

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 -

467226 B.C. Ltd. operating as Superior Beauty Supplies and Equipment
("Superior")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 97/461 & 97/506

DATE OF HEARING: September 22, 1997

DATE OF DECISION: January 5, 1998

DECISION

OVERVIEW

The appeal is by 467226 B.C. Ltd. operating as Superior Beauty Supplies and Equipment (“Superior”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) against two Determinations issued under the authority of the Director of Employment Standards (the “Director”). The first Determination, dated May 30, 1997, is to impose on Superior a \$500.00 penalty for failure to keep payroll records as required by section 28 of the *Act*. The second Determination, dated June 13, 1997, is that Superior failed to pay Maria Punzo at least the minimum wage for all hours worked and that it owes wages as a result plus vacation pay and interest.

APPEARANCES

Don McCrimmon
Ben Lindholm
Maria Punzo

Counsel for Superior
Manager of Superior
On Her Own Behalf

ISSUES TO BE DECIDED

At issue is the number of hours worked by the employee. Superior argues that the Director’s delegate, in accepting the employee’s record of hours worked, accepted an incorrect record despite considerable credible evidence of its inaccuracy. Superior argues that no moneys at all are owed.

At issue is the Director’s decision to impose a penalty on Superior. Superior has failed to keep a record of hours worked as required by section 28 of the *Act*. Superior says that it has no way of keeping that record, that compliance would necessarily force it to “fabricate or falsify hourly work records” and that, as such, no penalty should be imposed.

A post-hearing order for the production of documents has been issued. At issue is the fairness of allowing the employee that further opportunity to present documents. Superior argues it is unfair because the employee failed to heed earlier summons and notices to provide the records and because it requires a response which is at considerable expense to the employer.

FACTS

Maria Punzo began working for Superior Beauty Products on September 6, 1995. Her last day of work was June 14, 1996. During all of that period she sold beauty products to hair

salons in parts of Greater Vancouver and the Fraser Valley. She earned commissions, initially with the guarantee of a salary.

Punzo was required to attend training and hair product shows but, like many other commission salespersons, she was free to choose her hours of work. She did not have to report to an office. Superior had only an office in Kelowna. And Superior did not cap or otherwise restrict her hours of work.

In Punzo, Superior had an inexperienced but satisfactory employee. In a letter to Maria's husband, John Punzo, dated February 9, 1996, Superior expressed that she was "very pleasant to work with and we don't want to lose her".

In the relevant period, Superior was just getting established in the lower mainland and it was looking to triple sales on advice of its accountant. It had entered into discussions with John Punzo about the possibility of his joining with Superior for a share of profits. It wanted someone in the lower mainland to "concentrate and work closely with the sales staff as they need to develop their territories as quickly as possible". While negotiations were at a serious stage in February of 1996, the deal fell through soon after.

On investigating the complaint, a delegate of the Director found that Superior kept no record of the hours worked by Punzo. Superior says that it has "no way to accurately maintain hourly work records" and "it is impossible to accurately track their actual hours". A delegate of the Director found that Superior contravened section 28 (1) d of the *Act* in not keeping a daily record of hours worked and imposed a \$500 penalty. In the Determination, the delegate states, "the penalty for this contravention is \$500.00 which is imposed under section 28 of the *Employment Standards Regulation*". There are no other stated reasons for the penalty.

In presenting matters to the Director, Superior said that its salespersons spent 34 hours a week on average calling on salons and complained of Punzo's record of work but it failed to provide a coherent account of her work. Against that, Punzo claimed a disciplined, forty hour workweek with training, some travel and hair show work on weekends and in evenings beyond that. And Punzo presented the Director's delegate with what appeared to her as a detailed, day-by-day record of hours worked (the "calendar record"). The delegate found that Punzo's sales territory was greater than as described by Superior, that there was considerable daily travel and that a normal week included work beyond calling on salons. The delegate decided that the calendar record was credible and used it as the basis for the Determination.

On appeal, Punzo admits that her calendar record is not a contemporaneous record of work but was prepared at the time of, and for the purpose of, the complaint. She explained that the calendar record is based on records which were kept contemporaneously. So that I might examine them, the contested post-hearing order to produce documents was issued. The documents, once received, were sent to Superior for its response and a written submission was received.

As the evidence is now before me, there is no contemporaneous record of the hours worked by Punzo. I am shown nothing which confirms what are said to be regular start and finish times or that she worked all of the days that she claims to have worked.

At best the calendar record is Punzo's recollection of work, one compiled from memory well after the event. But there is also a distinct lack of lunch breaks. I find it unlikely that Punzo would not break for lunch as claimed. And Punzo has a distaste for her former employer. It may stem in part from the failed business deal of her husband or the fact that she was terminated only four months after being told that she was pleasant to work with and an employee that Superior wanted to keep. I observe that she strongly believes that she was inadequately compensated for all of the time she put into Superior. It may reflect only that. But that she dislikes her former employer is clear, as is the likelihood that the result is some further overstatement of the quantity of work performed. I am led to the conclusion that the calendar record is not an accurate account of hours worked.

Superior on appeal speaks of an average work week of 24 hours, not 34 as expressed to the Director's delegate. I am presented with nothing which allows me to determine whether the average work week is in fact 24 hours.

There are sales records. They show little or no sales on some of the days Punzo claims to have worked. That suggests less work than is claimed. But I am satisfied that Punzo performed substantial work on at least some of the days where the record shows little or no sales. That is because selling was not all she had to do. She was also required to order, unpack, repack, deliver and ship a certain amount of merchandise, some of that for use in shows. And beyond that, of course, she had to keep herself organized for her selling to hair salons.

The salesperson that took over from Punzo sold considerably more than Punzo did. Superior argues that shows a lack of work on Punzo's part. Punzo says that it reflects the greater experience of the new salesperson and the many clients which he managed to bring with him to Superior. As matters are presented me, I have no way of deciding what is the reason for the difference in sales. A lack of information prevents me from isolating what factor or factors are responsible for that.

Beyond Punzo's normal work, there was training, some travel and hair show work outside of her regular work hours. As matters are presented to me, the calendar record is the more reasonable account of the work. I am satisfied that Punzo is far more likely to remember such work as it is of a relatively unique, less humdrum nature. Superior says that there was less of the work than is displayed by the calendar but it fails to show that, with one exception. There is a lack of breaks for lunch and dinner. I find it unlikely that Punzo would not break for such meals. I find that training, travel and hair show work outside of Punzo's regular hours of work is as the calendar record shows minus an hour for lunch where the calendar shows no lunch break and, where work is beyond 10 hours and there is no second break, an additional hour for dinner.

ANALYSIS

Section 16 of the *Act* requires that employers pay at least the minimum wage for work. Did Superior do that? In order to answer that question one must first determine how many hours were worked.

So that I might have the best evidence available, a post-hearing order to produce documents was issued. Superior argues that furnished Punzo with an unfair opportunity to submit evidence, but where new evidence comes to light, there is a need to exercise discretion. As matters were before me, the documents sought through the contested order appeared likely to have an important influence on the result and appeared to be hard, credible evidence of hours worked. Moreover, on reflection, it became clear to me that it was not through fault of the complainant that the documents were not produced at some earlier stage [Lord Denning in *Ladd v. Marshall* (1954) 3 All E.R. 745 at 748]. There was no lack of reasonable diligence on the employee's part, nor was there a deliberate withholding of evidence contrary to instructions. The delegate simply did not ask for them, accepting the calendar record as she did. And I am satisfied that Punzo could read instructions, like those of the Tribunal, to "include all records and documents in support of your response", as a request to produce the calendar record and nothing more. Untutored as she is in the ways of courts and administrative tribunals, it was reasonable for her to see the calendar record as all the support that was needed, in large part because of the delegate's acceptance of the calendar as a basis for the Determination.

No unfairness flows from the expense of having to respond to the documents. As a party to a dispute, Superior is expected to assume the cost of representing itself. That is simply a necessary part of the process. In the interest of avoiding such expense in the future, the employer will want to pay attention to section 28 of the *Act*. Had that been done in this case, there may well have been no need for a Determination, never mind an appeal.

As it turns out, the documents which Punzo produces in support her calendar record are in fact of no value at all. This is a case where neither employer, nor employee has kept what can be considered a reasonable record of hours worked. Should the complaint be dismissed for that reason? It is clear to me that it should not. It is inconceivable to me that Punzo's claim for minimum wages should fail because the employer failed to meet a statutory obligation, namely, the requirement to keep a record of hours worked.

Punzo performed work, that is clear. Superior argues that it owes no wages which is to say that Punzo worked no longer than what it would take to earn what she did at the minimum wage. But Superior does not know how many hours were worked by Punzo. It is entirely possible that long hours were worked despite the meagre commissions of some weeks. Low commissions, which is to say, sales, may reflect a lack of work, or not that at all, but some other factor or factors such as the season, the sales area, differences in productivity, differing quantities of work for which there are no commissions and the state of the economy.

Faced as I am with no record of the employee's daily or weekly hours, and no way of determining that from other records, I am left with what Superior said was an average

workweek in responding to the delegate, a 34 hour workweek calling on salons. I conclude that Punzo spent on average 34 hours a week calling on salons. She was at least an average employee, I conclude, on the basis of Superior's stated satisfaction with her as employee in February of 1996. Having found that her normal duties included the performance of work beyond calling on salons, and having found that there was work outside of her normal work hours, I conclude that Punzo's normal work week was 35 hours a week, with training, travel and hairs show work which was outside normal hours being beyond that.

In deciding that Punzo did not work as set out in the Determination, but as set out above, there is the need to determine whether minimum wages are still owed Punzo. The arithmetic is found on the attached table. It shows that, in failing to pay attention to section 28 of the *Act*, and in failing to cap or otherwise restrict Punzo's hours of work, Superior allowed Punzo to work such that she earned less than the minimum wage, in some weeks. The total amount of minimum wages owed is \$1,460. To that amount of wages is added vacation pay of 4 percent for another \$58, and interest. The Determination is accordingly varied.

Superior has contravened the *Act* in failing to keep the required records. It is advised to find ways of complying with the law. Further contact with the Employment Standards Branch may prove invaluable in that regard. I have no doubt that compliance does not require the fabrication of records. It may only require some monitoring of work and commissions, and possibly a cap of some sort on hours of work.

The final matter before me is the appeal of the penalty which has been imposed on Superior by a delegate of the Director.

Section 81 (1) is as follows:

On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:

(a) the **reasons** for the determination; (my emphasis)

Section 98 (1) of the *Act* states,

*If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director **may** impose a penalty on the person in accordance with the prescribed schedule of penalties.* (again my emphasis)

As Superior has contravened a requirement of the *Act*, the Director may impose a penalty, that is clear. But the penalty is imposed through a Determination and as such there must be a statement of reasons. The *Act*, s. 81 (1) (a) requires it. Moreover, as I read s. 98 (1) of the *Act*, it requires two things of the Director in regard to penalties. It requires that

discretion be exercised. And where the discretion is exercised, there must be a statement of reasons for that. Because the Determination of May 30, 1997 fails to provide any reasons for the decision to impose a penalty on Superior, I am cancelling the Determination.

That the Director have the power to impose penalties was recommended by Commissioner Mark Thompson in his report, Rights and Responsibilities In A Changing Workplace: A Review of Employment Standards in British Columbia. He saw it as a way of solving the problem of persons and companies who violate the *Act* repeatedly.

The legislature has given the Director a broad power to impose penalties. If a penalty is imposed for repeated violation of the *Act*, then the Director should list the violations. That appears to me to be a relatively simple thing to do. If it is for some other reason, then state why the discretion to impose a penalty has been exercised. I cannot imagine that the Director could have any great difficulty in that. There is no need for lengthy reasons, only a short statement of why the person or company is being singled out for a penalty. In my view there is no question that natural justice demands it. As a delegate of the Director has proceeded in this case, he acts insidiously. The employer is not even advised that it is being singled out for a penalty.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination which imposes a penalty on Superior, and which is dated May 30, 1997, be cancelled.

I order, pursuant to section 115 of the *Act*, that the Determination dated June 13, 1997 be varied. The amount which Superior owes Punzo is \$1,518 together with whatever further interest has accrued pursuant to Section 88 of the *Act*, since the date of issuance.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc