

BC EST #D 010/98

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 -

Tracie Erikson operating as K-Cafe
("Erikson")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Paul E. Love

File No.: 97/845

Date of Decision: January 14, 1998

DECISION

OVERVIEW

Tracie Erikson operating as K-Cafe (“Erikson”) appeals a Determination made on October 31, 1997, pursuant to s. 112 of the *Employment Standards Act* (the “Act”). The Directors delegate found that the employer contravened s. 46 *Employment Standard Regulation* (“*Regulation*”) by failing to provide information and records. The Director’s Delegate imposed a penalty of \$500.00, pursuant to section 28 of the *Employment Regulation*. The employer argued that the Director’s delegate had determined that the employee, Ms. Kurulak, failed to establish claims related to failure to receive a pay cheque, failure to pay wages for days worked, and that there was voluntary compliance by the employer with payment of statutory holiday pay. Erikson further argued that she had not failed to provide the records, but offered to provide them by telephone. She further argued that her records had mysteriously disappeared, and produced to the Director’s delegate in the Penticton office by Ms. Kurulak. She further argued that she failed to produce the records that she had in her possession, because the records were incomplete. The Determination was confirmed as the employer had breached the terms of s. 46 of the *Regulation*.

ISSUE TO BE DECIDED

Did the Director’s Delegate impose properly a penalty of \$500.00 for non-compliance with an order to produce records?

FACTS

Erikson operated a cafe in Keremeos known as K Cafe. Kurulak was employed as a waitress at the cafe from February 18, 1997 to April 3, 1997. Kurulak made a complaint to the Director concerning vacation pay and statutory holiday pay. Erikson was invited to either pay the amount outstanding or produce payroll records and time sheets, by letters dated May 16 and May 21, 1997. A formal demand dated July 15, 1995 required the employer to disclose, produce and deliver all records relating to wages, hours of work, conditions of employment and all records an employer was required to keep pursuant to part 3 and part 8 of the Act, and sections 46 and 47 of the Regulation. The records were to be produced by 9:00 am on August 5, 1997. I find that the demand was served on Erikson by registered mail on July 21, 1997.

BC EST #D 010/98

The written submission from the Director's delegate, which I accept, outlines that Erikson did not respond to the demand in writing or by telephone call. The telephone records filed by Erikson confirm that one 1 minute call was made on July 24, 1997, however, I accept the submissions of the Director's delegate that no response was made in writing or by telephone to the demand. A one minute telephone call would be insufficient to discuss the records issue, and indicates merely that a phone call was made, and perhaps a message was left by the employer.

The Director's delegate found that the employer breached section 46 of the Regulation by failing to supply records in response to the demand. The Director's delegate imposed a \$500.00 penalty pursuant to s. 28 of the *Regulation*. In written submissions to this Tribunal the employer admitted that she failed to forward records for Ms. Kurulak's last two weeks of employment. She indicates that she failed to supply the records, because the records would be, in her view, useless without the earlier records, which had vanished mysteriously from her business premises, only to turn up in the hands of the Director's delegate at a later date.

ANALYSIS

In this case the Director's delegate was investigating claims related to non-payment of wages, and non-payment of statutory holiday pay. In order to conduct the investigation, it was necessary for the Director's delegate to review the employer's records. The Director or delegate has been given a statutory power to demand records. This power is set out in s. 85(1)(d) of the Act. Section 46 of the *Regulation* makes compliance with the demand mandatory. By virtue of section 28 of the *Regulation*, the penalty for contravening section 46 of the *Regulation* is a \$500.00 fine.

I have accepted the written submissions of the Director's delegate that the employer failed to comply with the demand.

The demand for records was reasonably related to the investigation of the claims made by the employee. It has been held by this Tribunal that the failure of an employer to produce records was not an excuse even where the employer thought the underlying complaint was resolved:

Western Campus Resources Inc. v. B.C. (Director of Employment Standards), (July 28, 1997) 335/97 B.C.E.S.T. (Suhr)

In my view the ultimate outcome of the complaint is irrelevant to the issue whether the demand was reasonably related to the Director's investigation, or whether the employer breached the demand.

In my view, if an employer can establish that an employee had stolen all the business records demanded by the Director's delegate, the failure to supply records would not be a

BC EST #D 010/98

breach of the demand. The employer was not in this position. She chose not to supply records that she had in her possession - at least those for the last two weeks of employment. The employer is therefore in breach of section 46 of the *Regulation*.

ORDER

Pursuant to section 115 of the Act I confirm the Determination made that Tracie Erikson is in breach of section 26 of the *Regulation*, that she cease contravening the *Regulation*, and I confirm a penalty of \$500.00 imposed by the Director's Delegate.

Paul E. Love
Adjudicator
Employment Standards Tribunal