

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 -

Royal Star Plumbing, Heating & Sprinkler Ltd.
("Royal Star" of the Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 97/770

DATE OF DECISION: January 22, 1998

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DECISION

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on October 7, 1997 which imposed a penalty of \$500.00 on Royal Star for “failing to produce or deliver records.” The Employer claims that the Determination is wrong and says it did produce the records demanded. The Employer asks that the penalty be set aside.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the Determination should be varied, confirmed or cancelled.

FACTS

On August 27, 1997, the Director’s delegate issued a Demand for Employer Records. Royal Star does not dispute that the Demand was issued. The Demand requested that the Employer “disclose, produce and deliver employment records” for a certain employee, for a certain period, by a certain time and date.

The delegate found that the Employer

“failed to produce a record of daily hours, wage rates, statutory holidays and vacation pay in contravention of Section 28 of the Employment Standards Act. Some records were produced in the time required but they are inadequate for the reasons given. You contravened Section 46 of the Employment Standards Regulation by failing to produce or deliver the records as and when required.”

The submission by the Director’s delegate notes that the records produced were deficient in that they did not provide the employee’s name, wage rate, hours worked per day and statutory holiday calculation. The delegate contacted the Employer’s accountant to secure more complete records but was told that the records presented were those that were available. In the result, the delegate imposed a \$500.00 penalty on the Employer.

The Employer states that it delivered the records it had. The Employer says that it attempted to contact the Director's delegate but did not succeed. Royal Star states that it did not hear from the Director's delegate until the Determination was issued.

ANALYSIS

Section 28 of the *Act* requires that the employer keep records of certain information and provides (in part):

“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 the employment began;
- (c) the employee's wage rate...;
- (d) the hours worked by the employee on each day...;
- (h) the dates of statutory holidays taken by the employee and amounts paid by the employer;”

Section 46 of the *Employment Standards Regulation* (the “*Regulation*”) provides that a person required under Section 85(1)(f) of the Act to produce records, must produce and deliver the records as and when required.

In my view, the *Act* and the *Regulation* clearly distinguish between the obligation to “keep” certain records and the obligation to “produce” such records as and when required. An employer may be in breach of one or both of these requirements.

Section 98 of the *Act* provides the Director's delegate with the discretion to impose a penalty in accordance with the prescribed schedule. Section 28 of the *Regulation* establishes a penalty of \$500.00 for each contravention of Section 28 of the *Act* and Section 46 of the *Regulation*. The Director, or her delegate, has no discretion to determine the amount of the penalty once she, or her delegate, has determined that a contravention of Section 28 of the *Act* and Section 46 of the *Regulation* has occurred (see Section 28 of the *Regulation*) (see, for example, *Mega Tire Inc.*, BCEST #D406/97; and *Lakeside Office Systems Ltd.*, BCEST #D166/97).

The Determination states that the Employer failed to produce records in contravention of Section 28 of the *Act*. Section 28 of the *Act* imposes an obligation on an employer to “keep” certain records. The thrust of the Determination is the failure to produce records and, hence, the breach of Section 46 of the *Regulation*. The Determination acknowledges that the Employer produced “some” inadequate records. However, as the Employer delivered what records it had “as and when required,” in a timely fashion, the Employer did not breach Section 46 of the *Regulation*. The Determination, in my view, did not correctly state the statutory provision alleged to have been breached.

In this case, there is evidence before me upon which I can reasonable conclude that the records kept by the Employer were deficient. The hand written records submitted by Royal Star to the Director’s delegate only indicated indicated the employee’s first name, total hours per pay period, gross pay, deductions for CPP, EI, tax and net pay. Indeed, the record submitted to the tribunal by the Employer, essentially sets out the same information, albeit in a typed form. The records did not contain the other information required by Section 28(1)(a)-(d) and (h) of the *Act*.

The penalty for a violation of Section 28 of the *Act* or Section 46 of the *Regulation* is the same-- \$500.00 for each contravention. Moreover, Section 123 of the *Act* provides that a “technical irregularity does nor invalidate a proceeding under this Act”. However, in my view, as the penalty provisions of the *Act* and *Regulation* are in the nature of quasi-criminal regulatory offence provisions, a party against whom a penalty has been imposed, is entitled to know what specific statutory provision they are alleged to have breached, and such breach must be strictly proven (*Mega Tire*, above). In this case, the Employer correctly argued that it had provided what records it had “as and when required”. As such, the failure of the Director’s delegate to correctly state the statutory provision alleged to have been breached, deprived the Employer of the opportunity to properly appeal the Determination, or explain why a penalty should not have been imposed. In the result, I find that the failure of the Director’s delegate, is not a mere “technical irregularity”.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated October 7, 1997 be cancelled.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal