

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 -

Mettco Electric Limited
("Mettco" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No: 1999/626

DATE OF DECISION: February 4, 2000

payroll information for July 1999. Without this information it will not be possible to determine the extent of violations of the ESA and the SDFWA.

....

.Mettco Electric Limited has contravened Section 46 of the *Employment Standards Regulation* by failing to produce proper payroll records. The penalty for this contravention is \$500.00. It is imposed under Section 28(b) of the *Employment Standards Regulation*.

Mettco has not produced complete records for work performed at Langley Fine Arts School and Mettco has been made aware of the consequences of not complying with a record requirement.

....Failure to deliver a record, at the very least, delays investigation. It may deny an employee a minimum employment standard. The records demanded were relevant to an investigation, the employer was aware of the demand for production of records, and the records were not delivered.

No reasonable explanation for the failure to deliver was given. As noted above, Mettco, though given ample opportunity, has not complied with the Demand for Employer Records nor co-operated with the Officer's investigation. If a reasonable explanation had been given, the Director would have exercised discretion and a penalty would not have been issued.

The Employer denies that it failed to co-operate with the delegate and says that it provided such records as were demanded. In a letter to the delegate, dated October 7, 1999, the Employer sets out its explanation:

- The Employer received the Demand in late June 1999. (The records were to be produced by July 6).
- The Employer then contacted the delegate and explained that he would get his bookkeeper to locate the documentation. The bookkeeper does not work in the office on a daily basis. This would apparently take some time because the bookkeeper was involved in other activities. The Employer understood this to be agreeable to the delegate.
- The delegate subsequently contacted the Employer's customers (the general contractor and the Langley School Board) directing them to freeze payments owing to the Employer.
- The records, time cards and time records, were sent to the delegate on July 25, 1999.
- On September 1, 1999, the Employer received a further request records for a named employee, Dave Hall. The Employer provided certain records on September 5, 1999 (which I understand to be time cards).

- On September 7, 1999, the delegate requested further information regarding Dave Hall, in particular, proof of payment, by September 16, 1999.
- On September 12, 1999, the Employer sent copies of cheques for Dave Hall.
- Subsequently, the delegate telephoned the Employer and left a message to contact her. When the Employer telephoned, the delegate was unavailable. The delegate called back and stated that a penalty would be issued unless the records were received by noon that day.
- On September 26, 1999, the Employer faxed a letter to the delegate. In the letter the Employer explained that it had sent a copy of the cancelled cheque for Dave Hall and time cards for the rest of the employees. The Employer also indicated that it was sending cancelled cheques for other employees for the month of July.

On September 27, 1999, the delegate issued the Determination.

The submissions of the Director does not take issue with the assertions of the Employer.

ANALYSIS

I am of the view that the Determination should be set aside.

First, Section 28 of the *Act* requires that the employer keep records of certain information. Section 46 of the *Regulation* provides that a person required under Section 85(1)(f) of the *Act* to produce records, must produce and deliver the records as and when required. The *Act* and the *Regulation* clearly distinguish between the obligation to “keep” certain records and the obligation to “produce” such records as and when required. An employer may be in breach of one or both of these requirements. The Determination states that the records produced by the Employer failed to meet the requirements of Section 28 of the *Act* which imposes an obligation on an employer to “keep” certain records. However, the reason for the Determination is the failure to produce “proper” records contrary to Section 46 of the *Regulation*. While the penalty for a violation of Section 28 of the *Act* or Section 46 of the *Regulation* is the same--\$500.00 for each contravention--and Section 123 of the *Act* provides that a “technical irregularity does not invalidate a proceeding”, a party, against whom a penalty has been imposed, is entitled to know what specific statutory provision it is alleged to have breached, and such breach must be strictly proven. The failure of the Director’s delegate to correctly state the statutory provision alleged to have been breached, is not a mere “technical irregularity”.

The Determination acknowledges that the Employer produced some--albeit--inadequate records: the Employer produced “at various times, a portion of the records demanded”. These records may well have been inadequate, which may have provided the basis for a penalty for failure to “keep” proper records; however, if the Employer delivered what records it had “as and when required”, the Employer did not breach Section 46 of the *Regulation*. In short, the Determination did not correctly state the statutory provision alleged to have been breached. This is fatal to the penalty Determination.

Second, in the instant case, the Employer explains that delegate accepted that it could not provide the records within the time frame set out in the Demand. The Employer supplied the records on July 25, 1999. Under Section 46 of the *Regulation*, the Director may require a person to deliver records “as and when required”. If the delegate agreed to extend the time for the delivery of records, and this is not disputed, I do not accept that the delegate can rely on the failure to produce by the date set out in the original Demand concerning all employees who had worked on the school project. From the Employer’s submission, and this is not in dispute, I understand that while the delegate subsequently requested further documentation and records, the Employer complied with these requests in a timely fashion.

In the result, I conclude that the penalty Determination cannot stand.

I decline to deal with the Employer’s request that the Director release the contract amount plus interest, some \$15,000. This issue is not before me as a part of the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated September 27, 1999 be cancelled.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal