

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 -

Valley Caterers Ltd.
("Valley")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 98/798

DATE OF DECISION: February 5, 1999

DECISION

OVERVIEW

This is an appeal by Valley Caterers Ltd. (“Valley”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued by a delegate of the Director of Employment Standards (the “delegate”) on November 24, 1998. The delegate imposed a penalty of \$500.00 on Valley for “failing to produce proper payroll records”. Valley effectively asks that the penalty be set aside.

ISSUE TO BE DECIDED

The issue to be decided is whether the delegate correctly decided to impose a penalty on Valley.

FACTS

On October 30, 1998, a delegate of the Director of Employment Standards issued a Demand for Records to Valley. The Demand indicated that records for two employees were to be delivered to the Employment Standards Branch office in Abbotsford by November 17, 1998. The Demand clearly stated that a failure to comply with it may result in a penalty of \$500.00.

There is no dispute that the Demand was received by Valley. It, however, did not produce “proper payroll records” to the delegate. The delegate found that no reasonable explanation for the failure to deliver records, which were relevant to his investigation, was given by Valley and he imposed a penalty of \$500.00 under Section 28(b) of the *Employment Standards Regulation* (the “Regulation”) for contravening Section 46 of the *Regulation*. It is noted in the Determination that had a reasonable explanation been given, the delegate would have exercised his discretion not to give a penalty.

Valley appealed the Determination on December 17, 1998. Phil Marchant, on behalf of Valley, provided the following reasons for failing to deliver the records to the delegate:

1. I was in & out of hospital when this was going on.
2. (The delegate) & I missed each other with phone calls.
3. My book keeper was gone on holidays in Florida and Alberta for a month. She is back on Dec 19/98. She had all records.
4. I can have records to (the delegate) on Dec 21/98.
5. The people involved in dispute Larry Larson & John Fair are going to be involved in litigation with Valley Caterers Ltd.
6. Any funds involved with Mr. Larson & Mr. Fair must be held in trust pending court outcome.

(reproduced as written)

In a reply submission dated December 22, 1998, the delegate stated he has not received any records from Valley. Mr. Marchant was invited to reply to the delegate, but no submission was received by the Tribunal.

ANALYSIS

Section 28 of the *Act* requires an employer to keep payroll records for each employee.

Section 46 of the *Regulation* provides that a person required to produce records, must produce and deliver the records as and when required.

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's delegate has no discretion to determine the amount of the penalty once she/he has determined that a contravention of Section 28 of the *Act* or Section 46 of the *Regulation* has occurred.

In this case, Valley was in receipt of a Demand which clearly advised it when and where to produce records and that failure to comply could result in a penalty, yet it did not forward any records to the delegate. I agree with the delegate that there has been no reasonable excuse provided by the employer for failing to deliver the records and that the imposition of a penalty for a contravention of Section 46 of the *Regulation* was entirely correct. I am not satisfied that Mr. Marchant made any attempt to contact the delegate after he received the Demand. He appears to say that he could not comply with the Demand or contact the delegate because he was in and out of the hospital, but there is no support for that assertion. Nor is there any support for his assertion that he made phone calls to the delegate in reply to the Demand. Furthermore, the fact that his accountant may have had his records does not relieve him of his responsibilities under the *Act* to keep and provide payroll records. Moreover, at least as of December 22, 1998, Mr. Marchant has never provided any records to the delegate. Finally, Mr. Marchant's statements regarding litigation between Valley and its former employees and that funds should be held in trust pending outcome of the litigation are irrelevant to the issue to be decided in this appeal.

For the above reasons, I conclude that Valley has failed to meet the onus on it to demonstrate any error made in the imposition of the penalty.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated November 24, 1998 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal

NE:sa