

**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 -

Louis Zompanti operating General Flooring and Paint Service  
("Zompanti" or the Employer")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE NO.:** 97/925

**DECISION DATE:** March 6, 1998

**APPEARANCES/SUBMISSIONS**

Mr. Louis Zompanti on behalf of the Employer

Mr. Wayne Mackie 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 December 9, 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 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 November 25, 1997, the Director’s delegate issued a Demand for Employer Records (the “Demand”) for certain employees to be delivered at a certain time. The Director’s delegate determined that the Employer failed to produce the records:

“You contravened Section 46 of the *Employment Standards Regulation* by failing to produce or deliver the records as and when described. The penalty for this contravention is \$500.00 which is imposed under Section 28 of the *Employment Standards Regulation*.”

The Employer claims that the persons described in the Demand are not its employees and, consequently, does not possess such records. The Employer also states that it received the Demand at the same time as the Determination and was not given a fair chance to produce the records.

The Director acknowledges that it is possible that the Employer did not receive the Demand as it was “delivered by hand” to what may have been the Employer’s former address.

**ANALYSIS**

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. 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*. In my view, the Determination goes no further than stating that the Employer contravened the *Regulation*. Nothing in the Determination explains why the Director's delegate elected to exercise his power to issue penalty.

Moreover, where, as in the case at hand, the circumstances are such that the Employer may not have received the Demand because it was not served as required by Section 122(1) of the *Act*, that is, either "served on the person" or "sent by registered mail", the Determination based on that Demand cannot stand.

In the result, the Determination should be set aside.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated December 9, 1997 be cancelled and the amounts 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**