

**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 -

Royal Star Plumbing Heating & Sprinklers Ltd.  
("Royal Star")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorna Pawluk

**FILE NO.:** 98/124

**DATE OF DECISION:** July 8, 1998

## DECISION

### OVERVIEW

This is an appeal by Royal Star Plumbing Heating & Sprinklers Ltd. ("Royal Star" or the "employer") under Section 112 of the *Employment Standards Act* (the "Act") from a Determination issued by the Director of Employment Standards ("the Director") on February 13, 1998.

### ISSUE TO BE DECIDED

The issue is whether the Director correctly imposed a penalty on the employer for failing to respond to a Demand for Employer Records issued under section 85 of the *Act*.

### FACTS

On January 30, 1998, the Director's delegate issued a "Demand for Employer Records" for certain records relevant to the employment of Norm Chisholm for the period of October 1 – December 31, 1996. In particular, the Demand sought "all records relating to wages, hours of work and conditions of employment" and "all records an employer is required to keep pursuant to Part 3 of the *Employment Standards Act* and Part 8, Section 46 & 47 of the *Employment Standards Act Regulation*; the deadline was 4:30 p.m. on February 7, 1998. The Demand included the address of the Director's office where the records were to be submitted along with the name and telephone number of the officer who issued the Demand. The Demand outlined the penalty for a failure to comply and included a copy of the relevant provisions of the *Act* and *Employment Standards Regulation* ("*Regulation*"). Proof of service shows the document was served at the employer's premises on January 30, 1998.

On February 6, 1998, the employer faxed to the Branch a detailed breakdown of the hours of work, pay and deductions. However, the officer found that the records produced by the employer were deficient as he could not calculate the overtime owed to Chisholm. He thus issued a penalty.

The employer challenges the penalty saying that they tried repeatedly to get in touch with the officer to determine if what they had produced was sufficient. On several occasions they tried to reach him at the telephone number on the Demand, but never spoke with him. They also left messages in the office and on February 6, 1998 attended personally at the Branch but he was not in. They also maintain that the Determination is based on a number of inaccurate facts and are requesting that the penalty be waived.

The Director maintains that the records are insufficient because they do not include the hours worked each day by the employee and thus do not fulfill the requirements of section

28 of the *Act*. Attached to the Director's submission is a hand written document outlining wages and deductions for the employee, as is a copy of a cancelled cheque payable to Norm Chisholm. These documents are date stamped September 15, 1997, as received at the Employment Standards Branch in Burnaby. Also enclosed in the Director's submission was a type written document submitted by the employer on February 6, 1998 outlining the hours worked in each pay period, gross pay, deductions and amount of the cheques paid to Chisholm for October 1 – December 31, 1996. This document is date stamped February 6, 1998 as received at the Branch office in Burnaby. As none of these documents indicate the daily hours worked by Chisholm, the delegate said he could not calculate daily overtime.

### ANALYSIS

The Demand for Documents served on Royal Star was issued pursuant to section 85 of the *Act*. Section 85(1) of the *Act* outlines the Director's entry and inspection powers. Subsections (c) and (f) pertain to production of records and documents:

85(1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:

...

inspect any records that may be relevant to an investigation under this Part;

...

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

The Demand sought "all records relating to wages, hours of work, and conditions of employment" and "all records an employer is required to keep pursuant Part 3 of the *Employment Standards Act* and Part 8, Section 46 & 47" of the *Regulation*. Part 3 of the *Act* contains section 28 which identifies payroll records which an employer must keep:

28(1) For each employee, an employer must keep records of the following information:

the employee's name, date of birth, occupation, telephone number and residential address;

the date employment began

the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;

the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;

the benefits paid to the employee by the employer;

the employee's gross and net wages for each pay period;

each deduction made from the employee's wages and the reason for it;

the dates of the statutory holidays taken by the employee and the amounts paid by the employer;

the dates of the annual vacation take by the employee, the amounts paid by the employer and the days and amounts owing;  
how much money the employee has taken from the employee's time bank,  
how much remains, the amounts paid and dates taken.

Payroll records must  
be in English;  
be kept at the employer's principal place of business in British Columbia,  
and  
be retained by the employer for 7 years after the employment terminates.

Section 46 of the *Regulation* governs the production of records:

*Production of Records*

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.

A breach of section 46 is covered under section 28(b) of the *Regulation*, the penalty section:

The penalty for contravening any of the following provisions is \$500 for each contravention:

...

(b) section 3, 13 or 46 of this regulation.

The document tendered by the employer was found by the Delegate to be deficient in light of the requirements in section 28 as they did not include the employee's daily hours of work.. According to the Determination, this meant that the officer was unable to calculate unpaid daily overtime.

The defence raised in argument on behalf of the employer indicates that Mr. Upadhyaya made several unsuccessful attempts to contact the Delegate to ascertain whether the records submitted satisfied the Demand. Mr. Upadhyaya did not discuss any matters with the Delegate who issued the Determination ordering the \$500 penalty because the records were not sufficient for him to calculate overtime.

The Director of Employment Standards is responsible for administration and enforcement of the *Act*. Among the many tools available to ensure compliance with various aspects of the *Act* is Section 46 of the Regulation which makes it an offence to not produce records under section 85(1). Section 28(b) of the Regulation sets out a penalty of \$500 for contravention section 46. What defences are available to Royal Star?

The answer to this question depends on the nature of the offence created by these provisions. This problem was discussed by the Supreme Court of Canada in *R. v. Sault*

*Ste. Marie (City)* [1978] 2 S.C.R. 1299, in the context of pollution offences brought against the city. On behalf of the Court Dickson, J. identified the various types of offences in Canadian law:

. . . there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge or recklessness, must be proved by the prosecution, either as an inference from the nature of the act committed, or by additional evidence.

Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believe in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular events. These offences may be properly called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.

1. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first category. Public welfare offences would, *prima facie*, be in the second category.

They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "willfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies.

Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

It can be difficult to identify the type of offence that is created by a regulatory scheme such as that under the *Employment Standards Act*. Mewitt & Manning on *Criminal Law* offer the following comments:

It seems, therefore, that if an offence is determined to be one not requiring full *mens rea*, the normal presumption will be that it will be an offence where proof of due diligence will be a defence, but the court may determine that it is one of absolute liability to which even due diligence will not be a

defence, if the legislation has so stated expressly, or if the type of offence involved, the pattern of the legislation in that area, and the relative triviality of the penalty lead to that conclusion. One assumes that, in fact, the Supreme Court is stating that such offences will be rare and that the defence of due diligence will now be applicable to the large bulk of these types of offences. (@160)

The offence created by Section 46 of the Regulation for delivery of records under section 85(1) is part of a larger regulatory scheme designed to regulate employment relationships in the non-unionized sector of the economy. There is nothing explicit in the provisions that calls for proof of intention in the traditional sense of the word or that implies an offence of absolute liability. Thus, according to the criteria above, the offence is one of strict liability, which allows the party charged to be acquitted where there is proof of due diligence.

Does due diligence provide a defence in this case? I am not satisfied on the evidence before me that Royal Star, which as the appellant bears the onus to show that the Determination is incorrect, exercised due diligence in responding to the Demand for Documents. In particular, it is unclear whether Royal Star could have produced the required documents and did not simply because it did not understand the full scope of the Demand. If they failed to produce documents simply due to the vagueness of the Demand, their actions would have shown due diligence. But where they fail to observe their substantive obligations to maintain certain records, they cannot rely on due diligence as a defence to a Demand for Documents. It is unclear according to the evidence and argument before me which of these possibilities applied in this case. Thus the appeal fails.

**ORDER**

Pursuant to section 115 of the Act, I confirm the Determination dated February 13, 1998.

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**Lorna Pawluk**  
**Adjudicator**  
**Employment Standards Tribunal**