

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 -

Westside Stables Inc. and Langely's Country Living Magazine
("Westside")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Alfred Kempf

FILE NO.: 97/853

DATE OF DECISION: February 3, 1998

DECISION

OVERVIEW

This decision deals with the Penalty powers of the Director under section 98 of the Act for a failure to produce records in a timely fashion under Section 85 of the Act and section 29 of the Regulations.

The appeal proceeded by way of written submissions from the Director and Westside.

ISSUES TO BE DECIDED

Is Westside liable to pay a penalty in this case ?

FACTS

Having received a complaint on June 26, 1997 the Director contacted Westside via telephone on October 6, 1997. This seems to be the very first contact with the employer by the Employment Standards Branch (“the Branch”).

Westside advised that prior to providing any information it would require a formal request for information.

On October 7, 1996, a Demand for Employer Records dated October 6, 1997, was sent to Westside via Certified Mail. The Demand required production of the records by October 21, 1996. The demand and the cover letter described below were the first written communication to Westside.

The letter requests that Westside submit calculations of various sums be submitted if Westside agreed to liability for same. The Employer was asked to submit records if it believed it had no liability.

The letter also set out that: “Please note that failure to produce records may result in a \$500 penalty, as per Section 28 of the Employment Standards Regulations” (emphasis added).

While it is not entirely clear I find that Westside received the Demand between October 15 and 17, 1997.

Westside did not produce records within the time stipulated.

There were no follow calls or letters regarding the records.

A Penalty determination was issued on November 10, 1997. No reasons for the Director's exercise of discretion to issue a Penalty were provided in the Determination.

Westside appeal this Determination saying that it could not comply with the demand because the requested documents were at its' accountant for year - end purposes. Westside indicates that the letter accompanying the Demand indicated only that a penalty may be issued and that Westside expected some further communication prior to a Penalty being issued.

Westside's accountant verified by letter that he had the payroll records until October 31, 1997 and could not be returned to Westside "prior to October 1997 due to the meetings that did not materialize between myself and Mr. Millaire."

The Director's submission on the appeal took the form of copies of certain file materials. There is no indication offered as to why a penalty was imposed in this case.

ANALYSIS

Section 98 of the Act indicates that the Director may impose a penalty for violations of the Act. The imposition of a penalty is not automatic under the Act.

Section 81 of the Act requires that determinations state the reasons for the determination.

In decision BC EST #D374/97 (the Super Save decision) the Tribunal stated:

Thus, in my opinion, when the Director's delegate exercises the discretionary power given by Section 98(1) of the Act, that power ought to be exercised in a way which is not arbitrary and the reasons for imposing the penalty must be stated clearly in the Determination.

The Penalty provisions have been described by the Tribunal as "onerous" *Monchelsea Investments Limited* (BC EST #D315/97) and "quasi-criminal" *Westminster Chevrolet Geo Oldsmobile Ltd.* (BC EST 210/97). The Director must indicate the reasons for the exercise of discretion to issue a penalty. That has not been in done in this case and the penalty must be set aside.

It is not necessary to comment on whether the Director in the circumstances of this case would have been justified in penalizing Westside. Westside ought to have communicated its difficulty in assembling the records to the Branch. However, given the wording of the Demand and the absence of follow-up communication from the Branch, it is understandable that Westside may have underestimated the importance of the deadline imposed by the Demand.

ORDER

For the foregoing reasons Westside's Appeal is allowed and the Determination is cancelled.

Alfred Kempf
Adjudicator
Employment Standards Tribunal

AK:cef