

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 Katz

FILE No.: 2001/660

DATE OF DECISION: December 18, 2001

DECISION

SUBMISSIONS:

Appeal filed on behalf of Louis Enterprises Ltd.
D. Lynne Fanthorpe on behalf of the Director of Employment Standards

OVERVIEW

The Director of Employment Standards (“Director”) found that Louis Enterprises Ltd. Operating Lou’s Grill (“Lou’s”) breached overtime, statutory holiday pay, and inappropriate wage deductions and assessed a penalty of \$450 for the three breaches of the *Employment Standards Act*. The first Determination finding Lou’s in breach of these provisions was on April 12, 1999 and assessed no penalty.

The Determination on this complaint was confirmed on appeal. Lou’s appeal addressed the issue of definition of manager within the meaning of the *Employment Standards Act* (“Act”) and *Regulation* but said nothing specific about the \$450 penalty.

This Appeal proceeded on the basis of written submissions from the Director’s delegate. Lou’s did not make any submissions after filling in the appeal form.

ISSUE

The sole issue in this appeal is whether Lou’s has shown that assessment of the penalty should be varied or cancelled.

ARGUMENT

Lou’s has filed an appeal with no statements in support of a variation of the penalty.

The Director’s position is that Lou’s has breached these sections of the *Employment Standards Act* in the past and continues to operate without compliance.

THE FACTS

The Delegate’s Determination issued on August 24, 2001 found Lou in violation of the *Act* and assessed a penalty of \$450 pursuant to section 28 of the *Employment Standards Regulation* BC Reg. 396/95 and 359/99 on the basis of previous breaches in the last 3 years.

ANALYSIS

The onus of proving the Director has erred is on the appellant in an appeal to the Tribunal. Lou has appealed the Director's decision to assess a penalty of \$150 for a breach of each of sections section 18 (s), section 21(2) and section 40 (1)(2). 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.

The specific regulation enabling these penalties is section 29 of the *Regulation* which states the following.

Penalties for other contraventions

- 29
- (1) In this section, "**specified provision**" means a provision or requirement listed in Appendix 2.
 - (2) The penalty for contravening a specified provision of a Part of the Act or of a Part of this regulation is the following amount:
 - (a) \$0, if the person contravening the provision has not previously contravened any specified provision of that Part;
 - (b) \$150 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on one previous occasion;
 - (c) \$250 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on 2 previous occasions;

- (d) \$500 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on 3 or more previous occasions.

Section 29 (2) (b) has been applied by the Director in these circumstances.

CONCLUSION

There is no evidence before me to suggest that the Director has not applied her discretion appropriately to these facts. I therefore deny the appeal and confirm the penalty in the Determination.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated August 24, 2001 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal