

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 -

Sarwan Koonar & Company Ltd.
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	98/570 and 98/572
DECISION DATE:	November 6, 1998

DECISION

SUBMISSIONS

Mr. Amrik Koonar on behalf of the Employer

Mr. James Walton on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against two Determination of the Director of Employment Standards (the “Director”) issued on August 26, 1998; the first imposed a penalty of \$1,800.00 on the Employer, the second cancelled the Employer’s farm labour contractor licence. The first Determination found that the Employer had contravened Section 17(1) of the *Act* (failure to pay semi-monthly) for the second time. The number of affected employees is 12 and the penalty is \$150.00 multiplied by that number for a total of \$1,800.00. The second Determination cancelled the Employer’s licence and set out the Employer’s history of contraventions of the *Act* and *Regulation*.

FACTS AND ANALYSIS

In my view, penalty determinations involves a three-step process (see, for example, *Narang Farms and Processors Ltd.*, BCEST #D482/98).

First, the Director must be satisfied that a person has contravened the *Act* or the *Regulation*. In this case, the Employer argues that he did not breach Section 17(1). The Employer explains that he paid as follows:

“We started employment on June 8, 1998 From June 8 - June 22, 1998 is my first pay period. Now I have eight days to pay for this pay period. Which would be July 01, 1998. My second period would start on the 23 June to July 8, 1998. My last day to pay for this pay period would be July 16, 1998. Now instead of waiting until July 16, 1998 I’ve paid on June 30, 1998 in this pay cheque ...”

The delegate responds that 12 employees did not--in fact--receive an advance for mid June 1998. During an interview, the Employer agreed that he only provided only one cheque to employees for the month of June. This is not contradicted by the Employer.

In the result, I am satisfied that the Employer contravened Section 17(1) which requires that an employer must pay “at least semi-monthly and within 8 days after the end of the pay period”. The Employer must meet both requirements of Section 17(1), *i.e.*, pay at least semi-monthly *and* within eight days after the end of the pay period.

Second, if that is the case, it is then necessary for the Director to assess or determine whether a penalty must be issued. 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 or a licence cancellation, 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. In *Takarabe et al.* (BCEST #D160/98), the Tribunal reviewed the case law and noted at page 14-15:

“In *Jody L. Goudreau et al.* (BCEST #D066/98), the Tribunal recognized that the Director is “an administrative body charged with enforcing minimum standards of employment ...” and is “... deemed to have specialized knowledge of what is appropriate in the context of carrying out that mandate.” The Tribunal also set out, at page 4, its views about the circumstances under which it would interfere with the Director’s exercise of her discretion under the *Act*:

The Tribunal will not interfere with the exercise of discretion unless it can be shown that the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

... a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in the law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is

said, to be acting “unreasonably”. *Associated Provincial Picture Houses v. Wednesbury Corp.*, <1948> 1 K.B. 223 at 229.

In *Boulis v. Minister of manpower and Immigration* (1972), 26 D.L.R. (3d) 216 (S.C.C.), the Supreme Court of Canada decided that statutory discretion must be exercised within “well established legal principles”. In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant considerations.”

Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it (*Randy Chamberlin*, BCEST #D374/97). Given that the power to impose a penalty is discretionary and is not to be exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. 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 third step is the determination of the actual penalty. Section 98 of the *Act* provides the Director’s delegate with the discretion to impose a penalty in accordance with the prescribed schedule. Section 29 of the *Regulation* establishes a penalty escalating from \$0.00 to a maximum of \$500.00 for each contravention of a specified provision. The Regulation does not require that a penalty has been imposed for the previous contravention; it merely requires a contravention. The Director, or her delegate, has no discretion to determine the amount of the penalty once she, or her delegate, has determined that a contravention of a specified provision of the *Act* has occurred.

In this case, there is no dispute that this is the second contravention of Section 17(1). The Regulation prescribe the penalty as \$150.00 multiplied by the number of affected employee. The Employer does not appear to dispute that the number of affected employees is 12. In the result, the penalty is \$1,800.00 as found by the delegate.

Turning to the cancellation of the farm labour contractor licence, there is nothing--either on the face of the Determination or in the Employer’s very brief appeal--to indicate that the Director’s delegate did not exercise his discretion for *bona fide* reasons, in an arbitrary manner or based his decision on irrelevant considerations. In the result, I am not persuaded that the Determination cancelling the licence should be disturbed.

ORDER

Pursuant to Section 115 of the Act, I order that the Determinations in this matter, dated August 26, 1998 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal