Employment Standards TRIBUNAL

An appeal

- by -

Capital Environmental Resource Inc.
(the “Appellant”)

- 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.: 2002/541

DATE OF DECISION: January 15, 2003

DECISION

OVERVIEW

This is an appeal by Capital Environmental Resource Inc., pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director of Employment Standards (the "Director") issued on October 22, 2002 which imposed a $500.00 penalty. The Determination concluded that the Employer had contravened 28(b) of the *Employment Standards Regulation* (the "*Regulation*") by failing to "produce" certain records, namely daily hours worked by two employees.

FACTS AND ANALYSIS

The Appellant take issue with the Determination and wants it cancelled. As the Appellant, it has the burden to persuade me that the Determination is wrong. In my opinion, it has failed to lift that burden and the appeal is dismissed.

In *Narang Farms and Processors Ltd.*, BCEST #D482/98, the penalty process is summarized 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 material facts of this appeal are relatively straight forward and largely not in dispute.

On August 27, 2002, the Delegate issued a Demand for Employer Records, including daily hours. It appears that the Employer failed to produce the requested records and the Delegate issued a $500 penalty determination on October 2, 2002. This determination was paid by the Employer and not appealed.

On October 2, 2002, the Delegate again issued a Demand for Employer Records. The Demand was necessary, according to the Determination, because the Appellant Employer had failed to provide information voluntarily. The Delegate found that "no record of daily hours was submitted for Shaylene Smith or Barry Scott for the periods demanded." The documents were to have been produced by October 15, 2001. I understand from the Delegate's submission, and this appears not to be in dispute, that documents dealing with daily hours for one of the complainants (Scott) were produced on October 31, 2002. Similar records for the other complainant (Smith) were not produced because they did not exist. While the October 2 Demand was served on the employer, the Delegate, who had had extensive contacts with counsel for the Employer, also provided a copy to counsel via fax.

The Appellant argues, in effect, that the penalty is unreasonable in the circumstances. It says that the Delegate should have been able to discern the necessary information from the records produced.

In my view the Employer misses the point. The Demand clearly and expressly included records pertaining to "daily hours." Regulation 46 states that a person required to produce and deliver records must produce or deliver "as and when required." In my view, there is a clear statutory obligation to produce and deliver such records as may exist. Obviously, if certain records do not exist, they cannot be produced or delivered.

In this case, the Employer was served with two Demands. The Delegate issued a penalty for the failure to comply with the first Demand. Still, the Employer did not comply. The Employer's view that the records produced are sufficient, is not a defence in my view. The Demand (under appeal), which was served on the Employer and faxed to counsel, clearly required the production of "all records." The Employer did not comply with the Demand. It produced the records late, *i.e.*, after the date set out on the Demand. Moreover, it appears from the appeal submission that the Appellant, even as of the filing of the appeal, still has records for one of the complainants (Scott) not yet produced. The submission reads:

> "With regard to Mr. Scott, the employer does have some time cards which show daily hours worked and *will* produce these records; however, it is submitted that from the records already produced, the Branch was able to discern all necessary information. If the Branch required further information, it could simply have asked for it and it would have been produced." (Emphasis added)

In the circumstances, I am of the view that the penalty was proper. As noted in the Determination, the failure to produce relevant records, at the very least, delays the investigation into a complaint.

The Employer says that it appears that the Delegate "has a particular dislike for this company" and acted in bad faith. I add that I see nothing to support that contention.

Briefly put, I am not persuaded that the Delegate erred and the Determination stands.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated October 22, 2002 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal