

**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 -

Rainbow Angels Home Service Club Inc.

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** April D. Katz

**FILE No.:** 2000/586

**DATE OF DECISION:** October 30, 2000

**DECISION**

**OVERVIEW**

In a Determination dated August 4, 2000, the Director of Employment Standards, the “Director”, found that the Employer, Rainbow Angels Home Service Club Inc. (“Rainbow”), owed Ryan Doria \$265.13 in unpaid minimum wages and overtime for one long day of work.

The Determination also imposes a penalty of \$150 on the basis that this is the second time in less than a year that Rainbow has contravened Parts 3 &4 of the *Employment Standards Act* (“Act”).

Rainbow’s appeal states that the Employee worked 12 hours and the Employer is not prepared to pay for hours not worked. The appeal also states that Rainbow does not believe it has “broke any laws and am not willing to pay the penalty”.

This decision is based on written submissions from the Rainbow and the Director’s Delegate.

**ISSUE TO BE DECIDED**

1. The first issue is whether the Employer has failed to pay wages for regular and overtime.
2. The second issue is if the penalty imposed on Rainbow was appropriate in the circumstances.

**FACTS**

Rainbow operates a home renovation and cleaning business. The Employee, Ryan Doria (“Doria”), went to work for Rainbow on April 21, 2000. Rainbow states that Doria worked for 12 hours and Doria’s evidence is that he worked 21 hours. His evidence is that he worked at 4 different locations doing cleaning and painting. He states that he did not receive a meal break. The breaks from work occurred by driving to the new location.

The Delegate heard the evidence of Doria’s mother that her son, who is 19 year old, went to work for 8 AM. She called Rainbow at 1 A.M. and Mr. Esmaili answered the phone and advised her that her son was with him. She spoke to her son after speaking with his supervisor. Doria confirmed that he was still working. Her evidence was that Doria arrived home at 6 AM on April 22, 2000.

On May 25, 2000 the notice of the complaint was given to Mr. Esmaili, the President and Secretary of Rainbow. Mr. Esmaili advised the Delegate that Doria had worked for 12 hours and there was a cheque for Doria which he could pick up.

The Delegate made a credibility finding in favour of the complainant whose evidence he found to be more straightforward. The evidence from Rainbow changed during the interview. Rainbow did not refute Doria's mother's evidence during the investigation.

## **EVIDENCE AND ANALYSIS**

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the submissions from the appellant must demonstrate some error in the Determination, either in the facts accepted, or the conclusions reached or in the Director's analysis of the applicable law.

The appeal does not provide any new evidence to support the appeal.

The letter of appeal states:

“I do not believe I owe money to Ryan P Doria in the amount of \$265.13. The employee of mine only worked 12 hours I do not believe he is entitled to the amount owing.”

The Delegate interviewed the witnesses and made a credibility finding. The statement in the appeal is a restatement of Rainbow's unsupported position with the Delegate. There is no new evidence to support this position in the appeal. The belief of an employee unsupported by employee payroll records is not sufficient to cancel or vary a finding in a Determination.

The evidence supports the Determination that Doria was not paid wages earned at regular time or overtime. The Appeal is denied on this ground for insufficient evidence.

Having found a breach of the Act it is up to the Director to decide if a penalty is warranted. In *Narang Farms and Processors Ltd.* BC EST #D482/99, Adjudicator Petersen was assessing the appropriateness imposing a penalty. He set out a three step process.

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.

In dealing with the second step he stated that the Director must exercise her discretion reasonably. He set out the requirements of the Director as follows.

The Director's authority under Section 79(3) of the Act 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.

In applying the Tribunal's three step process, the first question is if Rainbow has contravened the *Act* or *Regulations*. Rainbow does not dispute that wages were owed and not paid. The only issue raised in the appeal was how many hours were worked and then how much was owed. I found that the Director was correct in finding a contravention of the *Act*.

The second step is to assess if the Director had reasons for exercising her discretion in these circumstances. The Determination set out the basis for the exercise of the Director's discretion in these circumstances. As in *Gain Suns Enterprises Ltd.* there was a substantiated previous complaint within a year of this complaint.

The third step is to ensure that the penalty was applied in accordance with the Regulation. Regulation section 29(2) provides as follows:

"29(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 provision 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;*

The evidence is that on October 20, 1999, Bernie Gifford, a delegate of the Director, issued a Determination which found that Rainbow had contravened Section s 17, 28, 40 and 58 of the *Act*. That Determination was not appealed. Based on that undisputed evidence in the Determination the penalty for this contravention is \$150.

On the basis of this analysis I do not find any new evidence to draw a conclusion that there is an error of fact or law in imposing a penalty in the Determination.

There is, in fact, no suggestion in the letter of appeal that there was an error of law in the Determination. The appellant has failed to meet the evidentiary burden on it to support a successful appeal.

**ORDER**

Pursuant to section 115 of the Act, Determination ER#: 100686 dated August 4, 2000 is confirmed. Rainbow Angels Home Service Club Inc. (“Rainbow”), owes Ryan P. Doria \$265.13 plus interest pursuant to section 88.

***April D. Katz***  
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**April D. Katz**  
**Adjudicator**  
**Employment Standards Tribunal**