

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 -

Canadian Petcetera Warehouse Inc.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO: 1999/42

DATE OF DECISION: April 1, 1999

DECISION

OVERVIEW

This is an appeal by Canadian Petcetera Warehouse Inc ("Petcetera") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination dated January 07, 1999 by the Director of Employment Standards (the "Director").

The Director imposed a penalty in the amount of \$500.00 under Section 28(b) of the *Employment Standards Regulation* (the "*Regulation*") for failing to deliver records to the Director following a demand for such production.

Petcetera has appealed the penalty determination on the basis that a reasonable explanation was provided but the determination makes no reference to it and that therefore the penalty is unfair.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether the penalty determination is a fair and reasonable exercise of the Director's discretion.

FACTS

The facts as set out in the determination are that on December 4, 1998, the Industrial Relations Officer ("IRO") issued a Demand for Employer Records pursuant to section 85(1)(f) of the *Act* to Petcetera. The Demand was in relation to complaints filed by two employees, Elsa Chu and Peter Mak. The IRO said that Petcetera failed to provide the records as Demanded and as no reasonable explanation was given imposed the \$500.00 penalty. This penalty was imposed in accordance with sections 28 and 46 of the *Regulation* which stipulates a \$500.00 penalty for failing to produce records as and when demanded.

Petcetera says that it is important to note that they had prior dealings with the same IRO about two previous employees. During the prior investigation they submitted to the IRO that daily time records were not kept for the employees because they were salaried employees paid monthly with no overtime worked or provided for. Petcetera says that when the new Demand for time records was delivered that they wrote to the IRO explaining that the situation was the same for employees Chu and Mak as it had been for the prior employees.

ANALYSIS

I will not recite the sections of the *Act* and *Regulation* which provide for the penalty in this case as they are not in issue. It is not argued that the Director does not have the authority to impose the penalty in this case. However, as the imposition of penalties is discretionary, this Tribunal has held that such imposition must be fair and reasonable under all of the circumstances.

The Determination states, in part, as follows:

No reasonable explanation for the failure to deliver was given. If one had been given, the Director would have exercised her discretion and not issued a penalty.

Nowhere in the Determination does the Director reflect the fact that Petcetera had sent in a letter explaining that hours of work records were not kept because the employees worked set hours on a monthly salary and that the hours of work and rates of pay were the same as the previous employees. In my opinion it is incumbent on the Director to at least address this issue. It may be that this explanation is simply untrue or insufficient or there may have been some other reason for it to be rejected. However to completely ignore the explanation and proceed to impose a penalty despite the employer's attempt to offer an explanation is not a reasonable exercise of discretion.

ORDER

I order, under Section 115 of the *Act*, that the Determination is cancelled.

JOHN M. ORR
Adjudicator
Employment Standards Tribunal