

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 -

Fairex Enterprises Limited
("Fairex" or the Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 97/862

DATE OF DECISION: February 3, 1998

DECISION

SUBMISSIONS

Ms. Linda Cheng on behalf of Fairex

Mr. David Oliver on behalf of the Director of Employment Standards

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 November 19, 1997 which imposed a penalty of \$500.00 on the Employer for “failing to produce or deliver records.” The Employer claims that the Determination is wrong and says it did produce the records it believed had been 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 April 15, 1997, the Director’s delegate issued a Demand for Employer Records. 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, including:

- “2. All records an employer is required to keep pursuant to Part 3 of the *Employment Standards Act* and Part 8, Section 46 & 47 of the *Employment Standards Act Regulations* (sic).”

Fairex does not dispute that the Demand was issued.

The Director’s delegate found as follows:

“You contravened Section 46 of the *Employment Standards Regulation* by failing to produce or deliver the records as and when

required. The penalty for this contravention is \$500.00 which is imposed under Section 28 of the *Employment Standards Regulation*.”

The submission by the Director’s delegate notes that the records produced were deficient in that they did not provide the hours worked per day and vacation pay.

The Employer states that it delivered the records it believed it had to deliver. When the Employer received the Demand for Employer Records, on April 22, 1997, the Employer’s Ms. Cheng contacted the Director’s delegate by telephone to ascertain what records she required. Based on that advice Ms. Cheng faxed the records to the Director’s delegate. The following day, Ms. Cheng again contacted the Directors’ delegate to ascertain whether the records produced were sufficient. The Directors delegate answered that she “would get back to” Ms. Cheng. Another employee of Fairex also contacted the Director’s delegate to ascertain the nature of the complaint she was investigating. The Director’s delegate did not return those calls. Fairex states that it did not hear from the Director’s delegate until the Determination was issued. The submission of the Director’s delegate does not dispute these facts.

ANALYSIS

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.

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 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 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).

In this case, there is disagreement, which I do not find material for the disposition of the present appeal, on whether the Employer kept the appropriate records. Section 28 of the *Act* requires that the employer keep records of certain information, including those pertaining to hours of work. There is nothing in Section 28 of the *Regulation* which limits the authority of the Director’s delegate to only impose a penalty for contraventions that are made knowingly. The Demand stated the records required to be produced.

In any event, that is not the end of the matter. I agree with my colleague in *Randy Chamberlin*, BCEST #D374/97, that Section 81(1)(a) of the *Act* requires the Director to give reasons for the Determination to any person named in it. Given that the power to impose a penalty is discretionary

and is not to be exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. It is not adequate to simply state that the person has contravened a specific provision of the *Act* or *Regulation*.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated November 19, 1997 be cancelled and the amount of the penalty returned to the Employer together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal