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 -

KEA Foods Enterprises Ltd.
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/043

DATE OF DECISION: March 24, 2000

DECISION

APPEARANCES:

Mr. Kuoc On	for the employer
M. Elaine Bellamore	for the Director of Employment Standards

OVERVIEW

This is an appeal by KEA Foods Enterprises Ltd. (the "Employer") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination dated January 6, 2000 imposing a penalty of $500.00 upon the employer for failing to produce proper payroll records.

ISSUE(S) TO BE DECIDED

Did the employer contravene Section 46 of the Employment Standards Regulations and, if so, is the imposition of the penalty appropriate?

FACTS

The employer is the operator of a food store located on Main Street in Vancouver, British Columbia. On December 3, 1999 the Director's Delegate issued a Demand for Employer Records pursuant to Section 85 of the *Employment Standards Act*. The Demand, which was made pursuant to a complaint, required the employer to disclose, produce and deliver all records relating to wages, hours of work and conditions of employment. Furthermore the Demand asked for all records an employer is required to keep pursuant to Part 3 of the *Employment Standards Act* and Part 8, Sections 46 and 47 of the Employment Standards Regulations. The employer was required to produce those records by 4:00 p.m. on December 20, 1999. The file record indicates that the Demand was received by the employer on December 6, 1999.

The employer did not respond to the Demand. On January 6, 2000 the Director's Delegate issued a Determination stating that the employer had contravened Section 46 of the Employment Standards Regulations by failing to produce proper payroll records. The Director's Delegate imposed a $500.00 penalty under Section 28(b) of the Regulation.

The employer responded quickly when it received the Determination. The employer's representative spoke with the Director's Delegate on Monday January 10, 2000. The Delegate requested that the employer deliver the records no later than Tuesday January 11, 2000 before 4:30 p.m. The employer delivered the records by hand on January 11, 2000. That is, the employer complied with this amended directive made by the Director's Delegate.

In its defence the employer argues that it had no intention not to provide the records as requested. The employer states that December is its busiest month due to the Christmas and New Years'

Holidays. The employer pleads that his staff simply neglected to forward the Demand to him. The employer argues that once it received the Determination it acted immediately to comply. The employer seeks relief from the imposition of the $500.00 penalty.

The scheme of the *Act* provides a sound rational for the requirement to maintain and produce detailed employment records. Section 2 sets out the purposes of the *Act*. Section 2(d) reads:

> "The purposes of this Act are as follows:
>
> (d) To provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act:"

Section 28 of the *Act* requires the employer to keep detailed records of employee information. An overview of the provision requires that the employer keep certain personal data, the date employment began, wage rates, hours worked, benefits paid, gross and net wages for each pay period, deductions made from the wages and reasons for those deductions, statutory holidays taken by the employee, dates of annual vacation and credits and withdrawals from a time bank if such is kept. The records must be kept in English, maintained at the employer's principle place of business and stored for a minimum of 5 years from the date employment terminates.

Section 85 of the *Act* grants extensive powers of entry and inspection to the Director. Section 85(1)(c) and 85(1)(f) of the *Act* read:

> "For the purposes of ensuring compliance with this Act and the regulations, the Director may do one or more of the following:
>
> (c) inspect any records that may be relevant to an investigation under this Part
>
> (f) require a person to produce, or to deliver to a place specified by the Director, any records for inspection under paragraph (c)."

The requirement to produce records under the *Act* is dealt with in Regulation 46. That Regulation reads:

> "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 *Act* also provides an enforcement mechanism. That provision is found in Regulation 28. Regulation 28 reads:

> "The penalty for contravening any of the following provisions is $500.00 for each contravention;
>
> (a) Section 25(2)(c), 27, 28, 29, 37(5) or 48(3) of the *Act*;
>
> (b) Section 3, 13, 37.6(2) or 46 of this regulation."

The penalty of $500.00 is fixed by statute. There is no ability to exercise direction to reduce the amount. (Re: Rise Investments Ltd. (c.o.b. Nuffy's Donuts) BCEST # D116/97 (Crampton))

Where a complainant alleges improper payment of wages as defined by the *Act* the merits of that complaint can only be determined by an inspection of the records. The failure by an employer to maintain the required records, or to produce them if they have been properly kept, has the potential of causing prejudice both to the investigation and to the minimum employment standards to which employees may be entitled. The delay aspect of a failure to produce the records on demand is a factor that is considered when the Director makes a Determination under regulation 46. Furthermore, the delay or failure to produce the records has the effect of frustrating the intent of the *Act*. The severity of the penalty under Section 28(b) of the regulations is indicative of the Legislature's intent to deter any attempt to frustrate the *Act*.

Mr. On pleads that his employees failed to deliver the December 3, 1999 Demand to him. He states that his business was experiencing its peak seasonal demand and that his employees, most of whom are part-time, were paying more attention to servicing customers than processing mail. I do not accept that argument as a basis for relieving Mr. On of the penalty. Likewise I do not accept the argument that the employer did not intend to breach the *Act* as a basis for relief. Proof of intent is not required under Section 46 of the regulations. The employer agrees it did not comply with the original December 3, 1999 Demand. Section 46 is a specified provision under Section 28(b) of the regulations which attracts the mandatory $500.00 penalty. (Re: C.S.Q. Foods Ltd. (c.o.b. Bill Baily's Family Restaurant) BCEST # D118/97 (Crampton))

However, this case does have a peculiar circumstance. Once Mr. On learned of the January 6, 2000 Determination he contacted the Director's Delegate. In that conversation he inquired about the precise nature of the information that he was obliged to produce. The Director's Delegate explained the requirements to him. She also stated that he had until 4:30 p.m. the following day to produce the information. Mr. On complied.

In the circumstances of this case I view the January 10, 2000 conversation and Mr. On's compliance with the request as a basis for canceling the January 6, 2000 Determination. Under Section 86 of the *Act* the Director has the ability to vary or cancel a Determination. Section 86 reads:

> "The director may vary or cancel a determination."

I view the ultimatum given by the Director's Delegate on January 10, 2000 to produce the information by the close of business the following day as a variance of the January 6, 2000 Determination. Alternatively, if I am wrong in that analysis, I view the circumstances as constituting a cancellation of the January 6, 2000 Determination by the delegate with Mr. On being given a "last chance" to comply with the December 3, 1999 Demand. As stated previously he did comply in a timely fashion. I find that immediate compliance is sufficient to grant relief from the penalty. The employer is not required to pay the $500.00 penalty.

ORDER

The Determination dated January 6, 2000 is cancelled.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal