

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-

Edgar Niemann operating as Niemann's Bakery & Cafe
(the "Employer")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Hugh R. Jamieson

FILE NO.: 1999/89

DATE OF DECISION: April 8, 1999

DECISION

OVERVIEW

This appeal dated February 16, 1999, is brought by the Employer against a Determination issued by the Director on January 25, 1999, wherein a penalty of \$500.00 was imposed on the Employer for having failed to produce payroll records. The penalty was assessed pursuant to Section 28 (b) of the *Employment Standards Regulations*, B.C. Reg. 396/95 (the “*Regulations*”). The appeal is based on the Employer’s apology and a statement of regret that the requests by the Director for payroll records had not been answered

ISSUES TO BE DECIDED

The issue here is whether the discretion to impose a penalty under Section 98 of the *Act*, where there has been a violation of the *Act* or *Regulations*, has been properly exercised by the Director.

FACTS

While investigating a claim for wages, overtime wages, statutory holiday pay and vacation pay against the Employer by a Ms. Myriam Jungling (the Employee), the Director had occasion to request the production of payroll records. The Employer did not respond to the first request that was made by letter dated October 14, 1998. A telephone message left at the Employer’s business on November 2, 1998, met the same fate. This was followed up by another letter dated November 20, 1998, however, this demand was inadvertently sent to the wrong address. This letter was therefore repeated, being replaced by a letter dated December 3, 1998. The Employer did not respond.

On December 21, 1998, a formal demand was made by the Director pursuant to Section 85 (1) (f) of the *Employment Standards Act*, (the “*Act*”), for production of the payroll records relating to the Employee’s claim. This demand set a deadline for production of the records. They were to be in the hands of the Director by 9.00 a.m. on January 12, 1999. Again, there was no response from the Employer.

On January 25, 1999, the Determination that is the subject of this appeal was then issued. It imposes a \$500.00 penalty on the Employer pursuant to Section 28 (b) of the *Regulations* for an alleged violation of Section 46 of the *Regulations*.

In the appeal, the Employer presented submissions going mostly to the merits of the Employee’s claims for unpaid wages. However, the submissions end with:

“ I apologias(sic) for not answering the first Letter because I did not feel guilty of doing anything wrong.”

ANALYSIS

In the statutory scheme of the *Act*, Section 28 requires employers to keep payroll records for all employees. Section 84 (1) (c) of the *Act* gives the Director powers to inspect these records and, Section 85 (1) (f) of the *Act* provides the Director with the authority to require employers to produce or to deliver payroll records to a specified place. This authority to require production of payroll records to the Director is also governed by Section 46 of the *Regulations*:

“ 46 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.”

Against that legislative background, Section 98 of the *Act* contemplates the imposition of penalties at the discretion of the Director where the *Act* or *Regulations* have been violated:

“ 98 (1) If the director is satisfied that a person has contravened a requirement of this *Act* or the *Regulations* or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.”

The relevant prescribed penalty in situations involving the failure to produce payroll records is contained in Section 28 (b) of the *Regulations*:

“ 28 The penalty for contravening any of the following provisions is \$500.00 for each contravention:
.....
(b) section 3, 13 or 46 of this regulation.

In the prevailing circumstances here, there can be no question about the Employer having received the Director's demand of December 21, 1998, for the production of payroll records. This is verified by Canada Post's "Acknowledgement of Receipt" signed and dated December 23, 1998, a copy of which is on file. There can also be absolutely no doubt that the Employer violated Section 46 of the *Regulations* by failing to produce the required payroll records in response to the deadline set out in the said demand.

Having established a violation, the issue then becomes one of whether the Director properly exercised the discretion under Section 98 of the *Act* to impose the penalty in question. In this context, to have properly exercised the discretion to impose a penalty means of course that the Director must have acted in good faith, without discrimination and not in an arbitrary fashion. In this regard, it is the Employer that carries the burden to establish improper conduct by the Director.

In reviewing the appeal in its entirety, there are not even any allegations to this effect let alone proof. Moreover, the Employer has provided no explanation as to why there was no response to

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the Director's repeated attempts to gain access to the payroll records. What we have here, are simply indications of remorse on the Employer's part for having ignored the Director during the investigation of the Employee's complaint. Remorse at this stage of the process is too late and in any event, it does not constitute grounds for the Tribunal to interfere with the Determination.

The appeal must fail accordingly.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated January 25, 1999, imposing a penalty of \$500.00 on the Employer is hereby confirmed.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal