

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 -

Fort Optical Ltd. operating Hale Optical
(“Fort Optical”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Mark Thompson

FILE NO.: 97/145

DATE OF DECISION: May 15, 1997

DECISION

OVERVIEW

This is an appeal brought by Fort Optical Ltd., operating as Hale Optical (“Fort Optical” or the “Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on March 5, 1997 under file number 051330. The appeal was decided on the basis of written materials submitted by Fort Optical and the Director.

FACTS

The facts of the case were not in dispute. On February 17, 1997, the Director’s Delegate issued a demand for employer records in connection with a complaint filed by a former employee. The Delegate sent the letter to Fort Optical’s address in Surrey and to the firm’s registered office address by certified mail. The Employer did not claim the letter, which was returned to the Employment Standards Branch. Fort Optical’s registered address is a lawyer’s office. According to Fort Optical, the lawyer there accepted delivery of the demand for records, but did not forward it to the Employer, as he noted that the document was also sent to the company’s address. When the Director did not receive a reply to the February 17 demand for records, the Delegate issued Determination on March 5, 1997, assessing a penalty of \$500 against the Employer for violating Section 46 of the *Act*.

Fort Optical appealed the Determination on the grounds that it never received the demand for records. Mr. Ron Phillip, who addressed the appeal to the Tribunal, stated that no one in the office recalled having received any certified letter. He attached a letter from the office receptionist to that effect. Mr. Phillip surmised that the notice of attempt to deliver the certified letter may have been left in a box with flyers and similar items. He also noted that the demand was addressed to an individual who did not work at the Surrey address, although she was a store manager in Victoria. In support of his appeal, Mr. Phillip attached copies of previous communications with the Employment Standards Branch to show that the Employer had always cooperated with the Branch in the past. He asserted that the Employer would have complied with the demand for records in the case at issue had it received the letter.

ISSUE TO BE DECIDED

Should Fort Optical be assessed a penalty for its failure to respond to the demand for employer records?

ANALYSIS

There was no dispute between the Employer and the Director that Section 46 of the *Employment Standard Act Regulation* gives the Director the authority to require a person, Fort Optical in this case, to produce records as required. Section 28 of the *Regulation* establishes a penalty of \$500 for a contravention of Section 46.

Section 122 of the *Act* deals explicitly with the service of demands as follows:

- (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.*

Section 122 of the *Act* prevails in this case. The statutory language is clear that a demand is deemed to have been served if it is sent by registered mail to the proper address. In this case, the Director's Delegate sent the demand to two current addresses, so the requirements of Section 122 were met fully. Fort Optical acknowledged that the demand was received at its registered office address, so it did have the opportunity to respond to the demand. Section 28 establishes an automatic penalty for failure to respond to a demand issued by the Director's delegate. While these provisions of the *Act* and the *Regulation* are not flexible, they are consistent with the need for efficiency in administering the *Act*. As noted above, this decision does not imply any doubt concerning the truthfulness of the statements by persons representing Fort Optical.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination in this case, dated March 5, 1997, under file number 051330, be confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal