

An appeal

- by -

Milner Greenhouses Ltd.
("Milner")

- 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: M. Gwendolynne Taylor

FILE No.: 2001/629

DATE OF DECISION: November 20, 2001

DECISION

OVERVIEW

Pursuant to section 112 of the *Employment Standards Act*, Milner Greenhouses Ltd. (“Milner”) filed an appeal from a Determination by the Director dated August 20, 2001. The Director found that Milner had contravened Section 23 of the *Act*, by failing to pay overtime. The Director imposed a \$0.00 penalty and noted that a penalty of \$150.00 per employee would result from any further contravention. Milner had voluntarily resolved the overtime issue by paying the complainant an outstanding amount of \$3,630.89.

On September 5, 2001, Milner appealed the Determination on the grounds that the company would have corrected the overtime error without the necessity of the Employment Standards Branch determination, if the complainant had brought it to the company’s attention. The company asked that the Determination be removed from their record.

ISSUE

1. Does the evidence support the Director’s Determination to impose a \$0.00 penalty on Milner?

SUBMISSIONS

The Director responded to the appeal noting that there had been three complaints about failure to pay overtime, each of which was voluntarily resolved by the company paying the complainants the amount claimed. The Director notes that they were filed on April 20, 2001, June 21, 2001 and, this complaint, July 4, 2001. The Director issued a penalty because this was the third complaint and the Director believed a disincentive was needed to promote compliance with the *Act*.

Milner submitted that the errors in all three cases, which occurred within a few months of each other, were due to expansion at the company and to differences in the way short haul and long haul drivers were paid. Short haul drivers use a time clock. Long haul drivers are paid per trip, with a specified number of hours allotted for each trip. The difficulties arose when short haul drivers also made long haul runs, and the hours crossed from one system to the other.

Milner submitted that to correct the problems, they have hired a new Human Resources Director to review the drivers’ logs twice weekly to catch potential problems, and hired a Chief Financial Officer. The company is looking at updating the payroll software to a system that will accommodate both methods of driver billing.

FINDINGS

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 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.

Milner bears the onus of proving that the Director's determination was incorrect. The issue raised by Milner is whether the Director acted properly in imposing the penalty.

I find the Determination in this case is curious. The only reference to a penalty having been imposed is in the “re” portion of the Determination:

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Amount Owing: \$0.00**

In the body of the Determination, the Director found that Milner contravened section 23 of the *Regulation*. The only reference to a penalty is the Director’s notice that further contraventions will result in a penalty of \$150.00 per employee.

As noted in the *Narang* case, it is incumbent on the Director to give some reasons when imposing a penalty. There are no reasons in the Determination, short of the finding that there was a contravention. There is no reference to Milner having voluntarily paid the overtime owing, or when it was paid. There is no reference to other employee claims for overtime. That information is contained only in the Director’s reply to the appeal. There is no reference to any reason Milner might have advanced as an explanation for failure to pay the overtime.

The Director has not challenged Milner’s contention that the errors were innocent nor challenged Milner’s explanation of why the errors occurred. The evidence is that Milner voluntarily corrected the errors for each complainant and that the company has taken steps to put systems in place to prevent these errors occurring in the future.

Milner says the three cases arose within a few months of each other. The Director indicated that one of them was in June 2000. This could be a typographical error. Given Milner’s response, and the lack of further response from the Director, I find that it was in fact June 2001.

It appears that the Director did not afford Milner an opportunity to make submissions on whether a penalty should be imposed. The Director did not give reasons in the Determination for imposing a penalty. There is no indication that the Director knew of the company expansion and the problems, and solutions, that arose from the expansion.

It seems that these complaints could have been resolved without the involvement of the Director. However, once the Director was involved, the situation was ripe for dispute resolution, and it was successfully resolved. In my view, unless the Director advised Milner of the intention to consider imposing a penalty, and offered an opportunity to be heard, the successful resolution as between the parties should have been the end of the matter.

I find that the Director did not act reasonably in exercising discretion to impose a penalty.

ORDER

Pursuant to section 115 of the *Act*, I cancel the Determination issued August 20, 2001.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal