

An appeal

- by -

Syncon Investments Ltd.,
operating as George and Dragon Pub Style Restaurant

- 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: John M. Orr

FILE No.: 2001/380

DATE OF HEARING: October 2, 2001

DATE OF DECISION: October 17, 2001

DECISION

APPEARANCES:

Philip Leseur

Counsel for Syncon Investments Ltd.

Adele Adamic

Counsel for The Director of Employment Standards

OVERVIEW

This is an appeal by Syncon Investments Ltd. (“Syncon”) pursuant to Section 112 of the Employment Standards Act (the “*Act*”) from a Penalty Determination dated April 20, 2001 by the Director of Employment Standards (the “Director”).

On April 20, 2001 a delegate of the Director issued a determination on behalf of an employee. In that determination the delegate determined that there had been an infringement of the *Act*. A second delegate then issued a penalty determination against the employer the same day. Syncon appealed alleging that there had not been an “independent” assessment done as required by the *Act* and that therefore the penalty determination should be cancelled.

The issue in this case is whether a delegate of the Director acting independently from the delegate who had conducted the investigation determined the penalty.

FACTS AND ANALYSIS

The principle that the complaint investigation role and the penalty determination role should be independent from each other is provided in section 117 of the *Act* as follows:

117. (1) Subject or subsection (2), the Director may delegate to any person any of the Director's functions, duties or powers under this Act, except the power to delegate under this section.

(2) The Director may not delegate to the same person both the function of conducting investigations into a matter under section 76 and the power to impose penalties in relation to that matter.

In this case the Director delegated an investigation to industrial relations officer “A” who completed the investigation and decided that Syncon had infringed provisions of the *Act*. When I.R.O., “A”, wrote her determination she also drafted a penalty determination based on the information in the file, including the results of previous investigations. In essence, she wrote the penalty determination even though this authority had not been delegated to her. “A” signed off her investigative determination but did not sign the penalty determination. I was advised that this

process is normal practice in the office in which “A” works. I was not advised whether this is the Director’s policy throughout the province.

After signing the investigative determination and writing the penalty determination, “A” took the determinations, the file and a package that contained any previous penalty determinations to another I.R.O., “B”, who happened to be available in the office at that time. The information provided to “B” also contained a printout that listed every complaint made against the employer. This printout indicated the nature of the complaints and the outcomes.

Upon receipt of the package of information, “B” read the draft penalty determination and checked it against the previous penalty determinations and reviewed the employer's history of complaints. I heard that in most cases the second delegate would then simply sign-off the penalty determination as written by the first delegate. In this case however, delegate “B” discovered that the penalty determination as written had taken into account certain events that had occurred subsequent to the breach that was the subject of this particular penalty. As the penalties in the *Act* increase based on the number of penalty infractions, the sequencing of events can make a difference to the penalty that is imposed. Delegate “B” returned the file to “A” pointing out the error and asked her to rewrite the penalty determination accordingly.

“A” again reviewed the file, taking into account the point raised by “B”, and rewrote the penalty determination. She then again presented the file and the determination to “B” who signed-off the penalty determination.

Syncon submits that this process conflicts with the provisions and intent of section 117 because the second delegate does not make the penalty determination in an independent manner.

I can see that there is certainly a risk that the "signing-off" process could become routine and could be done without any independent decision being made by the second delegate. When the penalty determination is written by the first delegate and is presented for signature it could be tempting for a busy and perhaps overworked delegate to simply sign the penalty determination without turning his or her mind independently to whether a penalty is appropriate and if so in what amount. The process might even give the perception that the penalty decision is in fact made by the investigating delegate and simply “rubber stamped” by the second officer.

However, on the facts of this case, I am satisfied that delegate “B” did make an independent decision and exercised his own discretion, to the extent that it applied, in imposing the penalty that was applied in this case. On the facts before me, “B” conducted a review that was sufficient to identify that the first “draft” of the penalty determination was calculated inaccurately and returned the file to the first delegate for the determination to be rewritten. “B” testified that when the second “draft” was presented he again reviewed the file, the previous determinations, and the history of the employer and made his own independent assessment that the appropriate penalty was in the amount as “drafted” by “A”.

Despite the perception, and the high risk, (arising from the practice of having the investigating delegate write the penalty determination) of lack of independence I am satisfied on the facts of this case that the penalty determination was imposed by a delegate independently from the person conducting the investigation.

The quantum of the penalty was not appealed and, therefore, I conclude that the penalty determination should be confirmed.

ORDER

I order, under section 115 of the *Act*, that the penalty Determination dated April 20, 2001 in the amount of \$900.00 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal