

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-

511630 B.C. Ltd.

(the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/813

DATE OF HEARING: March 9th, 1999

DATE OF DECISION: March 10th, 1999

DECISION

APPEARANCES

Ron J. Wilinofsky Counsel for 511630 B.C. Ltd.
No appearance for the Director of Employment Standards

OVERVIEW

This is an appeal brought by 511630 B.C. Ltd. (the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 30th, 1998 under file number 059-159 (the “Determination”). By way of the Determination, the Director’s delegate levied a \$500 penalty against the employer for failing to produce employment records.

The employer’s appeal was heard at the Tribunal’s offices in Vancouver on March 9th, 1999 at which time I heard evidence and submissions from David Wilinofsky and from his brother and company solicitor, Ron J. Wilinofsky, on behalf of the employer. The Director did not appear at the appeal hearing although the Director did provide a brief written submission.

THE RELEVANT LEGISLATION

During the course of an investigation under the *Act*, a Director’s delegate may inspect relevant employment records [section 85(1)(c)] and, in addition, require that those records be produced for inspection [section 85(1)(f)]. Section 46 of the *Employment Standards Regulation* states that the person to whom a section 85(1)(f) demand is issued “must produce or deliver the records as and when required”. Section 98 of the *Act* authorizes the imposition of prescribed monetary penalties where “a person has contravened a requirement of [the *Act*] or the regulations”. In the event a person fails to produce employment records that have been properly demanded, a \$500 penalty may be imposed pursuant to section 28(b) of the *Regulation*.

FACTS

The uncontradicted evidence before me is that:

- on January 27th, 1998 a former employee, Mary Andersin, filed a complaint under the *Act* claiming unpaid wages;

- on April 24th, 1998 the delegate wrote to the employer advising of the complaint and asked that if the employer disputed the employee's claim, it should "remit copies of your payroll records and a written explanation by May 8th, 1998". The letter asked the employer to telephone the delegate "should you wish to discuss this matter further";
- The employer did not respond to the delegate's April 24th letter and the delegate's subsequent attempt to contact the employer by telephone was unsuccessful because the employer's telephone line had been disconnected;
- on July 23rd, 1998 the delegate forwarded, by certified mail, a "Demand for Employer Records"--this Demand required the employer to produce employment records relating to Ms. Andersin for the period February 1st, 1996 to June 1st, 1998 by no later than 4:30 P.M. on August 7th, 1998. The Demand was sent by certified mail to both the employer's business office and its registered and records office. In boldface, at the bottom of the one-page demand, was the following notice: "**Failure to comply with a record requirement may result in a \$500 penalty for each contravention as stated in Section 28 of the Regulations. See Attached Sheet.**" Appended to the Demand were the relevant provisions of the *Act* and *Regulation*;
- as evidenced by Canada Post receipts, the Demands sent to the employer's business office and to the employer's registered and records office were both received on July 27th, 1998;
- David Wilinofsky, the employer's principal (according to his affidavit sworn December 21st, 1998, he is the employer's "sole director, officer, shareholder and manager") admits that his brother--a lawyer whose office served as the employer's registered and records office--"advised [me] in the spring or summer of 1998 that the Employment Standards Branch was seeking certain documents from me".
- In that same affidavit, David Wilinofsky stated that employment records were not produced as demanded because: "Unfortunately I was unable to provide many of those documents, as many of my financial records were stolen from my vehicle, where I had placed them in order to take them to my accountant's office for the preparation of certain returns."
- the employer did not, nor does it now, contend that it, in fact, produced any records pursuant to the Demand.

In addition to the explanation set out in the above-mentioned affidavit, David Wilinofsky's testimony before me was that, for the most part, his payroll records were prepared and administered by the company's chartered accountant. As I understand the situation, Ms. Andersin would prepare a record of her hours worked which would, in turn, be forwarded to the accountant who would calculate the requisite statutory deductions and amount due and would then direct the employer to issue the appropriate cheque. At year-end, the accountant prepared the employees' records of employment (during the material time frame, Ms. Andersin and Mr. Wilinofsky were the only full-time employees although there was one other person who worked during seasonal peaks).

ANALYSIS

In my view, the employer has not satisfactorily explained its failure to produce the employer records that were demanded. The Demand was entirely proper on its face, it was sent and received by the employer and the employer concedes that no records were produced in response to the Demand. Indeed, the employer did not respond in any fashion; it simply chose to ignore the matter altogether.

The employer's present position is that the employment records in question were not produced because it was unable to do so, the records having been stolen. Even if that is true--and there is no independent evidence before me one way or the other--I note that in his affidavit, David Wilinofsky does not aver that *all* of the employer's employment records were stolen, only that *many* of the records were stolen. I have to query why the employer did not advise the delegate of this situation at the time the Demand was issued. In my view, at a minimum, upon receipt of the Demand the employer's obligation was to communicate with the delegate and advise as to what records it had in its possession or control and otherwise explain why it would not be able to fully comply with the Demand. Upon receiving the Demand, some measure of "due diligence" on the employer's part was called for; in the instant case, the evidence shows that the employer exhibited an altogether too cavalier attitude towards its statutory obligations under the *Act* and *Regulation* particularly when the employer had clear notice as to the possible monetary penalty that could be imposed if it did not respond to the Demand in a timely fashion.

I also query why the employer did not review the remaining records that it did have in its possession and communicate with the delegate. Further, based on the employer's own evidence, relevant records should have been in the possession of the accounting firm who actually prepared the employer's payroll documents. I have no evidence before me as to what efforts, if any, the employer made to ensure that the records in the possession of the company accountant were made available to the delegate.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of \$500.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal