

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 -

Rainbow Angels Home Service Club
("Rainbow")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 98/011

DATE OF DECISION: February 12, 1998

DECISION

OVERVIEW

This is an appeal brought by Rainbow Angels Home Service Club (“Rainbow”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards on December 15, 1997. The Determination found that Rainbow had violated Section 46 of the *Employment Standards Regulation* (the “Regulation”) by failing to produce or deliver records pertaining to the employment of Antonio Reyes (“Reyes”) and imposed a penalty of \$500.00 under Section 28 of the *Regulation*.

ISSUE TO BE DECIDED

Was the penalty imposed properly by the delegate for a breach of Section 46 of the *Regulation*?

FACTS

On November 28, 1997 a Demand for Employer Records concerning Reyes’ employment was issued against Rainbow. The Demand stated that pursuant to Section 97 of the *Act* Rainbow was required to disclose, produce and deliver by December 9, 1997 all records relating to wages, hours of work and conditions of employment, and all records an employer is required to keep pursuant to Sections 10 and 40 of the *Act* and Section 6 of the *Regulation*.

Rainbow replied on December 10, 1997 by submitting a list of total hours worked each day by Reyes. In turn, the delegate issued the Determination which imposed the \$500.00 penalty because Reyes’ name, date of birth, occupation, phone number, residential address, start date of employment and wage rate were missing from the records.

Rainbow appealed on the basis that Reyes never provided it with information on his date of birth, occupation, S.I.N. number, residential address and therefore after one week he no longer worked for the company.

ANALYSIS

After considering the evidence, I conclude that the penalty must be set aside.

The Demand for Employer Records appears to have been issued pursuant to the old *Act* and not the new *Act* which was proclaimed on November 1, 1995 (S.B.C. 1995 c.38). The

pertinent provisions of the current *Act* are Sections 85 (Entry and Inspection Powers) and Section 28 (Payroll Records). The Demand for Employer Records therefore does not cite the correct statutory provisions of the *Act* which pertain to the Director's authority to request records and the employer's obligations to keep certain payroll records. Moreover, there is no evidence that Rainbow was advised that failure to comply with the Demand would result in the issuance of a penalty. There is no statement to that effect on the face of the Demand, and the delegate provided no documents or evidence to show that Rainbow was advised of the penalty provisions of the *Act*.

Section 98 of the *Act* states that the Director may impose a penalty for violation of the *Act*.

Given that the penalty provisions are "onerous" and "quasi-criminal" (see *Monchelsea Investments Limited* BC EST #D315/97 and *Westminster Chevrolet Geo Oldsmobile Ltd.* BC EST #D210/97) a party against whom a penalty has been imposed should be properly advised of their obligations under the *Act* and *Regulation*, including the precise statutory provisions involved, and the repercussions it faces if it fails to comply.

In my view, the penalty was not properly imposed in this case. In the Demand for Employer Records the delegate failed to identify the correct statutory provisions related to the production of payroll records. The penalty was imposed for a violation of Section 46 of the *Regulation*. Section 46 of the *Regulation* states that where a person is required to produce records under Section 85 of the *Act* the person must do so as and when required. The delegate, however, never advised Rainbow it was required to produce records pursuant to Section 85 of the *Act*. The delegate also failed to advise Rainbow that a \$500.00 penalty would be imposed if it did not produce the records as and when required.

For these reasons, I conclude that the penalty should be set aside.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated December 15, 1997 be cancelled.

Norma Edelman
Registrar
Employment Standards Tribunal

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