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-

Buy & Save Gas Inc.
(the "Appellant")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE NO.: 98/827

DATE OF DECISION: April 12, 1999

DECISION

APPEARANCES

Amarjit S. Sandhu for the employer

Glen Smale for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by the employer, Buy & Save Gas Inc., of a Determination dated December 7, 1998 which required the employer to pay a penalty of $500.00 for failing to produce daily payroll records upon demand. The Director's Delegate determined that the appellant had contravened Section 46 of the *Employment Standards Regulation* and imposed the penalty under Section 28(b) of the *Regulation*.

ISSUE TO BE DECIDED

1. Did the appellant comply with the Statutory Requirements when it produced a bi-weekly report of employment insurance insurable earnings on a Record of Employment?

FACTS

The employer operates a gas station on the Ladner Trunk Road in Ladner, British Columbia. The Director's Delegate, Mr. Glen Smale, was conducting an investigation initiated under a complaint by a former employee alleging improperly paid regular hourly wages, unpaid daily and weekly overtime, improperly or unpaid statutory holiday pay and a claim for compensation for length of service. As part of his investigation the Director's Delegate demanded that the employer produce payroll records which are required to be kept pursuant to Section 28 of the Act.

The history of the investigation follows. On September 16, 1998 the Director's Delegate wrote to the appellant setting out the claims of the complainant. He asked the appellant to respond to those claims. The Director's Delegate asked the appellant to either forward a cheque in the amount of the claim or, alternatively, submit in writing reasons for its rejection of the claim including a copy of the complainant's payroll records. The Director's Delegate asked that the payroll records be produced for the time period of the complainant's employment. The employer did not respond to this letter.

On October 5, 1998 the Director's Delegate send a Demand for Employer Records. The postal receipts indicate that the employer received that Demand on October 7, 1998.

On October 15, 1998 the Director's Delegate received a telephone message from Mr. Sandhu stating that the employer would be sending a copy of the complainant's Record of Employment and hours worked the following week. No hours were received nor was any further contact initiated by the employer.

On December 7, 1998 the Director's Delegate issued a Determination assessing a penalty of $500.00 pursuant to the Regulation on the employer.

Within two days Mr. Sandhu telephoned the Director's Delegate to inform the Delegate that a report of the complainant's weeks of insurable earnings had been mailed in October. The Director's Delegate informed Mr. Sandhu that those were not the records that were requested. Mr. Sandhu responded that those were the only records that he had. He stated he did not have any daily hours of work or other payroll records which were required to determine the merits of the complainant's claim.

In its appeal submission dated December 21, 1998 the appellant stated that he had explained to an auditor that he had lost his daily records and could only furnish partial records. The appellant stated that he used a payroll service and that he had contacted them to obtain any information which they may have. That information was the employment insurance history report which was referred to earlier for the purposes of providing Record of Employment information.

The appellant further states that pursuant to the conversation with Mr. Smale of October 15, 1998 he did mail, on October 27, 1998, a copy of that record to Mr. Smale. The employer states that he awaited Mr. Smale's response and could not possible know that Mr. Smale did not receive that information. The employer argues that it is unfair to penalize the company for the sole reason that the information was lost in transition. The employer states that it did not ignore the situation. The employer asks for some latitude concerning the penalty and states that it will "direct my efforts towards resolving this matter."

The Director's Delegate states in his submission of January 8, 1999 that ". . . not one shred of evidence save the ROE records, has been produced since the September 16th, 1998 letter to the employer."

ANALYSIS

Section 28 of the *Act* sets out the records that are required to be kept by an employer. The section states:

> 28. Payroll Records
>
> (1) For each employee, an employer must keep records of the following information:
>
> a) The employee's name, date of birth, occupation, telephone number and residential address;
> b) The date employment began;
> *c)* The employee's wage rate, *whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;*
> d) *The hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis*;
> e) The benefits paid to the employee by the employer;
> f) The employee's gross and net wages for each pay period;
> g) Each deduction made from the employee's wages and the reason for it;
> h) The dates of the statutory holidays taken by the employee and the amounts paid by the employer;
> i) The dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
> j) How much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.
>
> (2) Payroll Records must:
>
> a) Be in English,
> b) Be kept at the employer's principle place of business in British Columbia, and
> c) Be retained by the employer for 7 years after the employment terminates.
>
> (italics by writer)

