

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

Lakeside Office Systems Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/150

DATE OF DECISION: April 17, 1997

DECISION

OVERVIEW

This is an appeal by Lakeside Office Systems Ltd. (“Lakeside”), under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued by a delegate of the Director of Employment Standards on February 28, 1997. The Determination imposed a penalty of \$500.00 on Lakeside due to a finding that Lakeside had contravened Section 28 of the *Act* by “...failing to keep proper payroll records.”

This decision deals only with the Determination which imposed a penalty on Lakeside.

ISSUE TO BE DECIDED

Should the Determination be varied, cancelled or confirmed?

FACTS

The following facts were set in the Determination:

On February 20, 1997, a Demand for Employer Records was issued by Wendy L. Jones, Employment Standards Officer. A copy of the demand is attached. On February 24, 1997, you delivered those records to Wendy L. Jones.

Wendy L. Jones reviewed the records and discovered that you have not kept daily records as required by section 28(1)d of the *Employment Standards Act* as follows: the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis.

These are the only facts which were set out in the Determination. However, documents submitted by the Director’s delegate to the Tribunal show that the central focus of the officer’s investigation concerned the number of hours worked by Hugh Forsyth and his entitlement to wages.

Forsyth was employed by Lakeside as a commissioned salesperson.

The Director’s delegate determined that Lakeside contravened Section 28 of the *Act* and imposed a \$500.00 penalty.

Lakeside gives the following reasons for its appeal:

1. Lakeside did not intend to contravene the *Act*. It is a new business venture operated jointly by Mary Quinn and Trevor Quinn.
2. Lakeside purchased the business in June, 1996 and continued the former owner's methods of remuneration and record-keeping.
3. Forsyth was a probationary employee when Lakeside purchased the business and did not meet Lakeside's performance expectations during the months of June, July and August, 1996.
4. Forsyth's employment was terminated on August 14, 1996.
5. Forsyth (and other salespersons) work independently in their sales territories and did not record or report hours of work each day.
6. Upon receiving the Demand for Employer Records dated February 20, 1997 Lakeside provided copies of its payroll records for the period June 1, 1996 to August 12, 1996 with instructions that the previous owner would have payroll records for the period prior to June 1, 1996.
7. Lakeside's payroll records did not include any hours of work information because it was not aware of the requirement under the *Act* to record daily hours of work.
8. Following a discussion with the investigating officer in December, 1996, Lakeside now requires all salespersons to record actual hours of work each day.

Lakeside argues that: the Tribunal should consider that its failure to maintain daily hours-of-work records was not a deliberate act; as a new employer, it simply adopted the previous owner's record-keeping practices; and, the imposition of a \$500.00 penalty under these circumstances is severe.

ANALYSIS

Section 28 of the *Act* requires employers to keep detailed payroll records for each employee. Specifically, Section 28(1)(d) requires the employer to record "the hours worked by an employee on each day, regardless of whether the employee is paid on an hourly or other basis."

Section 85(1)(c) of the *Act* describes the powers given to the Director of Employment Standards to inspect any records that may be relevant to an investigation under Part 10 of the *Act*. Section 85(1)(f) permits the Director to:

require a person to produce, or to deliver to a place specified by the Director, any records for inspection under paragraph (c).

Section 46 of the *Regulation* (B.C.Reg. 396/95) states:

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.

The penalty was imposed by the Director's delegate under authority given by Section 98 of the *Act* and Section 28 of the *Regulation*.

Section 28 of the *Regulation* establishes a penalty of \$500.00 for **each contravention** of Section 28 of the *Act* and Section 46 of the *Regulation*. Thus, the Director has no discretion concerning the amount of the penalty to be imposed once she has determined that a contravention of Section 28 has occurred.

Section 29(2) of the *Regulation* sets out the penalty for contravening a provision or requirement listed in Appendix 2 of the *Regulation*. In particular, Section 29(2)(a) of the *Regulation* imposes a \$0 penalty for contravening a "specified provision" for the first time. However, Section 28 of the *Act* is not a "specified provision". I conclude from this that the Legislature intended that a \$500.00 penalty would be imposed for **each** contravention of Section 28 of the *Act*.

I accept the arguments made by Lakeside that it was not aware of its responsibility under Section 28 of the *Act* when it purchased the business in June, 1996. However, Section 28 of the *Regulation* does not give the Director (or her delegate) the discretion to impose a penalty only if the contravention was made knowingly.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal