the cheques for Pay periods May 6 - 19 and May 20 - June 22 on June 24, 2000.

By June 20, 2002 the Employer had paid all wages owing to the employees. The Delegate, however, issued a Determination dated June 20, 2002 finding that all wages were paid as of the date of the Determination but also finding the Employer committed the following breaches of the *Act*:

- 17(1) - failing to pay wages at least semi-monthly
- 18(2) - failing to pay wages within 6 days after an employee quits
- 58(3) - failing to pay accrued vacation pay upon termination.

On June 20, 2002, the Delegate assessed a penalty of \$1500 for violations of Part 3 of the *Act*, involving three affected employees. On June 20, 2002 the Delegate assessed a penalty of \$1,000 for violations of Part 7 of the *Act* involving two affected employees. The Employer appealed the penalty determination. The basis for the appeal appears to be that Ahead experienced “tight cash flows” due to a loss of money in 2001 due to employee embezzlement. The Employer also claimed that it had problems in producing records due to theft of computers. The Employer further argued that the Employee agreed to receive the payrolls late.

The Delegate assessed the penalty to “emphasize the importance of compliance with the Act and Regulations” and to “provide a financial incentive” to comply with the *Act*. The Delegate also took into account the past record of infractions by Ahead. The past record of infractions by Ahead is not in dispute. The record is as follows:

Date	Infraction	Penalty Imposed
June 12, 2001	17(1), 18(1), 21(1), (2), 27(1), 58(3), 63(1) in Parts 3, 7, 8 of the <i>Act</i>	0
November 13, 2001	17(1) of Part 3 of the <i>Act</i>	0
December 6, 2001	17(1) and 18(1)	no penalty assessment
March 5, 2002	17(1), 18(1), 58(3), 63(1) of the <i>Act</i>	\$800.00

The Delegate determined that this was the fifth time Ahead had contravened Part 3 of the *Act*, and the third time Ahead had contravened Part 7 of the *Act*.

Employer’s Argument:

The Employer submits that the Tribunal should cancel the Determination for “facts that were not considered in the investigation”, and which the Employer sets out a letter to the Tribunal dated July 8, 2002. The Employer submits with respect to Kevin Wang that Mr. Wang quit on June 3, 2002, and that it paid Mr. Wang vacation pay on the same day. The Employer submitted a note signed by Mr. Wang indicating:

I Kevin Wang of Vancouver BC would like to confirm that I would like to quit from my job at Ahead (sic) College

I acknowledge that I have requested to be away from my personal project so today I have decided to quit.

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The Employer submits that the employees agreed to receive the payroll late, in order to keep working at their jobs.

Delegate's Argument

The Delegate submits that the penalties were properly imposed in accordance with the *Act* and *Regulation*. The Delegate submits that Mr. Wang had quit on March 22, 2002, and did not receive his final cheque until April 23, 2002. The Delegate indicated that he was advised by Mr. Wang was coerced by the Employer, to sign a false statement in order to get his vacation pay. The Delegate further submitted that the Employer did not mention during the investigation that other ex-employees including Mr. Wang and Mr. Huang were owed wages.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer to show that there is an error in the Determination, such that the Determination should be canceled or varied.

In my view, the fact that an Employer has complied with the *Act* by the date of the Determination, does not preclude a finding that the Employer was in breach of the *Act*, and the imposition of a penalty. Payment of wages is an essential part of the employment relationship, and non-payment of wages, or delayed payment of wages can impose a significant hardship on an employee. An employee should not have to file an employment standards complaint in order to receive regular wages.

Further the fact that an Employee agrees to accept a late payment of wages does not excuse the Employer from a penalty imposed under the *Regulation*. The *Act* clearly specifies when an Employer must pay an employee in section 17 of the *Act*. The wages must be paid semi-monthly and within eight days after the end of the pay period:

- 17(1) At least semi-monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.
- (2) Subsection (1) does not apply to
 - (a) overtime wages credited to an employee's time bank,
 - (b) statutory holiday pay credited to an employee's time bank, or
 - (c) vacation pay.

Further where an employee ceases employment, the Employer must pay wages owing within 6 days after the resignation date, as set out in section 18(2):

- 18(2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

Further in Part 7 of the *Act*, section 58(3) clearly specifies a time period for the payment of vacation pay:

- 58(3) Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.

In my view, it is apparent that the evidence shows that Mr. Wang had quit his employment prior to the writing of the note on June 3, 2002, and therefore the note written does not support the Employer's contention that it paid vacation pay on the same day that the Employee left the employment. The evidence, in fact shows, that the Employer was in breach of the *Act* by failing to pay the wages within the time period set out in the *Act*.

The Employer alleges the Employees agreed to accept late payment of wages in order to maintain their jobs. This is not supported by any of the material considered by the Delegate. In my view, it is not open to an Employee and an Employer to agree to deferred payment of wages, as the *Act* clearly specifies that all wages are to be paid at last semi-monthly and within 8 days of the end of a pay period. Employees and Employers are not permitted to enter into agreements which violate the minimum standards set out in the *Act*, and any agreement contrary to the *Act* is void:

4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

In my view, financial difficulty of the Employer, does not excuse the Employer from its obligation to pay wages to the Employees in the manner provided in the *Act*. All businesses from time to time may experience cash flow difficulties, and Employers should not expect their Employees to finance their business by "deferred acceptance" of wages. The notion of deferred acceptance of wages is ousted by sections 17, 18 and 58 (3) which provides a time period for the payment of wages by an Employer.

The *Regulation* provides for an escalating penalty, based on the number of affected employees. The salient penalty provision is set out in section 29(1) and (2) of the *Regulation*:

29(1) In this section, "specified provision" means a provision or requirement listed in Appendix 2.

- (2) The penalty for contravening a specified provision of a Part of the Act or of a Part of this regulation is the following amount:
 - (a) \$0, if the person contravening the provisions has not previously contravened any specified provision of that Part;
 - (b) \$150 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on one previous occasion;
 - (c) \$250 multiplied by the number of employees affected by the contravention, if the person contravening that provision has contravened a specified provision of that Part on 2 previous occasions;
 - (d) \$500 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on 3 or more previous occasions.

In order for the *Act* to have some deterrent affect, the Legislature has determined that an Employer who breaches the *Act* is subject to an escalating penalty. The Delegate has clearly set out the violations of the *Act*, and the reasons for assessing a penalty. The Employer has shown no error that the Delegate has made in assessing penalties in this case.

For all the above reasons, I dismiss the Employer's appeal, and confirm the Determination.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated June 20, 2002 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal