

An appeal

- by -

Fiction Restaurant Ltd.

- 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:** Robert Groves

**FILE No.:** 2004A/186

**DATE OF DECISION:** February 8, 2005

## DECISION

### OVERVIEW

This is an appeal by Fiction Restaurant Ltd. (“Fiction”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a determination (the “*Determination*”) issued by a delegate of the Director of Employment Standards (the “*Delegate*”) on June 29, 2004 ordering Fiction to pay an administrative penalty of \$500.00 for contravening Section 46 of the *Employment Standards Regulation* (the “*Regulation*”) when it failed to produce employer records as required under Section 85(1)(f) of the *Act*.

The assessment of the administrative penalty was made in accordance with Section 29 of the *Regulation*, and arose as a result of a complaint filed with the Employment Standards Branch by one Jeff Wernbacher (“*Wernbacher*”) claiming that Fiction had contravened Sections 18, 21, 25 and 58 of the *Act*.

While Fiction delivered a request for an appeal in Form 1 to the Tribunal before the close of business on August 6, 2004, the last day of the time period within which the *Determination* stated an appeal could be filed under the *Act*, the Form 1 was incomplete, and it was not accompanied by the materials in support of the request specified in the Form 1, or the Rules of Procedure of the Tribunal concerning appeals. Fiction did not deliver a completed Form 1, and the other documents required to perfect its appeal, until August 13, 2004.

On August 16, 2004, the Tribunal invited the *Delegate* to make submissions on the question whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and extend the time period for requesting an appeal. The *Delegate* delivered a submission to the Tribunal dated August 31, 2004 asserting that no extension should be granted (the “*Delegate’s Submission*”).

By letter dated September 1, 2004, the Tribunal forwarded a copy of the *Delegate’s Submission* to Fiction and invited it to make any further reply by September 16, 2004. No reply was received.

On September 20, 2004, the Tribunal gave notice that the issue whether the deadline for requesting an appeal should be extended would be decided on the basis of the written submissions received from the parties. In a Decision dated October 26, 2004, the Tribunal determined that it should extend the time period within which Fiction might request an appeal to August 13, 2004, the date Fiction delivered a proper request to the Tribunal, with the result that Fiction’s appeal was permitted to proceed on its merits.

By letter dated October 27, 2004 the Tribunal informed the Director that she might make further submissions concerning the merits of the appeal should she wish. Those submissions were to be received by November 18, 2004. No further submissions were received.

### ISSUE TO BE DECIDED

Is Fiction bound to pay the administrative penalty of \$500.00 imposed on June 29, 2004?

## FACTS

The record provided to the Tribunal reveals the following:

- Wernbacher having filed a complaint, the Delegate contacted the principal of Fiction, one Sean Sherwood (“Sherwood”) on March 18, 2004 and, *inter alia*, requested Fiction’s response to the complaint, and “records”.
- Having received no response by April 19, 2004, the Delegate telephoned the restaurant premises operated by Fiction and requested of an employee that Sherwood call the Delegate. Sherwood did not call, and on April 27, 2004 the Delegate sent a registered letter to Fiction enclosing a Demand for Employer Records pursuant to Section 85 of the *Act*, with a stipulated return date of May 17, 2004. The Demand stated that a failure to produce the records would result in a determination being issued which, if a contravention of the *Act* were found to have occurred, would result in the imposition of an administrative penalty of at least \$500.00.
- The records did not arrive by May 17, 2004. On May 18, 2004 the Delegate left another message for Sherwood to call.
- On May 20, 2004 the April 27, 2004 registered letter was returned to the Branch, marked “unclaimed”. The Delegate telephoned the Fiction premises again on May 21 and 27, 2004, leaving messages for Sherwood.
- On June 1, 2004, Sherwood left a message to return his call. On either June 2 or 3, 2004, the Delegate reached Sherwood on his cell phone. According to the Delegate, Sherwood explained that “no one picked up registered mail as the restaurant didn’t open until later in the day and that in any event registered mail usually meant bad news.” Sherwood promised a response and the records.
- On June 10, 2004, the Delegate sent, by regular mail, a further letter to Fiction, attaching a copy of the April 27, 2004 correspondence, and advising that if Fiction did not supply the records within 10 days an administrative penalty of \$500.00 would be levied.
- No response or records having been received within the 10 days stipulated, the Delegate issued the Determination dated June 29, 2004, which contained the finding that Fiction had contravened Section 46 of the *Regulation*, and the order that Fiction pay an administrative penalty of \$500.00.

## ANALYSIS

For the purposes of this appeal the relevant portions of Section 85(1) of the *Act* read as follows:

*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).*

Section 46(1) of the *Regulation* reads:

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.*

The apposite portion of Section 29 of the *Regulation* reads:

29.(1) *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.*

The record reveals that in his first communication with Sherwood on March 18, 2004, the Delegate requested Fiction's employer records relating to Wernbacher, and he renewed that request on several occasions thereafter, without result.

Sherwood says that all the “tools” the Delegate needed “were a telephone and one working finger” in order to achieve compliance. But the record shows that the Delegate did communicate at least twice by telephone with Sherwood, during which discussions he requested the employer records.

On April 27, 2004, the Delegate forwarded by registered mail, to Fiction’s correct business address, a Demand for Employer Records pursuant to Section 85 of the Act, with a stipulated return date of May 17, 2004. Section 122(2) of the *Act* specifies that since service was by registered mail, the Demand was deemed to be served 8 days after it was deposited in a Canada Post Office. No records were delivered in response to the Demand, notwithstanding that Sherwood received notices from Canada Post advising that he had mail.

If these were the only facts on the basis of which an administrative penalty had been imposed and a determination issued, Fiction would have been hard pressed to convince me that its appeal should succeed.

The difficulty I have, however, is that it does not appear that the Delegate issued the Determination imposing the administrative penalty as a result of Fiction’s failure to respond to the Demand for Employer Records sent on April 27, 2004, which stipulated a return date of May 17, 2004. Rather, the Determination was issued because Fiction did not respond to further correspondence from the Delegate dated June 10, 2004 advising that if Fiction did not supply the records within 10 days thereafter, an administrative penalty of \$500.00 would be levied. That June 10, 2004 correspondence was sent by regular mail, and there is no evidence that Fiction, Sherwood, or anyone else on behalf of the company ever received it.

As was stated in *D.E. Installations Ltd.* BCEST #D397/97 the Tribunal takes a strict view that fair procedures be followed when serving Determinations and Demands for Employer Records. In order for an administrative penalty to be validly imposed for failure to produce or deliver records pursuant to Section 46 of the *Regulation*, it must be shown that the person from whom the records were requested failed to produce or deliver them “as and when required”.

Here, the deadline which caused the penalty was the 10 day deadline set out in the June 10, 2004 correspondence from the Delegate to Fiction, and not the May 27, 2004 deadline referred to in the April 27, 2004 letter and the Demand which accompanied it. Since that June 20, 2004 correspondence was sent by regular mail, there is no deemed service under the *Act*. In the absence of proof that Fiction received that correspondence, and therefore became aware of the final deadline, it cannot be said that Fiction failed to produce or deliver the records “as and when required” under Section 46 of the *Regulation*.

I have decided, therefore, that in the particular circumstances of this case the administrative penalty was improperly imposed.

### **ORDER**

The Determination dated June 29, 2004 ordering Fiction to pay an administrative penalty of \$500.00 for contravening Section 46 of the *Regulation* when it failed to produce employer records as required under Section 85(1)(f) of the *Act* is cancelled.

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**Robert Groves**  
**Member**  
**Employment Standards Tribunal**