

An appeal

- by -

Louis Enterprises Ltd. operating as Lou's Grill
(“Lou’s”)

- 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: April D. Katz

FILE No.: 2001/626

DATE OF DECISION: November 7, 2001

DECISION

SUBMISSIONS:

Appeal filed	on behalf of Louis Enterprises Ltd.
Bryan Raymond	on his own behalf
Lynne Fanthorpe and Kevin Molnar	on behalf of the Director of Employment Standards

OVERVIEW

The Director assessed two penalties of \$150 each against Louis Enterprises Ltd. Operating Lou's Grill ("Lou's") after finding that Lou's had breached Part 4 and Part 8 of the *Employment Standards Act* ("Act") for a second time in two years. The first Determination was issued on April 12, 1999 and this Determination was issued on August 9, 2001 for breaches of the same provisions. Lou's appealed the penalty assessment and the Determination which ordered Lou's to pay Bryan Raymond ("Raymond") for length of service.

ISSUE

The sole issue in this appeal is whether Lou's has shown there was no basis upon which the Director could exercise her discretion to issue the penalties.

ARGUMENT

Lou's submission in the Appeal states that Raymond was dismissed for cause and therefore the Determination should be cancelled.

The Director's Delegate submits that based on the previous finding of breach of sections 40 and 63 of the Act and the same finding in the Determination of August 9, 2001 it is necessary to promote compliance with the Act through the use of penalties.

THE FACTS

Raymond worked for Lou's as a Bartender from September 1997 until January 2, 2001 at the rate of \$9.00 per hour. Raymond was sick for the two weeks prior to January 2, 2001 which was a busy time at Lou's. When Raymond returned to work on January 2, 2001 he was told his services were no longer required.

Raymond filed a complaint claiming that he had worked many hours of overtime and was paid a straight time. Raymond also claimed length of service compensation. Lou's paid the overtime

found to be owing but refused to pay the length of service compensation on the basis that Raymond had a bad attitude and Lou's had received customer complaints and given Raymond written and verbal warnings. Lou's produced one written warning from January 4, 1999, which alleged Raymond had been an hour late for work. No other evidence was provided.

Raymond's submission was that he had worked in the service industry for 9 years and had a good relationship with customers that was important to him. Raymond's evidence was that no one at Lou's had raised any customer or attitude concerns with him prior to his employment ending.

In the Appeal filed Lou's states

“The Employment Standards Fact Sheet for “Just Cause” states that theft, fraud and dishonesty are examples of just cause. Bryan Raymond was fired because he stole (theft) from customers by short – changing them. There are numerous customer complaints of this. Therefore we had the right to fire without compensation for length of service.”

No specific evidence in support of these allegations was provided to the Delegate or for the Appeal.

ANALYSIS

The onus of proving the Director has erred is on the appellant in an appeal to the Tribunal. Lou's is appealing the Director's decision to assess a penalty. The Director's authority to issue a penalty is set out in section 98 of the *Act*, which provides as follows.

Monetary penalties

- 98 (1) 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.
- (2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes permits or acquiesces in the contravention is also liable to the penalty.
- (3) A person on whom a penalty is imposed under this section must pay the penalty whether or not the person
- (a) has been convicted of an offence under this Act or the regulations, or
- (b) is also liable to pay a fine for an offence under section 125.
- (4) A penalty imposed under this Part is a debt due to the government and may be collected by the director in the same manner as wages.

Section 29 (2) (b) of the Employment Standards Regulation provides that the penalty is \$150 per employee if the person has contravened the provision on one previous occasion.

In *Narang Farms and Processors Ltd.* BC EST #D482/99 the Tribunal set out a three step process for assessing a penalty.

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.

(See also, *Re James Cattle Co. Ltd.*, BC ESE #D230/99).

The Appeal Form alleges there was cause but does not provide any evidence to refute the findings in the Determination.

The second step is the exercise of discretion. In dealing with the second step in *Narang Farms* the Tribunal stated that the Director must exercise her discretion reasonably.

The Director's authority . . . 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 the Determination the Director's Delegate has set out the reasons for assessing the penalty. The Determination states that Lou's was aware of this requirement through the previous Determination on April 12, 1999 when Lou's was found to have breached the overtime provisions.

CONCLUSION

Lou's has asked the Tribunal to cancel two penalties assessed to provide an incentive to the employer to comply with the overtime pay requirements set out in the *Act*.

The discretion to assess the penalties belongs to the Director. There is no evidence that the Director based the exercise of her discretion on an error of fact or law. The Determination is therefore confirmed. The appeal is denied.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated August 9, 2001 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal