

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 -

478801 BC Ltd. Operating Azzi Pizza
("Azzi Pizza")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO: 96/116

DATE OF HEARING: June 13, 1996

DATE OF DECISION: June 17, 1996

DECISION

OVERVIEW

This is an appeal by 478801 BC Ltd operating Azzi Pizza (“Azzi Pizza”), Pursuant to Section 112 of the *Act*, against Determination # CDET 000819. The Determination was issued by a delegate of the Director of Employment Standards on January 19, 1996 and imposed a \$500.00 penalty for failure to provide payroll records contrary to Section 85 of the *Act* and Section 46 of the *Regulation*.

FACTS

The Director’s delegate issued a “Demand for Employer Records” on December 12, 1995 which required Azzi Pizza to disclose, produce or deliver all records relating to wages, hours of work and conditions of employment for three employees (Pisheyar; Ghalichechian; Moniezi). Azzi Pizza was required to deliver the records by December 19, 1995. It also contained clear warning that failure to comply could result in a \$500.00 penalty.

Marlon Blando’s (“Blando”) appeal on behalf of Azzi Pizza states that the Demand was not received, but that he is “... willing to show or to send the payroll record of the three employees.” Blando brought the payroll records to the hearing.

Blando’s evidence under oath at the hearing was that he did not receive the Demand until he received a copy of the attached Determination. He explained that he was very confused and believed that by sending copies of the ROE’s to the Director’s delegate that he had complied with the Demand.

The Director’s delegate gave evidence at the hearing that he sent the Demand by certified mail to Azzi Pizza and faxed a copy of it to Azzi Pizza’s legal counsel (McKitrick, Germmill, McLeod). He also gave evidence that he spoke to Blando by telephone on December 19, 1995 and extended the date for production of the records until December 22, 1995. Blando did not deliver the records on December 22, 1995. The Director’s delegate also stated that he contacted Blando on January 5, 1996. The records were not produced and the Demand was issued on January 19, 1996.

Blando gave evidence at the hearing that he faxed a copy of the Record of Earnings (ROE) for the three employees and believed this to be all that was required of him. He also stated that he went to the delegates office in early January 1996 without an appointment with his payroll records but the delegate was not there and he was unwilling to leave his original payroll records. The Directors delegate acknowledges receipt of the ROE's by fax, but gave evidence that he explained to Blando that he required all payroll records as set out in the Demand (not just ROE's).

Under cross examination Blando stated that he did not discuss the Demand with legal counsel. Legal counsel advised the Director's delegate in writing on December 31, 1995 that it did not represent Blando in this matter.

The Director's delegate could not provide proof at the hearing the Demand had been sent by certified mail. However, the documents disclosed by the Director to the Tribunal established that the demand was sent by fax to Azzi Pizza's legal counsel on December 12, 1995 at 12:09 p.m.

ANALYSIS

Section 85 (1)(c) of the *Act* gives the Director the authority to "...inspect any records that maybe relevant for an investigation." Section 85 (1)(f) requires a person to "produce or to deliver... any records for inspection." The Demand issued on December 12, 1995 makes specific reference to the authority granted under Section 85 to require disclosure of employment records.

Section 122(1) of the *Act* states:

- 122(1) A determination or demand that is required to be served on a person under this *Act* is deemed to have been served if
- (a) served on the person, or
 - (b) sent by registered mail to the person's last known address.

The Director's delegate argues that Section 122 (1) does not apply to the service of a "Demand for Employer Records" because Section 85 (1)(f) does not require a demand to be served on a person. The delegate argues that, under Section 85 (1)(f), the Director may require a person to produce or deliver records for inspection. He argues, further that issuing a "Demand for Employer Records" is a policy of the Employment Standards Branch rather than a statutory requirement of the *Act*. Thus he argues, the Director is not required to serve the Demand for the Employer Records by registered mail.

With respect, I find that line of argument to be somewhat convoluted, to say the least. The point is that in this particular appeal there is no evidence that Demand was delivered to Azzi Pizza whether by registered mail or by any other means. It would be a simple matter for the Director's delegate to have provided a copy of the "pink card" issued by Canada Post for each item of registered mail. No such evidence was tendered.

I accept Blando's evidence that he was confused initially about the difference between "Record of Employment" and payroll records. However, I find that Blando has not provided an acceptable explanation for his failure to disclose or deliver the records requested in the Demand. Exactly seven months elapsed between the date the Demand was issued and the date this appeal was heard. It simply is not acceptable for Blando to arrive at the hearing and express his willingness to disclose the payroll records. The Demand contained a clear warning that failure to comply may result in a \$500.00 penalty. I accept the delegate's evidence that he explained that the ROE's were inadequate and extended the date productions of documents on three separate occasions.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination # 000819 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

: