

An appeal

- by -

Hernandez Hotels Corp.

- 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

TRIBUNAL MEMBER: John Savage

FILE No.: 2004A/206

DATE OF DECISION: January 27, 2005

DECISION

SUBMISSIONS

Justine Heinz for Hernandez Hotels Corp., Appellant

Terry Hughes for the Director of Employment Standards, Respondent

OVERVIEW

The Employment Standards Tribunal determined that this appeal should proceed by way of written submissions. Written submissions were received from the Appellant and the Director of Employment Standards.

Andre Mollon (“Mollon”), a dishwasher, was terminated by his employer. A complaint was filed by Mollon with the Employment Standards Branch claiming that the employer, Hernandez Hotels Corp. (“Hernandez”) had contravened sections 63 and 45 of the *Employment Standards Act*, by failing to pay compensation for length of service and failing to pay statutory holiday pay for Christmas Day, December 25, 2003.

During the course of the investigation a Delegate of the Director issued a Demand for Employer Records on September 16, 2004 to Hernandez. The Demand for Employer Records was delivered to the Registered and Records office of the company on September 17, 2004 and to the addresses of the two directors on the same date.

No issue is taken concerning receipt of the Demand for Employer Records.

The Demand for Employer Records required payroll records relating to wages, daily hours of work and conditions of employment and all documents relating to the termination of Andre Mollon.

No issue is taken with the content of the Demand for Employer Records.

The Demand for Records required Hernandez to produce records to the Employment Standards Branch Office on or before Friday October 1, 2004. A hearing was scheduled to commence and did commence on October 12, 2004 on the substantive issues of Mollon’s complaint.

No records were supplied to the Delegate and Hernandez did not appear at the hearing of the complaint, communicate its position to the Delegate or provide any explanation for failing to deliver records until this appeal.

The Delegate of the Director issued a Determination dated October 18, 2004 finding that Hernandez contravened section 46 of the *Employment Standards Regulation*, B.C. Reg. 396/95. An administrative penalty was imposed pursuant to Section 29 of the *Employment Standards Regulation* of \$500.

Hernandez appeals seeking cancellation of the Determination on the specified ground that evidence has become available that was not available at the time the Determination was being made.

The explanation given says that documents were not filed by a previous employee, and that corrections and adjustments were necessary which caused a delay in issuing a severance cheque. Ultimately, no issue was taken with the complaint and the employer thought the file had been closed.

ISSUES

1. If no issue is taken from the substance of the complaint, is it nevertheless necessary to comply with a Demand for Employment Records?
2. If corrections or adjustments are necessary to records is such an excuse for failing to provide records in a timely way?
3. In the circumstances of this case was there new evidence available that was not available at the time of the hearing?

LEGISLATION

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination;
or
- (c) evidence has become available that was not available at the time the determination was being made.

The burden of establishing that the Determination is incorrect rests with an Appellant.

An employer's obligation to keep and produce employment records is an unambiguous statutory requirement of the *Employment Standards Act*.

Section 28 of the Act requires that the employer keep records for each employee of personal information, commencement date, wage rates, hours worked, benefits paid, gross and net wages, deductions, statutory holidays, annual vacations and other information. It reads as follows:

- 28(1) For each employee, an employer must keep records of the following information:
- (a) the employee's name, date of birth, occupation, telephone number and residential address;
 - (b) the date employment began;
 - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
 - (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
 - (e) the benefits paid to the employee by the employer;
 - (f) the employee's gross and net wages for each pay period;
 - (g) each deduction made from the employee's wages and the reason for it;
 - (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;

- (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
- (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.

During the course of an investigation the Director may inspect and require production for inspections records required to be maintained under the Act:

85(1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or 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 to deliver to a place specified by the director, any records for inspection under paragraph (c).

By subsection 46(1) of the *Employment Standards Regulation*, such records must be produced “as and when required”:

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

A breach of the Act or Regulation is an offence:

- 125(1) A person who contravenes a requirement of Parts 2 to 8 commits an offence.
- (2) If a corporation commits an offence under this Act, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence commits an offence.
- (3) Subsection (2) applies whether or not the corporation is prosecuted for the offence.
- (4) Section 5 of the Offence Act does not apply to this Act or the regulations.

By section 29 of the *Employment Standards Regulation*, B.C. Reg. 396/95 as amended, a contravention of the Act and can give rise to a prosecution or an administrative penalty, but if an administrative penalty is imposed there can be no prosecution:

- 29 (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, a person who contravenes a provision of the Act or this regulation, as found by the director in a determination made under the Act, must pay the following administrative penalty:
 - (a) if the person contravenes a provision that has not been previously contravened by that person, or that has not been contravened by that person in the 3 year period preceding the contravention, a fine of \$500;
 - (b) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under that paragraph occurred, a fine of \$2 500;
 - (c) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under paragraph (b) occurred, a fine of \$10 000.

...

- (4) If an administrative penalty is imposed on a person, a prosecution under the Act or this regulation for the same contravention may not be brought against the person.

ANALYSIS

The requirement to keep section 28 records and produce records “as and when required” are unambiguous statutory obligations on an employer. The accurate keeping of such records serves the employer as well as employees as it will normally produce the best evidence of facts memorialized in those records, being a contemporaneous business record of events.

In this case, the Demand for Employer Records arose in the course of a dispute concerning termination pay for length of service and statutory holiday pay. The provision of records was directly relevant to the dispute set for hearing. The records were not provided in a timely way, or at all for the hearing, no reasons were given for not providing the records before the hearing, nor was an extension of time requested.

After the Delegate issued his Determination Hernandez for the first time sought to give reasons for failing to comply with the Demand.

One reason given for failing to comply is the contention that the records were not accurate and required correction. In my opinion the alleged inaccuracy of records is not an excuse to the timely production of records pursuant to a Demand for Employer Records. Whether the records are accurate or not, the provision of the existing records was required by the Delegate in a timely way to deal with the issues in dispute. The Demand and requirement to comply was both reasonable in the context of the issues and authorized by the Act.

The second reason given for failing to provide records was that, ultimately, no issue was taken with the complaint. The record provided me and the Reasons for Determination make clear that Hernandez had made no such concession to the Delegate. Indeed, the Record of Employment issued alleged that dismissal was for “miss use of company equipment”. As noted by the Delegate in the Reasons for Determination on the substantive issues:

The employer did not attend the complaint hearing held on October 12, 2004. The employer did not provide any payroll records in response to the Demand for Employer Records, either by the due date of October 1, 2004 or at the hearing held on October 12, 2004. The employer did not make any contact with our office explaining why the payroll records were not produced. The employer did not make any requests for an extension of the time to provide the records. The employer did not make any requests to adjourn the hearing that was scheduled, or provide any explanation or reason as to why they did not attend.

In any event, even if no issue was taken with the substance of the complaint, the obligation to provide records arises once the appropriate Demand is made. Unless the Delegate cancels the Demand, the obligation continues. If an employer thinks they have reached a resolution with an employee it remains incumbent on them to communicate that with the Director and seek cancellation of the Demand. The Director may or may not end its investigation faced with this information.

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal established four conditions that must be met before new evidence will be considered. The appellant must establish that:

- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

In this case what is alleged as the “new evidence” is unclear. If it is the recalculation of the funds owed it is information that could have been supplied in a timely way in response to the Demand. If it is the employer’s belief that a resolution had been reached, that information too could and should have been presented in a timely way to the Director. In my opinion all of this evidence could, with the exercise of due diligence, have been presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made. Thus, the conditions for the receipt of new evidence have not been satisfied. In my opinion, however, even if the conditions for the receipt of new evidence had been met, the Delegate did not err in his Determination.

Having found a contravention of section 46 of the Regulation, there is no discretion to determine the amount of the penalty, which is fixed by section 29 of the Regulation: *Re Royal Star Plumbing, Heating & Sprinkler Ltd.*, [1998] BCESTD No. 56 (Q.L.), (22 January 1998), BCEST #D034/98.

In the circumstances, there is no merit to the appeal. The appeal is dismissed.

ORDER

The Determination of the Director of October 18, 2004 that, *inter alia*, Hernandez Hotels Corp. is required to pay an administrative penalty in the amount of \$500 is confirmed.

John Savage
Member
Employment Standards Tribunal