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 -

A-Mil Financial Corp.,
Operating as Zorba's Greek Taverna
("A-Mil")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/158

DATE OF DECISION: May 6, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by A-Mil Financial Corp., operating as Zorba's Greek Taverna ("A-Mil") of a Determination of a delegate of the Director of Employments Standards (the "Director") dated February 17, 1998. In that Determination, the Director concluded A-Mil had contravened Section 46 of the *Employment Standards Regulations* (the *"Regulations"*) and, pursuant to Section 28 of the *Regulations*, ordered A-Mil to pay a fine of $500.00 in respect of the contravention.

ISSUE TO BE DECIDED

The issue is whether the Director was justified in imposing a $500.00 penalty on A-Mil.

FACTS

I accept the facts as set out in the Determination:

> Repeated attempts were made to obtain employment records for the two complainants. A letter dated July 23, 1997 indicates that you had promised to provide records to the investigating officer in an earlier telephone conversation. No records were received. In December 1997 there were several telephone calls not returned. On January 8, 1998 you indicated that records had been faxed to Lynne Egan and would be re-sent to the Surrey office. No records were received. On January 23, 1998, a Demand for Employer Records was issued by D. Lynne Fanthorpe, Employment Standards Officer. A copy of this Demand is attached. You failed to produce or deliver the records described in this Demand.

It should be added that the Demand was served by registered mail, as that term is defined in Section 29 of the *Interpretation Act*, S.B.C. 1979, ch. 206, to the address on file for A-Mil to which all previous correspondence had been sent.

In the appeal, A-Mil says "a great deal of difficulty" has been experienced receiving mail at the business address, although no record of any difficulty communicating written correspondence to that address, either before or after the Demand was sent, is indicated in the material on file.

ANALYSIS

Section 46 of the *Regulations* reads:

> *46. A person who is required under section 85(1)(f) of the Act to produce or deliver records to the director must produce and deliver the records as and when required.*

This requirement disposes of the first argument by A-Mil, that they could , in effect, ignore the Demand because they had already "communicated" with two other officers of the Director. First, I doubt that A-Mil ever produced any records to any other officer of the Director, but even if they had, the indication to A-Mil in early January, 1998 was that the records were required to be produced (even if that meant "produced again") and they agreed to do that but had not done so by January 23, 1998. The statutory obligation to produce or deliver records in Section 46 of the *Regulations* is mandatory. Absent some clear and convincing proof the demand to produce is an abuse of process or power by the Director, there is no reason to look behind that demand. A-Mil was required to produce and they did not.

By application of Section 28 of the *Regulations*, failure to comply with the requirements of the above section can result in a $500.00 penalty for each contravention. There is clearly a contravention of Section 46 of the *Regulations* in this case.

Subsection 122(1) of the *Act* allows service of Demands and Determinations by registered mail and subsection 122(2) deems it to have been served eight (8) days following deposit of the correspondence in a Canada Post Office:

> *122. (1) A determination or demand that is required to be served on a person under this Act is deemed to have been served if:*
>
> *(a) served on the person, or*
>
> *(b) sent by registered mail to the person's last known address.*
>
> *(2) If service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.*

Accordingly, even if A-Mil was experiencing "great difficulty" receiving mail at the address of the business, the Demand was properly served and the "great difficulty", if it exists does not provide a ground of appeal.

This appeal is dismissed. The Demand was in order, it was justified on its face and it was deemed to have been served. A-Mil failed to comply. In those circumstances there is no reason to set aside the penalty imposed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 17,1998 be confirmed

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David Stevenson
Adjudicator
Employment Standards Tribunal