

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

A F Carpet Services Ltd.
("A F Carpet")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/110

DATE OF DECISION: May 1, 1996

DECISION

OVERVIEW

This decision deals with two appeals by A F Carpet Services Ltd. ("A F Carpet") against two determinations which were issued by two delegates of the Director of Employment Standards. Determination CDET# 000831 was issued on January 19, 1996 as a penalty for A F Carpet's failure to provide payroll records. Determination CDET# 001367 was issued on February 28, 1996 for failure to pay statutory holiday pay to Duane Brian Ruddock ("Ruddock") under Section 45 of the *Employment Standards Act*

A F Carpet has paid to the Director a cheque in the amount of \$609.06 to be held in trust pending the outcome of these appeals.

I have reviewed the written submissions made by A F Carpet and the information provided by the Director.

Consideration of this appeal falls under the transitional provisions set out in Section 128 of the *Act*.

ISSUE TO BE DECIDED

The issues to be decided are:

- has A F Carpet contravened Section 28 (Payroll Records) of the *Act*; and
- has A F Carpet contravened Section 45 (Statutory Holiday Pay) of the *Act*?

FACTS

Ruddock was employed by A F Carpet as a technician from January 3, 1994 to September 12, 1995. He was paid a salary and a commission. Ruddock filed a complaint on October 13, 1995 alleging that A F Carpet had not paid him (General) Statutory Holiday pay.

The current *Act* and *Regulation* was proclaimed into force on November 1, 1995 thereby replacing the former *Employment Standards Act* and *Regulations*. Part 5 of the current *Act* sets out employees' entitlement to "Statutory Holidays" which were described as "General Holidays" under the former *Act* and *Regulations*.

A delegate of the Director wrote to A F Carpet on December 5, 1995 requesting that daily time and payroll records be provided in connection with Ruddock's complaint.

A F Carpet responded on December 15, 1995 by providing payroll information for Ruddock for the period March 26, 1995 to November 6, 1995 but did not provide daily time records for the period prior to March 26, 1995.

Several telephone conversations took place between the Director's delegate and management staff of A F Carpet.

On January 2, 1996 the Director's delegate issued a "Demand for Employer Records" under Section 85 of the *Act* and required the records to be produced by January 16, 1996. A copy of the relevant sections of the *Act* was attached to the Demand which contained a warning that: "Failure to comply with a record requirement may result in a \$500.00 penalty for each contravention, as stated in Section 28 of the *Regulations*." The Demand required disclosure of records pertaining to Duane Ruddock for the period January 3, 1994 to September 12, 1995.

Mr. Robert Bunyan represented A F Carpet at a meeting with the Director's delegate on January 16, 1996 but did not produce records for the period January 3, 1994 to March 26, 1995 as demanded.

Determination CDET# 000831 was issued on January 19, 1996 ordering A F Carpet to pay a \$500.00 penalty for failing to produce the records described in the "Demand for Employer Records."

The investigation conducted by the Director's delegate revealed no evidence of Ruddock having been paid (general) statutory holiday pay at any time during his employment with A F Carpet. His calculations (attached to Determination CDET# 001367) show a total of \$572.87 wages owing for general holidays plus 4% vacation pay for a total amount payable of \$595.78 plus accrued interest owing under Section 88 of the *Act*.

ANALYSIS

A F Carpet offers the following reasons in support its appeal of CDET# 000831 which imposed a \$500.00 penalty for failure to produce records:

- Ruddock's last day of work was September 12, 1995, prior to the current *Act* being proclaimed into force on November 1, 1995;
- The former *Act* limited the recovery of unpaid wages to wages payable in the last six months of employment (Ref. Section 80 of the former *Act*);
- A F Carpet provided payroll records for the six month period (March/95 - September/95);

- “The company could not possibly keep Mr. Ruddock’s working hours”;
- Any contravention of the *Act* was unintentional and was not deliberate; and
- A F Carpet has co-operated fully with the Director’s delegate.

In addition, A F Carpet makes the following points concerning Determination CDET# 001367 (non-payment of statutory Holidays):

- At the beginning of his employment Ruddock was paid the greater of a bi-weekly salary or commissions;
- during that initial period Ruddock received his regular bi-weekly salary and a day off whenever a statutory holiday occurred; and
- A F Carpet agrees with the calculations made by the Director’s delegate concerning statutory holiday pay for the period April/95 to September/95.

Adjudication of this appeal falls under the transitional provisions of the *Act*. Section 128(3) of the *Act* states:

(3) If, before the repeal of the former *Act*, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that *Act*, the complaint is to be treated for all purposes, including section 80 of this *Act*, as a complaint made under this *Act*.

Section 80 of the *Act* states:

80. The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning

- a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment, and
- b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination, plus interest on those wages.

Imposition of penalty

Section 28 of the *Act* sets out the payroll records which an employer must keep for each employee. In particular, subsection (c) and (d) state:

(c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis,

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

Section 46 of BC Regulation 396/95 states:

Section 46, Production of records

A person who is required under section 85 (1) (f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required.

The letter dated December 5, 1996 to Robert Bunyan at A F Carpet states clearly that the Director's delegate required "...daily time and payroll records for the entire period of Ruddock's employment." However, A F Carpet's reply on December 15, 1995 provided records only for the period March 26, 1995 to November 6, 1995.

The "Demand for Employer Records" clearly required A F Carpet to produce:

1. all records relating to wages, hours of work, and conditions of employment. These records include daily record of hours and payroll.
2. all records an employer is required to keep pursuant to Part 3 of the *Employment Standards Act*. and Part 8 Section 46 and 47 of the *Employment Standards Act Regulation*."

The Demand contained a clear warning that failure to comply could result in a \$500.00 penalty being imposed.

A F Carpet's submission to the Tribunal states, in part:

"The company did not have accurate working hour for Mr. Ruddock as he did not follow company's working schedule but work on his own schedule."(sic)

Section 98(1) of the *Act* states:

(98)(1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.

Section 28 of BC Regulation 396/95 establishes a penalty of \$500.00 for each contravention of Section 28 of the *Act*.

It is clear from the evidence and A F Carpet's submission to the Tribunal that it breached Section 28 of the *Act* by not keeping a record of the hours worked by Ruddock. It is also clear that A F Carpet did not deliver records to the Director as required in the "Demand for Employer Records", thereby breaching Section 46 of the *Regulations*.

Section 98(1) of the *Act* gives to the Director the discretionary power to impose a penalty if she is satisfied that the *Act* has been contravened. When I consider the written request for records (December 5, 1995); the "Demand for Employer Records" (January 2, 1996); A F Carpet's response (December 15, 1995 and January 16, 1996); and A F Carpet's submission to the Tribunal (March 18, 1996) I do not accept that its failure to produce the payroll records for Ruddock's entire period of employment was unintentional.

For that reason, I conclude that the imposition of a \$500.00 penalty was a reasonable exercise of the Director's discretionary powers under Section 98 of the *Act*.

Statutory Holiday Pay

Section 44 and 45 of the *Act* state the following:

44. After 30 calendar days of employment, an employer must either
 - (a) give an employee a day off with pay on each statutory holiday, or
 - (b) comply with section 46.
45. An employee who is given a day off on a statutory holiday or instead of a statutory holiday must be paid the following amount for the day off:
 - (a) if the employee has a regular schedule of hours and the employee has worked or earned wages for at least 15 of the last 30 days before the statutory holiday, the same amount as if the employee had worked regular hours on the day off;
 - (b) in any other case, an amount calculated in accordance with the regulations.

A F Carpet argues that Ruddock was paid the greater of a bi-weekly salary or commissions earned "...at the beginning of his employment" and was paid for statutory holidays at that time. However, A F Carpet did not provide any payroll records or details to support that assertion.

The onus in this appeal rests with the appellant, A F Carpet.

The Director's delegate submits that "...no evidence was provided that Mr. Ruddock was paid for statutory holidays for the entire period of his employment." In addition, his investigation revealed that A F Carpet does not pay statutory holiday pay to employees who are paid on a commission basis.

In the absence of any records which would contradict the findings made by the Director's delegate, I accept the Calculation Schedule attached to Determination CDET# 001367 as a reasonable statement of the statutory holiday pay owing to Ruddock.

ORDER

I order, under Section 115 of the *Act*, that Determination CDET# 000831 and Determination CDET# 001367 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sf