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 -

Paul Skalenda
operating as Fine Line Traffic Marking
("Fine Line"or the "Employer")

-and-

Paul Skalenda
operating as Island Thermo
("Island Thermo"or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/164 and 1999/168

DATE OF DECISION: May 14, 1999

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DECISION

SUBMISSIONS/APPEARANCES

Mr. Paul Skalenda	on behalf of the Employers
Mr. Laird Cronk	on behalf of the Director

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act"*) is against two penalty Determinations of the Director's delegate issued on February 25, 1999. The delegate found that the Employers' payroll records were inadequate--they did not contain the hours worked by each amployee on each day as required by Section 28 of the *Act*--and issued penalties for contraventions of Section 46 of the *Employment Standards Regulation* (the "*Regulation*").

FACTS AND ANALYSIS

The Employers appeal the Determinations and ask that the penalties be set aside. The Employers explain that they were not aware of the requirement to keep daily records of employees' time: "Time sheets and records of production and locations were tossed out once cheques cleared and I was paid for a contract". The Employers explain that they did not intend to contravene the statutory requirements. The Employers state that they provided such records as were in their possession.

The delegate's submission state:

> "The investigation focuses on three complainants alleging that Skalenda did not pay any daily or weekly overtime, when worked, and did not pay minimum daily pay when less than four hours was worked in a day as required by the Act.
>
> Skalenda provided records for all three complainants for the period demanded. The records provided did not contain a record of the daily hours worked by the complainants prior to September 1998. The records did contain daily hours for work performed from September 1998 onward. As such, a Penalty Determination was issued by the Director ..."

I am of the view that the Penalty Determinations should be set aside. My reasons my be summarized as follows: first, that the Determinations do not correctly state the statutory provision alleged to have been breached and, second--and in any event--that the Determinations

do not contain sufficient reasons for the Director's exercise of her discretion to impose penalties in the circumstances.

In *Narang Farms and Processors Ltd.*, BCEST #D482/98, at page 2, the penalty process is summarized as follows:

> "In my view, penalty determinations involve a three-step process. First, the Director must be satisfied that a person has contravened the *Act* or the *Regulation*. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the *Regulation*."

Turning to the first ground, the failure to correctly state the statutory provision contravened, it is clear--indeed admitted--that the Employers in this case did not keep the records required by Section 28 of the *Act*. Section 28 provides that an employer must keep certain records for each employee, including "the hours worked by the employee on each day", and that these records must be retained for a period of 5 years after the employment terminates. As such, the Employers contravened Section 28 of the *Act*. The Employers acknowledge, and I agree, that ignorance of the law provides no defence to these penalties. However, that is not the end of the matter.

The Determinations state:

> "Paul Skalenda operating as Island Thermo <or Fine Line> has *contravened Section 46* of the *Employment Standards Regulation* by *failing to produce proper payroll records*. The penalty for this contravention is $500.00. It is imposed under Section 28(b) of the *Employment Standards Regulation*.

As mentioned, Section 28 of the *Act* requires an employer keep records of certain information. Section 46 of the *Regulation* provides that a person required under Section 85(1)(f) of the *Act* to produce records, must produce and deliver the records "as and when required". In other words, the *Act* and the *Regulation* distinguish between the obligation to "keep" certain records and the obligation to "produce" such records "as and when required". An employer may be in breach of one or both of these requirements. In that regard, I refer as well to my comments in *Elena Folch and Jose Luis Andrade*, BCEST #D108/99, at page 9:

> "The *Act* and *Regulation* distinguish between an obligation to "keep" records and an obligation to "produce" them. Provided that person is an employer, that person may have contravened Section 28 of the *Act*, the obligation to keep records, and may also have contravened Section 46 of the *Regulation.* As noted in *Dhillon Investments Ltd. operating as Da Tandoor Restaurant*, BCEST

> #D298/98: "An employer may be in breach of one or both of these requirements". However, this does not mean that an employer who fails to "keep" records is automatically in breach of the obligation to "produce" or "deliver". In my view, an employer who does not keep the records cannot, obviously and logically, produce those records and may be penalized for failure to keep those records, but not for the failure to produce them unless, in the circumstances, the employer conduct itself in a manner that warrants the imposition of a penalty separate and apart from the failure to keep those records. The penalty for failure to "produce" records must relate to the production of records."

The Determinations state that the records produced by the Employer failed to meet the requirements of Section 28 of the *Act* which imposes an obligation on an employer to "keep" certain records. However, the reason for the Determinations is the failure to produce "proper" records contrary to Section 46 of the *Regulation*. Section 28(b) of the *Regulation*, referred to in the Determinations, sets the amount of the penalty for a contravention of Section 46 of the *Regulation*. It is not in dispute that the Employers produced "some"--albeit--inadequate records. However, if, as here, the Employers delivered the records they had "as and when required," in a timely fashion, they did not breach Section 46 of the *Regulation*. In my view, therefore, the Determinations did not correctly state the statutory provision alleged to have been breached.

The penalty for a violation of Section 28 of the *Act* or Section 46 of the *Regulation* is the same--$500.00 for each contravention. Moreover, Section 123 of the *Act* provides that a "technical irregularity does nor invalidate a proceeding under this Act". However, as the penalty provisions of the *Act* and *Regulation* are in the nature of quasi-criminal regulatory offence provisions, parties against whom penalties have been imposed, are entitled to know what specific statutory provision they are alleged to have breached, and such breach must be strictly proven (*Mega Tire Inc.*, BCEST #D406/97). In this case, the Employers argued that they provided the records it had "as and when required". The failure of the Director's delegate to correctly state the statutory provision alleged to have been breached, deprived the Employers of the opportunity to properly appeal the Determination, or explain why a penalty should not have been imposed. In my view, the failure of the Director's delegate to state the correct basis for the penalty is not a mere "technical irregularity" and the Determinations must be set aside.

I now turn to the second ground, the delegate's exercise of his discretion.

As noted in *Narang Farms*, *above*, at pages 5-8:

> "The Director's authority under Section 79(3) of the *Act* is discretionary: the Director "may" impose a penalty. The use of the word "may"--as opposed to "shall"-- indicates discretion and a legislative intent that not all infractions or contraventions be subject to a penalty. It is well established that the Director acts in a variety of capacities or functions in carrying out her statutory

> mandate: administrative, executive, quasi-judicial or legislative. In the case of a penalty determination, the Director is not adjudicating a dispute between two parties, an employer and an employee, rather the Director is one of the parties. As such, the Director is exercising a power more akin to an administrative rather than an adjudicative function. ...
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> ...
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> > In *Boulis v. Minister of manpower and Immigration* (1972), 26 D.L.R. (3d) 216 (S.C.C.), the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant considerations."
>
> Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it (*Randy Chamberlin*, BCEST #D374/97). Given that the power to impose a penalty is discretionary and is not 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*. This means that the Director must set out--however briefly--the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention. In this case, the Determinations makes reference to a second contravention of the same Section. In my view, this is sufficient."

In this case, the Determinations on a first reading appears to state the reason for the exercise of discretion:

> Section 2(d) of the Act states that one of its purposes is to provide fair and efficient procedures for resolving disputes over the application of the Act. The merits of a complaint can often only be determined through an inspection of records the Act requires employers to keep and to deliver to the delegate when a request for production is made. Failure to deliver a record, at the very least, delays investigation. It may deny an employee a minimum employment standard. The records demanded were relevant to an

> investigation, the employer was aware of the demand for production of records, and the records were not delivered.
>
> If there are no disincentives against employers who fail to participate in an investigation, then such conduct may be repeated. The Director issues a penalty in order to create a disincentive against employers who frustrate investigation through failure to provide records."

In my view, this is insufficient. The apparent explanation is simply a general and generic statement which could be attached to any determination. There is nothing to explain why in these circumstances, a penalty will create a disincentive. I agree that access to records is an important tool in the Director's investigations of complaints, and that failure to deliver such records may delay investigation. In this case, there is nothing to suggest that the Employers frustrated the investigation "through failure to provide records" (because the Employers provided such records as they had). In other words, the reason stated is not only insufficient, it is--on its face--wrong. Penalties may be imposed on employers who frustrate the Director's investigation and on employers who fail to keep records as required. However, the authority to impose penalties is discretionary and the exercise of that authority should be accompanied by an explanation. I am of the view that the Determinations do not provide any reason, beyond the Employers' contravention of the *Act*--which, in any event, is not correctly stated--to explain why, in the particular circumstances of this case, the delegate decided to exercise his discretion. (*Dr. Patrick Nesbitt Inc.*, BCEST #D549/98; *Peter Chu*, BCEST #D348/98)

I understand that the Employers' submissions that they dispute the claim for overtime wages by three (former) employees. I do not know whether a determination with respect to the merits of these complaint has been issued and I want to make it clear that the issue before me in this appeal is the appropriateness of the Penalty Determinations and not the merits of these complaints.

ORDER

Pursuant to Section 115 of the Act, I order that the Determinations in this matter dated February 25, 1999 be cancelled.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal