



An appeal

- by -

Ronald Taylor operating as Station Street Sandwich Garden
(“Ronald Taylor”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Sheila McDonald

FILE No.: 2000/746

DATE OF DECISION: February 7, 2001

DECISION

OVERVIEW

On July 13, 2000 Ms. Elizabeth Lyle issued a Demand for Records pursuant to section 85(1)(f) of the *Employment Standards Act* (the “*Act*”) to Ronald Taylor Operating as Station Street Sandwich Garden. This Demand was made because a past employee of Mr. Taylor’s had filed a complaint alleging unpaid wages, statutory holiday pay and vacation pay.

The records that were provided were incomplete and no information was provided as to the hours worked each day, whether the complainant worked on a statutory holiday or the amounts paid for statutory holidays.

Mr. William Bull subsequently issued a Determination ordering Mr. Taylor to cease contravening Section 28 of the *Act* and to comply with the requirements of the *Act*. He also found that Mr. Taylor had contravened Section 46 of the *Employment Standards Regulation* (the “*Regulation*”) by failing to produce proper payroll records. He, therefore, ordered payment of a \$500.00 penalty for this contravention that is imposed under section 28(b) of the *Regulation*.

ISSUE

Should the Determination be confirmed, varied or cancelled?

THE FACTS AND ANALYSIS

On April 18, 2000 Ms. Joan Walter filed a complaint against Ronald Taylor. She stated that she worked for Ronald Taylor as a cook. In her complaint, Ms. Walter alleged that she was not paid overtime rates in accordance with Section 40 of the *Act*. She claimed she did not receive meal breaks in accordance with Section 32 of the *Act* and she was not paid statutory holidays in accordance with Section 45 and 46 of the *Act*.

On June 26, 2000 Ms. Elizabeth Lyle wrote to Ronald Taylor informing him of the complaint and stating that should he dispute the claim then he should send her his written response and all payroll records, time sheets and other documents to support his position. On July 13, 2000 Ms. Lyle issued a “Demand For Employer Records” to Ronald Taylor to include:

- (1) all records relating to wages, hours of work and conditions of Employment.
- (2) all records an employer is required to keep pursuant to Part 3 of the *Act* and Part 8, Section 46 and 47 of the *Regulation*.

- (3) Schedules showing when the ½ hour eating breaks, required by Section 32 of the *Act*, are scheduled.

She required these to be disclosed by August 8, 2000. These records were demanded in order to conduct a thorough and accurate investigation of Ms. Walter's complaint.

On September 13, 2000 Ms. Lyle wrote to Ronald Taylor indicating that the records that he had delivered to the Employment Standards Branch were incomplete. She indicated that he had not indicated the hours worked each day, when the meal breaks were scheduled or whether statutory holidays were worked

All correspondence from Ms. Lyle to Ronald Taylor indicated that failure to comply could result in a \$500.00 penalty.

Ronald Taylor responded by writing on Ms. Lyle letter of September 13th and faxing it back to her. He made the following comments handwritten on the letter:

- (1) We always closed on stats ask your client.
- (2) Work started at 7:30 AM closing around 1:30 to 3:30. Try to remember this is a restaurant. Hours vary.
- (3) Lunch breaks were generally between 1:30 and 2:00. Your client often decided to leave early to pick her children up from school.
- (4) All breaks were paid for including coffee breaks.
- (5) The time cards you have clearly show the amount of holiday pay your client received as well as the time of holiday. If you can't figure out the time of holidays ask your client. This is petty on your part.

On October 12, 2000 Mr. William Bull issued a Determination to Ronald Taylor ordering Ronald Taylor to cease contravening Section 28 of the *Act* and imposing a penalty of \$500.00 for contravening Section 46 of the *Regulation*.

Ronald Taylor appealed the Determination on October 20, 2000. In Ronald Taylor's letter to the Employment Standards Tribunal dated October 27, 2000 he states that he has been running his own business for eighteen years. With respect to the payroll records requested he states, " due to a major recession in the Cowichan Valley I was forced to lay-off my bookkeeper who handled all payroll records. She in turn closed her business as such I have no way of contacting her to see if this one item (the daily time cards) were available or even saved for that matter.....The only thing I do not have and had no idea you had to keep were the daily time sheets". He further goes on to state that " The only specific care seems to be

the hours worked each day, which if I had I would turn over to the Ministry.....now that I am aware I need to keep the daily time sheets I am doing so”.

In the Director’s submission to the Tribunal he makes the point that to be able to investigate whether there was a violation of the *Act*, it is necessary to review daily records.

Section 28 of the *Act* states:

(1) For each employee, the employer must keep records of the following information:

(d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;

(h) the dates of the statutory holidays taken by the employee, the amounts paid by the employer.

(2) Payroll records must

(a) be in English,

(b) be kept at the employer’s principal place of business in British Columbia’

(c) be retained by the employer for 5 years after the employment terminates.

The Director further states that Ms. Lyle had offered to work with Ronald Taylor to insure that his payroll records met the requirements of the *Act*. He states that Ronald Taylor declined to work with the Branch.

In the Employer submission to the Tribunal, Ronald Taylor states that no offer of assistance was made by Ms. Lyle.

In Ronald Taylor ‘s letter to the Tribunal dated October 27, 2000 he states that he does not have the daily time sheets. He goes on to state that he was unaware that they were required. He has, however, been in business for eighteen years. The payroll records that were provided to the Branch have no daily breakdown of hours.

Section 28 of the *Regulation* establishes a penalty of \$500.00 for contravening Section 46 of the *Regulation*. Ronald Taylor was required to produce and deliver the payroll records required by the Director. He did not comply and in fact states he was not aware that he had to record hours worked per day by employees. Being unaware of his responsibility under Section 28 of the *Act* is the explanation he gives as to why the requested records were not

available. The unavailability of these daily hours has prevented Ms. Lyle from conducting a proper investigation into the complaint.

In BCEST ##150/97 the employer Lakeside also argued that it was unaware of its responsibility to maintain daily hours of work. It was found in that decision that Section 28 of the *Regulation* establishes a penalty for **each contravention** of Section 28 of the *Act* and Section 46 of the *Regulation*. Thus, the Director has no discretion concerning the amount of the penalty to be imposed once it has been determined that a contravention of Section 28 has occurred.

The evidence supports the fact that Ronald Taylor contravened Section 46 of the *Regulation* and the Director had no discretion in determining the amount of the penalty.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination be confirmed.

SHEILA MCDONALD

Sheila McDonald
Adjudicator
Employment Standards Tribunal