

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 -

453428 B.C. Ltd. operating as Bagel St. Café
(the “ Appellant ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/121

DATE OF DECISION: May 12, 2000

DECISION

APPEARANCES

May Cheng for the employer

No one for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by May Cheng on behalf of 453428 B.C. Ltd. operating as Bagel St. Café from a Determination dated February 3, 2000 which found the employer liable in the amount of \$500.00 for contravening Section 46 of the Employment Standards Regulations by failing to produce proper payroll records.

ISSUE(S) TO BE DECIDED

Did the employer contravene Section 46 of the Employment Standards Regulations and, if so, is the imposition of the penalty appropriate?

FACTS

The employer is the operator of a café located in Vancouver, British Columbia. On November 4, 1999 the Director’s Delegate issued a Demand for Employer Records pursuant to Section 85 of the *Employment Standards Act*. The Demand, which was made pursuant to a complaint, required the employer to disclose, produce and deliver all records relating to wages, hours of work and conditions of employment. Furthermore the Demand asked for all records an employer is required to keep pursuant to Part 3 of the *Employment Standards Act* and Part 8, Sections 46 and 47 of the Employment Standards Regulations. The employer was required to produce those records by 4:00 p.m. on November 19, 1999. The file record indicates that the Demand was received by May Cheng on November 8, 1999. The records were not produced.

The employer states that she attempted to respond to the Determination, however, she did not retain copies of the requested records after she forwarded the originals to her payroll contractor. The employer further states that she was not aware of the requirement to keep records pursuant to Section 28 of the *Act*.

ANALYSIS

This case is an example of a recurring and fundamental problem in the area of Employment Standards. The problem is the failure by the *employer* to keep proper records. The *Act* specifically requires *employers* to keep such records. Section 28 reads:

28. Payroll Records

- (1) For each employee, an employer must keep records of the following information:
 - (a) The employee's name, date of birth, occupation, telephone number and residential address;
 - (b) The date employment began;
 - (c) The employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
 - (d) *The hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;*
 - (e) The benefits paid to the employee by the employer;
 - (f) The employee's gross and net wages for each pay period;
 - (g) Each deduction made from the employee's wages and the reason for it;
 - (h) The dates of the statutory holidays taken by the employee and the amounts paid by the employer;
 - (i) The dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
 - (j) How much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.

- (2) Payroll Records must:
 - (a) Be in English,
 - (b) Be kept at the employer's principle place of business in British Columbia, and
 - (c) Be retained by the employer for 7 years after the employment terminates.

(italics by writer)

It is clear that the employer in this case has breached Section 28. The statute places the obligation on the employer to keep the records. The reason is obvious – when disputes arise there will be a record of the pertinent payroll information. That information is absent and its absence is detrimental to the investigation in this case.

Although a payroll record for the amount of wages paid is available the investigation is hampered by the difficulty of tracing those hours back to establish the basis for payments. This is critical

information when investigating a complaint regarding unpaid wages. The employer is the appellant in this matter and bears the onus of showing that the Determination is incorrect.

The employer argues in its appeal submission that it had sent the records to its payroll company who computed the employees' payroll. The employer was not able to retrieve the records. Neither did the employer keep copies at its place of business. It is the failure to keep copies at the employer's business that is the problem in this case.

The requirement to produce records under the *Act* is dealt with in Regulation 46. That Regulation reads:

“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 *Act* also provides an enforcement mechanism. That provision is found in Regulation 28. Regulation 28 reads:

“The penalty for contravening any of the following provisions is \$500.00 for each contravention;

- (a) Section 25(2)(c), 27, 28, 29, 37(5) or 48(3) of the *Act*;
- (b) Section 3, 13, 37.6(2) or 46 of this regulation.”

I turn now to the employer's request for relief from the imposition of the \$500.00 penalty. The statutory basis for imposing the penalty is set out in sections 79(3) and 98 of the *Act* and sections 28 and 29 of the Employment Standards Regulation. For convenience those sections are reproduced.

79. Determination

- (3) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may do one or more of the following:
 - (a) require the person to comply with the requirement;
 - (b) require the person to remedy or cease doing an act;
 - (c) impose a penalty on the person under section 98.

98. Monetary penalties

- 1. If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.
- 2. If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation

who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

3. A person on whom a penalty is imposed under this section must pay the penalty whether or not the person
 - (a) has been convicted of an offence under this Act or the regulations, or
 - (b) is also liable to pay a fine for an offence under section 125.
4. A penalty imposed under this Part is a debt due to the government and may be collected by the director in the same manner as wages.

Employment Standards Regulation

28. **Penalty for contravening a record requirement** – The penalty for contravening any of the following provisions is \$500.00 for each contravention:
 - (a) Section 25(2)(c), 27, 28, 29, 37(5) or 48(3) of the Act;
 - (b) Section 3, 13 or 46 of this regulation.

Although a discretion may rest in the Director whether or not to issue a Determination once the Determination has been issued there is no discretion under the *Act* to vary the penalty. That is, the *Act* specifically states that:

“The penalty for contravening any of following provisions is \$500.00 for each contravention. . .” (See Regulation 28 reproduced above)

There is no element of discretion involved in assessing the penalty. The statute sets the penalty at \$500.00 and that is the amount in the Determination of February 3, 2000. The employer is obliged to pay that amount. (See *Repel Security Systems Ltd.*, BC EST #D293/98)

The employer argues that she was unaware of the requirements of the *Act* and, having had the requirements brought to her attention, now keeps the records at her office. She asks that the Tribunal consider current compliance as a mitigating factor in assessing penalty for the past transgression. The Tribunal will not accept ignorance of the law as reasonable excuse or a basis to set aside determinations. Employers are obliged to be familiar with laws governing employment standards. The Legislature has set the penalty for breaching section 28 of the Act or section 46 of the Regulation at \$500.00. On the basis of the evidence before me and the wording of the statute I am unable to vary the penalty that has been imposed.

ORDER

The Determination dated February 3, 2000 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal