

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 -

South China Foods Enterprises Ltd.
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Mark Thompson

FILE NO.: 97/348

DATE OF DECISION: June 23, 1997

DECISION

OVERVIEW

This is an appeal by South China Foods Enterprises Ltd. (the “Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued April 17, 1997 by a Delegate of the Director of Employment Standards. The Determination found that the Employer had contravened Section 28 of the *Act* by failing to produce certain payroll records named in a Demand for Employer Records issued by Mr. Dennis Gornall, acting on behalf of the Director, on April 2, 1997. The Determination imposed a penalty of \$500 on the Employer. The appeal was decided on the basis of written submissions.

ISSUE TO BE DECIDED

The issue to be decided is whether South China Foods Enterprises Ltd. should be required to pay a penalty for failure to respond to a Demand for Employment Records.

FACTS

Victor Fung (“Fung”), a former employee of the Employer, filed a complaint with the Director on July 26, 1996. Fung alleged that he had worked 48 hours per week from November 1, 1993 until March 2, 1996 at straight time. He attached copies of his pay cheque stubs during his entire period of employment. Fung calculated that the Employer owed him \$1,287.10 for overtime pay.

On March 24, 1997, Mr. Dennis Gornall (“Gornall”), an Industrial Relations Officer acting for the Employment Standards Branch, wrote to the Employer outlining the particulars of Fung’s complaint. Gornall attached a calculation of the money owed to Fung, based on data Fung supplied with his complaint. Gornall requested a cheque in the amount of \$1,287.10 made out to Fung. He also stated: “As an alternative you can present your payroll records relating to Victor Fung at this address for an audit.” Gornall concluded by listing his telephone number, should the Employer require further information.

When the Employer did not comply with either of Gornall’s suggestions, Gornall issued a Demand for Employer Records to the Employer concerning Fung’s employment records for the period November 1, 1993 through March 2, 1996, on April 2, 1997. Gornall cited Section 85 of the *Act*, which gives the Director the authority to require a party to produce documents, as well as sections of the *Regulation* dealing with the same subject. The deadline for compliance with the Demand was 4:30 p.m. on April 16, 1997.

Timothy B. Skagen, Esq. ("Skagen"), replied to the Demand for Records by facsimile on the morning of April 16. He announced that he had been retained by the Employer to act on its behalf in this case. In his letter, Skagen requested the date of Fung's complaint so that "we may determine if the requirements of Section 74 of the Act have been met." He also asserted that because Fung's employment had terminated on February 3, 1996, only wages payable from February 4, 1994 through the date of termination would be payable. Skagen further stated that the records Fung provided with his complaint were incomplete and that other funds had been paid to him. He offered to provide the records after the issues he raised had been clarified. On the Employer's behalf, Skagen also offered a settlement on a without prejudice basis.

Gornall replied to Skagen by facsimile at 1:40 p.m. on April 16. He reminded Skagen that the March 24 letter to the Employer provided the option of remitting the amount requested or presenting the payroll records for audit to determine what amount might be due to Fung. Gornall reiterated the requirement that the records be presented by the afternoon of that day. He reported that Fung had not accepted the offer of settlement Skagen presented. Gornall further stated that vacation pay owed within 24 months of the earlier date of Fung's termination or his complaint may have been payable up to 36 months prior to the termination date of March 2, 1996. He concluded by stating that the Employer should put the records required by law before him in order to respond to Fung's allegations.

The records were not produced. On April 17, Skagen wrote to Gornall by facsimile. He stated that the letter of March 24 did not refer to holiday pay, but overtime only, and asserted that the "period referred to is clearly beyond the scope of the *Act*." Skagen reported that his client did not accept that the amounts justified a complete review of payroll records. Instead Skagen requested the amount of Fung's overtime and holiday and suggested that a compromise on those issues might be possible. He concluded by stating that "some overtime is due to Mr. Fung," but alleged that the Employment Standards Branch had acted in a "heavyhanded" way that was inconsistent with the spirit of the legislation.

Mr. Kevin Rooney, acting as the Director's Delegate, issued the Determination in question for this case on April 17, 1997, penalizing the Employer \$500 for its failure to produce the records specified in the Demand for Employer Records of April 2, 1997.

In his submission to the Tribunal, Skagen reiterated his argument that Fung's complaint fell outside of the time limits in the *Act* and further stated that Gornall's letter of April 16 raised an entirely new claim to which he was unable to respond in a timely fashion. He also stated that the Employer had changed its record keeping system "over the last couple of years", so that presenting an employee's records had "proven to be time consuming. . . ." Skagen further confirmed that his client would provide "relevant documentation," but he wanted to discuss which documents were relevant. In particular, he objected to the issue of holiday pay being raised shortly before the Determination was issued. Skagen also requested that the Tribunal remove Gornall from this case.

ANALYSIS

Article 28 of the *Act* requires an Employer to keep employment records. The specific items of information are numerous and include hours worked by the employee each day, dates of statutory holidays taken, and the dates of annual vacation taken by the employee, together with the amounts paid by the employer. Section 85 of the *Act* gives the Director the authority to require an employer to produce records relevant to an investigation. In this case, the Employer received a request to produce its payroll records on or about March 24, 1997. Alternatively, it was offered the opportunity to accept Fung's claim and pay him the amount due to him. The Employer did neither. When it did not reply, a Demand for Employer Records was issued on April 2, 1997. Still the Employer did not produce the records. Instead, its counsel embarked on a series of objections to Fung's complaint. Those objections may be well founded, but the Director's Delegate is no position to deal with them until the records are produced. The Employer's counsel did not raise the defense of the difficulty of producing payroll records until June 6, 1997. The appropriate time for raising objections to the merits of Fung's complaint would be after the payroll records are produced, not before they are in the Delegate's possession. It is trite law that I have no authority under the *Act* to intervene in the Director's conduct of an investigation.

ORDER

For these reasons, I find that the Determination was correct and the appeal should be dismissed. Pursuant to Section 115 of the *Act*, the Determination dated April 17, 1997 is confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal