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 -

Protective Stratagems Incorporated
("Protective" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/109 and 98/110

DATE OF DECISION: April 27, 1998

DECISION

APPEARANCES/SUBMISSIONS

Mr. Terrence Chase	on behalf of Protective
Mr. Patrick Johnson	on behalf of himself
Ms. Jennifer Ip	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against two Determinations of the Director of Employment Standards (the "Director") issued on January 29, 1998. One imposed a penalty of $0.00 on the Employer for contravening specific provisions of the *Act* (Determination #1); the other found that the Employer had breached Sections 17(1), 21(1), 40(1) and (2), 58(3) of the *Act* and owed $269.99 to Mr. Johnson on account of wages (Determination #2). The Employer claims that the Determinations are wrong and says it did not receive a request for information. The Employer asks that the Determinations be set aside.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the Determination should be varied, confirmed or cancelled.

FACTS

The Employer argues that the Determinations are "incorrect" and based on the complainant's information only as the Employer first knew of this matter when it was served with the Determinations by registered mail. The Director's delegate notes that the Employer did not respond to requests for documents by telephone or regular mail. The Director's delegate sent a third letter seeking information by registered mail on December 10, 1997 but the Employer did not respond. The Employer says that it did not receive this letter. The Director's delegate acknowledges that she has not received an acknowledgement of receipt nor has the letter been returned to her by Canada Post. A copy of this letter is attached to the Director's submission and it is clear that the letter was sent by certified mail to Mr. Chase's residential address as set out in the corporate records. The Determinations were sent to the same address and they were received by the Employer.

Mr. Chase says he would like to present payroll records to show that no money is owed. The appeal does not attach any documentation with respect to this argument and the only one specific allegation, which is not supported by any particulars, is that Mr. Johnson "was found to be padding his time sheet".

ANALYSIS

With respect to Determination #1, Section 98 of the *Act* provides the Director's delegate with the discretion to impose a penalty in accordance with the prescribed schedule. Section 29 of the *Regulation* establishes a penalty escalating from $0.00 to $500.00 for each contravention of a specified provision of the *Act* or the *Regulation*. The Director, or her delegate, has no discretion to determine the amount of the penalty once she, or her delegate, has determined that a contravention of a specified provision has occurred (see, for example, *Mega Tire Inc*., BCEST #D406/97; and *Lakeside Office Systems Ltd*., BCEST #D166/97). However, I agree with my colleague in *Randy Chamberlin*, BCEST #D374/97, that Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it. Given that the power to impose a penalty is discretionary and is not to be exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. It is not adequate to simply state that the person has contravened a specific provision of the *Act* or *Regulation*. In this case, the Determination simply state that the Employer breached "specified provisions". In my view, this is not sufficient. In the result, Determination #1 must be set aside.

With respect to Determination #2, I find that the Employer has not provided any reason why it should be set aside. While I appreciate the Employer's concern that the Determination is based on the complainant' s information, which appears to be the Employer's payroll records, the Employer has not provided any reason for setting the Determination aside.

Section 122 of the *Act* provides for service of determinations and demands. In this case, the Employer received the Determination and it was served in accordance with the *Act*. The Tribunal has determined that it will not permit an employer to refuse to participate in an investigation by the Director and then appeal a subsequent determination. In view of the fact, that the Director's delegate acknowledges that she has not received an acknowledgement of receipt nor has the letter been returned to her by Canada Post, I am prepared to accept that the Employer did not receive the December 10, 1997 letter requesting information. I do not, therefore, find that the Employer refused to participate in the investigation.

However, that is not the end of the matter. Section 112 provides that a person may appeal a determination by delivering a written request, which includes the "reasons for the appeal", to the Tribunal. The appeal form utilized by the Tribunal clearly states that the appellant must give reasons why the Determination is wrong; why he or she is making the appeal; must state which facts are in dispute; and clearly state what remedy the appellant is seeking from the Tribunal. The appeal form also requires an appellant to attach "all documents which support" the appeal

and warns that the Tribunal "may decide this appeal based solely on the documents submitted to it". In this case, the appellant merely states that:

> "(T)he investigation conducted with regards to this file was done without input from Protective Strategems Incorporated, which ceased doing business effective August 31, 1997. Since no contact was made, with the exception of a certified letter received February 3, 1998, the decision was made on one person's information, which is incorrect. I would like to have an opportunity to present payroll records showing that the company owes no money to Mr. Patrick Johnson."

The Employer does not provide any reason why the Director's reliance on the complainant's information resulted in an "incorrect" determination. In that regard, I am mindful of the fact that the Determination found that Mr. Johnson was owed regular wages, overtime pay and vacation pay; and that the Employer had deducted amounts from Mr. Johnson's wages without authority.

In a subsequent submission, in response to the Complainant's submission, the Employer states that Mr. Johnson was found to be "padding his time sheet". The Employer neither provides any particulars with respect to this allegation nor any documents which would support the appeal.

In the result, I dismiss the appeal of Determination #2.

ORDER

Pursuant to Section 115 of the Act, I order that Determination #1 in this matter, dated January 29, 1998 be cancelled.

Pursuant to Section 115 of the Act, I order that Determination #2 in this matter, dated January 29, 1998 be confirmed and the amount of the Determination paid out to Mr. Johnson together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal