

An appeal

- by -

Coretech Industries (1991) Ltd.  
("Coretech" or the "Employer")

- 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:** Ib S. Petersen

**FILE No.:** 2001/617 & 2001/618

**DATE OF HEARING:** January 8, 2002

**DATE OF DECISION:** January 10, 2002

## DECISION

### APPEARANCES:

Mr. Ron Driedger	on behalf of Coretech
Mr. Walter Flietkau	on behalf of himself

### FACTS AND ANALYSIS

This is an appeal by Coretech pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against two Determinations of the Director of Employment Standards (the “Director”) issued on August 3, 2001. One Determination imposed a penalty of \$500.00 on the Employer (the “Penalty Determination”). The Delegate concluded that the Employer had contravened Section 46 of the *Employment Standards Regulation* (the “*Regulation*”) by failing to produce payroll records. In another Determination, issued on the same date, the Delegate concluded that Coretech had contravened Sections 18, 40, 58, 45, 27 and 63 of the Act and owed Mr. Walter Fietkau (“Fietkau”) 2,831.31 (the “Fietkau Determination”).

#### 1. The Penalty Determination

Coretech takes issue with the Penalty Determination and wants it cancelled.

In *Narang Farms and Processors Ltd.*, BCEST #D482/98, I summarized the penalty process as follows:

“... the penalty determinations involve a three-step process. 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*.”

The relevant legislation is Section 46(1) of the *Regulation* and Section 85(1)(f) of the *Act*.

46(1) A person who is required under 85(1)(f) of the Act to produce or deliver records to the director must produce and deliver the records as and when required.

85(1) For the purpose of ensuring compliance with the Act and the regulations, the director may do one of more of the following:

(c) inspect any records that may be relevant to an investigation under this part;

- (f) require a person to produce, or deliver to a place specified by the director, any records for inspection under paragraph (c);

Section 85(1)(c) and (f) of the *Act* broadly permits the director access to records relevant to an investigation. Section 46(1) of the Regulation provides for delivery of records “as and when required.” In the instant case, there is no doubt that records were requested and that, as these efforts appeared fruitless, a formal Demand was delivered to Coretech and that it refused or neglected to comply with that Demand.

The Director’s authority under Section 79(3) of the *Act* is discretionary: the Director “may” impose a penalty. Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it (*Randy Chamberlin*, BCEST #D374/97). The delegate’s reasons are stated in the Determination. Specifically, the delegate states there that the records demanded were important to the investigation and that no reasonable explanation was provided for the failure to provide the records.

In a submission to the Tribunal dated November 18, 2001, the Delegate points, as well, to the following circumstances:

- The employer was contacted on February 15, 2001, and committed to providing the records.
- On February 26, 2001, the Employer again committed to providing the records.
- On March 14, 2001, the Delegate sent a Demand for Employer Records.
- The Employer produced no records until August 27, 2001, *i.e.*, after the Penalty determination had been issued.

At the hearing, Mr. Driedger candidly admitted that he was upset with Mr. Flietkau—who he felt was a “bad employee” for a variety of reasons that I do not need to go into--and was “dragging his heels” for that reason. He explained that he wanted to delay paying Mr. Flietkau--and there is no real dispute that he owed him some money. He also explained that he was a hard-working “small business person” and did not give much priority to “paper-work”.

I can appreciate Mr. Driedger’s concerns. All the same, the Delegate, as can be seen from the above--and this is not in dispute--went out of her way to obtain the documents through telephone calls and a formal Demand. The Demand for Employer Records is an important tool for the Director. Under the *Act*, an employer is obligated to comply with the Demand. In this case, it was clear that the Employer deliberately refused to comply with the request for documents. In my view, the Tribunal clearly cannot condone Mr. Driedger’s “dragging his heels” to delay the investigation of Mr. Flietkau’s complaint, regardless of his feelings for Mr. Flietkau as a person or as an employee.

Section 28 of the *Regulation* provides that the penalty for a contravention of Section 46 of the *Regulation* is \$500. The amount of the penalty is not discretionary. The penalty in this case was the amount mandated by legislation. It cannot, therefore, be argued that the delegate erred in this aspect of the Determination.

The appeal of the Penalty Determination is hereby dismissed.

## **2. The Fietkau Determination**

At the hearing, Mr. Driedger offered to pay Mr. Flietkau in accordance with a settlement agreement that was entered into between the two back in October 2001. He produced an “official cheque” from a financial institution in the amount of \$1,726.29. The total settlement amount was \$2,211.24 for a “full and final settlement” of the Employer’s appeal of the Flietkau Determination. A document filed with the Delegate indicated that the Employer had deducted and remitted \$49.75 (EI), \$82.54 (CPP) and \$352.66 (tax), for a total of \$484.95. Mr. Flietkau accepted this settlement and took possession of the cheque for \$1,726.29.

In the result, there is no need for me to adjudicate the Employer’s appeal.

## **ORDER**

Pursuant to Section 115 of the Act, I order that the Penalty Determination in this matter, dated August 3, 2001 be confirmed.

Pursuant to Section 115 of the Act, I order that the Flietkau Determination in this matter, dated August 3, 2001 be cancelled, provided that the terms of settlement are complied with.

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**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**