

**Case No. 78/10/ESC-R**

**File No. 101896**

**IN THE MATTER OF: THE EMPLOYMENT STANDARDS CODE**

**BETWEEN:**

**AAR-AUTO LIST OF CANADA (1999) INC.,**

**Employer,**

**- and -**

**Director, Employment Standards Division,**

**Interested Party.**

**BEFORE:**

**W. D. Hamilton, Chairperson**

**SUBSTANTIVE ORDER**

**WHEREAS:**

1. On January 27, 2010, pursuant to Section 138.1 of *The Employment Standards Code* (the “*Code*”), the Director of the Employment Standards Division of the Department of Labour and Immigration, issued a Notice of Administrative Penalty, in the amount of Nine Thousand Five Hundred Dollars (\$9,500.00) to the Employer, AAR-Auto List of Canada (1999) Inc.

Section 138.1(5) of the *Code* reads as follows:

**Penalty recoverable as wages**

**138.1(5)** The penalty payable under this section is a debt due to the government and may be recovered by the director in the same manner as wages may be recovered under this Code.

2. The Employer, having disputed the payment of the administrative penalty, requested it be referred to the Board pursuant to Section 138.2(1) of the *Code*, and also requested that the Chairperson, pursuant to Section 138.2(4), reduce the amount of the deposit required.
3. Counsel for the Director of the Employment Standards Division indicated that, pursuant to Section 115(4) of the *Code*, the Director would be taking standing before the Board at

the hearing scheduled for October 26, 2010, respecting the Employer's request to reduce the amount of the deposit.

4. On October 26, 2010, the Board conducted a hearing at which time the Employer and a representative for the Director of the Employment Standards Division appeared before the Board and presented evidence and argument with respect to the Employer's request to reduce the amount of the deposit required. The Director of the Employment Standards Division was represented by Counsel.
5. At the commencement of the proceedings, the Employer requested an adjournment of the hearing in order to gather additional correspondence for the hearing. The Director of the Employment Standards Division, through Counsel, opposed the Employer's request.
6. The Board, following consideration of the Employer's request, and the submissions of Counsel for the Director of the Employment Standards Division, denied the Employer's request to adjourn the proceedings and continued with the hearing to deal with the Employer's request to reduce the amount of the deposit. In denying the request for an adjournment, the Chairperson noted that the date originally set for the hearing of this matter, namely July 20, 2010, was adjourned to accommodate the Employer's specific request that the hearing be set on a date subsequent to September 20, 2010, and the resultant date of October 26, 2010, was mutually agreed to by the parties. The Chairperson is satisfied that the purpose of the Employer's application for a reduction hearing was known to all parties for many months.
7. In addressing the application to reduce the deposit under Section 138.2(4) of the *Code*, the Chairperson had regard to the following factors:
  - a) Administrative penalties were introduced into the *Code* effective April 30, 2007 as an enforcement tool in order to ensure compliance with the statutory obligations established by the *Code*, *The Construction Industry Wages Act* or its regulations. Section 138.1(1) of the *Code* empowers the Director to impose an administrative penalty "...after the director has given the person notice of the requirement to comply with that provision" [Section 138.1(1)]. In this case, a written notice to comply with Sections 17(1) and 86(1) of the *Code* was issued to the Employer on June 26, 2009 (Ex. 3). Following a subsequent audit, the Employment Standards Division (the "Division") issued the Notice of Administrative Penalty dated January 27, 2010 (Ex. 1) to the Employer in the amount of Nine Thousand Five Hundred Dollars (\$9,500.00), comprising nineteen separate incidents involving ten employees for an (alleged) failure to pay overtime wages to these employees within ten (10) working days after the expiration of each pay period, as required by Section 86.1 of the *Code*, the pay periods being July 11-26, 2009 and July 27-August 10, 2009.

- b) Section 138.1(3) of the *Code* states as follows:

“The amount of the penalty for each incident of non-compliance is the amount prescribed by regulation. For this purpose, an incident of non-compliance relating to more than one employee may be treated as a separate incident of non-compliance in relation to each affected employee (emphasis added).”

The penalties are prescribed in the Schedule established pursuant to Section 29 of the *Employment Standards Regulations* (the “Regulation”). For most contraventions, the prescribed “...Penalty (Fine)” is Five Hundred Dollars (\$500.00). This amount is the prescribed penalty for a failure to comply with Section 86.1 of the *Code*. Once a decision is made to issue a Notice of Administrative Penalty, the amount of the Penalty is fixed. There is no discretion as to the amount of the penalty itself.

- c) The jurisdiction of the Board on the merits of an appeal from an administrative penalty is limited in that the Board “...must confirm or revoke the penalty” [Section 138.2(6) of the *Code*]. Unlike an appeal brought under Section 110 of the *Code*, the Board does not have the jurisdiction to vary an administrative penalty or to set it aside and make a new order (see Section 125(1)(b) of the *Code*). This limited jurisdiction under Section 138.2(6) confirms that the purpose of the administrative penalty regime is to enforce compliance with the minimum statutory requirements of the *Code*, provided that the requisite notice to comply has been issued under Section 138.1(1) of the *Code*.
- d) Given the purpose of the administrative penalty provisions, the fact that an individual employee has not filed a complaint with the Division or that the Division has not issued a specific order for unpaid wages in favour of the employee does not affect the right of the Director to issue a Notice of Administrative Penalty. The jurisprudence has long established that the Director may proceed on his own accord under the applicable authorizing provisions of the *Code* to enforce the *Code*’s minimum standards. See, for example, *Jet Roofing Ltd. v. Augustyn* [1990] M.J. No. 35 (Man. C.A.) affirming *Jet Roofing Ltd. v. Augustyn et al* [1989] M.L.B.D. No. 29.
- e) In the context of the forgoing summary of the administrative penalty regime and its purpose, the Chairperson took into account the relevant guidelines contained in *Information Bulletin No. 11*, recognizing that these guidelines are not exhaustive or inflexible. While these guidelines were written with Section 111(1) of the *Code* in mind, the factors listed are also relevant to an application under Section 138.2(4) of the *Code*, when deciding whether it is unfair or unreasonable not to

reduce the amount of the administrative penalty to the prescribed amount of Five Thousand Dollars (\$5,000.00). [Section 30 of the Regulation].

- f) The Chairperson does not accept the Employer's position that it has suffered "prejudice" because the amount of the penalty imposed far exceeds the total amount of the overtime at issue for the ten employees (ie: approximately Six Hundred and Seven Dollars and Eighty-One Cents (\$607.81) for the two pay periods – see Ex. 1), particularly when, as the Employer argued, no individual orders were issued ordering payment of the overtime to the employees. Objecting to paying the full amount of the penalty for these reasons is not sufficient, in and of itself, to establish prejudice because, again, the purpose of an administrative penalty is to ensure compliance with statutory obligations under the *Code*, following the issuance of a prior notice to comply.
  - g) Based on the submissions of the parties and the evidence adduced at the reduction hearing, the Employer has failed to satisfy its onus that being required to pay the full penalty will create an "undue financial hardship". It is admitted that the Employer is not insolvent, not in receivership nor is it in bankruptcy and it has actively conducted business for approximately seventeen years. There was no objective financial data (eg: financial statements) filed to establish that payment of the full deposit would create an undue financial hardship. While payment of the full penalty may be inconvenient and create some difficulties, this is an inevitable consequence of the normal deposit requirements but this reality fails to create an "undue" (ie: exceptional, excessive, or disproportionate) financial hardship.
  - h) The grounds of appeal advanced by the Employer, through counsel, in the letter of February 16, 2010 (Ex. 5) do not raise any unique or discrete legal issues that would require the Board to address new principles or re-visit an established principle. Most of the grounds for appeal raise factual issues which will have to be addressed by the Board at the hearing of the appeal on its merits. It would be inappropriate for the Chairperson to comment further on the limited evidence heard at the reduction hearing regarding the merits as the Chairperson is expressly prohibited from hearing the appeal [Section 138.2(5) of the *Code*] if he/she hears an application to reduce a deposit.
8. Taking into account the factors summarized in paragraph 7, the Chairperson is not satisfied that it would be unfair or unreasonable not to reduce the amount of the deposit in the circumstances of this case. The application of the Employer pursuant to Section 138.2(4) of the *Code* is dismissed. In the result, the Employer is required to deposit an amount equal to the penalty being appealed.

**T H E R E F O R E**

The Manitoba Labour Board **HEREBY DISMISSES** Employer's request to reduce the amount of the deposit pursuant to Section 138.2(4) of *The Employment Standards Code* and **HEREBY ORDERS AAR-AUTO LIST OF CANADA (1999) INC.** to pay to the Director of Employment Standards Division of the Department of Labour and Immigration, forthwith, the amount of Nine Thousand Five Hundred Dollars (\$9,500.00), being the amount of the deposit required pursuant to Section 138.2(3) of *The Employment Standards Code*.

**DATED** at WINNIPEG, Manitoba, this 10th day of November, 2010.

*“Original signed by”*

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**W. D. HAMILTON, Chairperson**

CJ:tj/rb-s