

**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 -

Donald Wesley Rosler  
("Rosler")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Cindy J. Lombard

**FILE No.:** 2000/066

**DATE OF DECISION:** May 10, 2000

**DECISION**

**OVERVIEW**

This is an appeal brought by Donald Wesley Rosler (“Rosler”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) issued on January 13, 2000.

The Determination was issued following a complaint by Kenneth Hillstead regarding non-payment of wages.

The Director issued a Demand for Records pursuant to Section 85(1)(f) of the *Act* to Rosler. The records were not produced by Rosler stating in his defence:

1. that he was not employer and therefore did not fall under purview of the *Act*; and
2. if an employer, that the records he had kept had gone missing.

In his Determination the Director directed that Rosler pay a penalty fine in the amount of \$500.00 for his failure to keep and produce employment records.

**ISSUES TO BE DECIDED**

Did the Director err in issuing the penalty?

**FACTS AND ANALYSIS**

In 1998, Rosler commenced to build a family house. He was introduced to Hillstead, he says, through his brother-in-law. In approximately November, 1998, Hillstead commenced working on the house doing various labouring jobs including dry-walling.

Hillstead worked on the home until approximately March, 1999, a period of approximately four months.

Rosler described the arrangement between he and Hillstead as an expectation that the work done was completely gratuitous, that is with no expectation of compensation or in the alternative, some form of compensation. Rosler gives the following evidence in his materials:

1. Participation by Hillstead in the building of the home was akin to a barn-raising with no expectation of compensation.
2. Rosler stated that in return for Hillstead’s work that he would provide some kind of barter in return such as helping out at Hillstead’s place though “it might take five years before that would be accomplished.”

3. Hillstead did work on the home but no more than approximately 84 days part-time according to Rosler's estimate. Rosler says that he kept a record of days and hours worked by Hillstead and others on his home not for the purpose of compensation but in order that Rosler could determine if it was in fact cheaper for him to build the house himself rather than hire someone to do it. Rosler says that he has been unable to locate this record.
4. Rosler did pay some monies to Hillstead during the construction as follows:
  - a) November 28, 1998 \$500.00
  - b) December 22, 1998 500.00
  - c) March 6, 1999 340.00
  - d) March 8, 1999 50.00
  - e) March 20, 1999 600.00

As well, additional amounts were paid by Rosler to Hillstead once the dispute had commenced including:

- a) May 3, 1999 \$126.49
- b) May 8, 1999 217.75
- c) May 14, 1999 225.00
- d) June 28, 1999 980.28

According to Hillstead, Rosler hired him to work on his home on the basis that he would be paid \$10.00 per hour with no overtime and no compensation if he was hurt and furthermore, that the majority of the wages owing would be paid through the last draw on the construction mortgage.

Section 28 of the *Act* requires that an employer must keep records for each employee that includes information such as hours worked by the employee, wage rate, etc. Section 85 of the *Act* and Section 46 of the Regulations provides that the Director may require a person to produce those records and that the same must be produced. Failure to do so results in a penalty of \$500.00 imposed by Section 28(16) of the Regulations.

In this case, Rosler answer to the Director's Determination that he be fined is:

1. Rosler did keep a record of time worked with respect to Hillstead but could not produce those records because he couldn't find them;
2. In any event, Rosler did not have to keep or produce such records on behalf of Hillstead because he was not an employer.

It is not necessary that someone, in this case Rosler, be determined to be an employer in order for a direction to produce employment records be valid pursuant to the *Act* provided that the demand

is bona fide and not arbitrary: see for example, *Lowe (c.o.b. Sweepers Canada) (Re)* [1998] BC EST #D502/98 and *Folch (Re)* [1999] BC EST #D108/99.

In this case, the demand was bona fide. Clearly the record of hours worked by Hillstead was relevant to the determination of whether an employer/employee relationship existed between Hillstead and Rosler.

Section 46(1) of the Regulations states:

*46(a) 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.*

As the Director is given the discretion to do so under Section 98(1) of the *Act* where a person has contravened the *Act*, he may impose a penalty in accordance with the prescribed schedule of penalties. Section 28 of the Regulations states that the penalty for contravening Section 28 of the *Act*, which requires that records, including hours worked, be kept is \$500.00.

The Director imposed the penalty because Rosler's explanation that he kept records but could not find them was not a reasonable answer and we agree.

In summary I find that the Director's determination that Rosler was liable to pay a penalty for failure to keep and produce employment records with respect to Hillstead was correct not on the basis that Rosler was an employer but because he offered no reasonable explanation for his failure to produce records.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination directing that Rosler pay a fine in the amount of \$500.00 for failure to keep and produce employment records with respect to Hillstead be confirmed as issued.

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**Cindy J. Lombard**  
**Adjudicator**  
**Employment Standards Tribunal**