I turn to the question of the sufficiency of the Employment Insurance History Report produced by the appellant. The report does contain some of the information required under the statute. For example, the report contains the employee's name, address and date of hire. The report does not contain the employee's date of birth, occupation nor telephone number. More significantly the report does not contain the employee's wage rate which is significant since the complainant in this matter alleges that there was an improper payment of a regular hourly wage. Furthermore the Employment Insurance History Report contains a bi-weekly summary of hours worked rather than a daily record. Furthermore, the Employment Insurance History Report does not contain a record of the employee's gross

and net wages for each pay period. Nor does it set out the deductions made from the employee's wages and the reason for each deduction; nor does it set the dates of the statutory holidays taken by the employee and the amounts paid by the employer; nor does it set out the annual vacation taken by the employee; nor, does it include any record of time taken from a time bank or if such a bank exists.

For the above reasons I find that the provision by the employer of the Employment Insurance History Report does not conform with the statutory requirements of the *Act.* The employer has therefore breached its requirements under Section 28 of the *Act* and Section 46 of the *Regulation*.

I have made this finding on the merits notwithstanding that the argument can be made that the appellant, by forwarding the Employment Insurance History Report after the Determination had been made, is attempting to introduce new evidence at the appeal stage. The Tribunal has an established policy regarding the introduction of new evidence at the appeal stage which limits an appellant's ability to introduce evidence that was available but not produced during the investigative stage. (See Kaiser Stables Ltd. BCEST No. D058/97) I am not prepared to diverge from that policy and find, regardless of the insufficiency of the aforementioned report, that the appellant would not be allowed to introduce new evidence at this stage.

I turn now to the employer's request for relief from the imposition of the $500.00 penalty. The statutory basis for imposing the penalty is set out in sections 79(3) and 98 of the Act and sections 28 and 29 of the Employment Standards Regulation. For convenience those sections are reproduced.

Determination

> (3) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may do one or more of the following:
>
> a) require the person to comply with the requirement;
> b) require the person to remedy or cease doing an act;
> c) impose a penalty on the person under section 98.

98. Monetary penalties

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.

2. If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

3. A person on whom a penalty is imposed under this section must pay the penalty whether or not the person

   (a) has been convicted of an offence under this Act or the regulations, or
   (b) is also liable to pay a fine for an offence under section 125.

4. A penalty imposed under this Part is a debt due to the government and may be collected by the director in the same manner as wages.

Employment Standards Regulation

28. **Penalty for contravening a record requirement** – 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 or 46 of this regulation.

Penalties for other contraventions

1. In this section, "specified provision" means a provision or requirement listed in Appendix 2.

2. The penalty for contravening a specified provision of a Part of the Act or of a Part of this regulation is the following amount:

   a) $0 if the person contravening the provision has not previously contravened any specified provision of that Part;
   b) $150 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on one previous occasion;
   c) $250 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on 2 previous occasions;
   d) $500 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on 3 or more previous occasions.

3. For the purpose of this section, a requirement imposed under section 100 of the Act is deemed to be a requirement of Part 11 of the Act.

4. Despite subsection (2), the penalty is $5 000 for contravention of the special provision respecting section 9(4) of the Act if the contravention relates to the employment of a child under 15 years of age in

    a) the motion picture industry
    b) the television industry, or
    c) the television or radio advertising industry.

In the instant case a letter was sent on September 16, 1998 informing the appellant of the allegations against it and the grounds for the monetary claim by the complainant. The employer failed to respond to that letter. On October 15, 1998 a formal Demand for Employer Records was issued. The Director's Delegate did not receive a response to that demand. Consequently the Director's Delegate issued the Determination dated December 7, 1998.

Although a discretion may rest in the Director whether or not to issue a Determination once the Determination has been issued there is no discretion under the Act to vary the penalty. That is, the Act specifically states that:

> "The penalty for contravening any of following provisions is $500.00 for each contravention . "

There is no element of discretion involved in assessing the penalty. The statute clearly sets the penalty at $500.00 and that is the amount in the Determination of December 7, 1998. The employer is obliged to pay that amount. (See Repel Security Systems Ltd. BC EST # D293/98)

On the basis of the evidence before me and the wording of the statute I am unable to vary the penalty that has been imposed.

ORDER

The Determination dated December 7, 1998 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal