Employment Standards TRIBUNAL

An appeal

- by -

J.M.C. Industries Ltd.
("JMC" or "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2003A/195

DATE OF DECISION: October 15, 2003

DECISION

SUBMISSIONS BY

James Canaday	for J.M.C. Industries Ltd.
Michelle Alman	Counsel for the Director of Employment Standards

OVERVIEW

This is an appeal by an employer, J.M.C. Industries Ltd. ("JMC" or "Employer"), from a Determination dated May 30, 2003 (the "Determination"), issued by a Delegate of the Director of Employment Standards ("Delegate"), pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). In a separate decision, I confirmed a determination awarding vacation pay in the amount of $504.00, plus interest in the amount of $13.63 to Jesse Simpson (the "Employee"). This Employer appeals a $500.00 administrative penalty, imposed by the Delegate, for the Employer's failure to keep records of daily hours worked by Mr. Simpson, as required by section 28(1)(d) of the *Act*. The Employer did not address any argument on this appeal as to the breach of section 28(1)(d). The Employer argued that it had produced information, that the Delegate could have asked it for more information, if the information was insufficient, and it was unfair to impose such a large penalty. I note that neither the Delegate nor the Tribunal have any discretion to reduce the amount of the penalty. The amount of the penalty is prescribed in the *Employment Standards Regulation, B.C. Reg. 396/95 as am.*, (the "*Regulation*").

In my view, the Employer's argument is without foundation. The Employer identified no errors or breach of natural justice germane to the penalty imposed for its failure to keep records of the daily hours worked by Mr. Simpson. The Employer directed its submission to the issue of records producible pursuant to a demand made by a Delegate. An Employer, having received a demand under the *Act*, is required to comply with the Demand, and there is no duty on the Delegate to remind the Employer to comply, to coax the Employer to comply, or to duty to follow up with an Employer with a request for further information, after the making the demand, prior to imposing an administrative penalty. An administrative penalty can be imposed for a breach of the record keeping provisions of the *Act*, or a breach of the record production sections of the *Act*, even if the Employer has otherwise complied with the *Act*, and a complaint has been dismissed. I note here the context was a complaint that the Employer failed to pay vacation pay as required, and the amount of vacation pay is directly dependant on the amount of wages earned. Further, the Delegate also investigated an overtime pay issue. The Employee was paid by the hour, and the Employer did not keep daily records of the hours worked. While the Employed filed an appeal on the basis of a breach of natural justice, the Employer has established no breach of natural justice in the issuance of the penalty and no breach of the *Act,* or the *Regulation* in imposing the penalty. I therefore confirmed the penalty determination.

ISSUE:

Was the penalty for the Employer's failure to keep daily time records for the Employee properly imposed?

FACTS

This matter proceeded before the Delegate by way of an oral hearing on April 30, 2003. Jesse Simpson (the "Employee"), attended, and James. E. Canaday, a representative of the Employer attended. The Delegate issued the Determination and written reasons on May 30, 2003. In a separate Determination, The Delegate found that the Employee was entitled to vacation pay in the amount of $504.00, plus interest in the amount of $13.63. The Employer filed an appeal of that Determination, and in a separate Decision, I dismissed that appeal.

This appeal proceeds by way of a consideration of the written submissions of the Employer, and counsel for the Director. The Employee did not file a submission in these proceedings.

This appeal relates to a penalty Determination. In the Determination dated May 30, 2003 (ER#117-942), the Delegate found that the Employer contravened section 28(1)(d) of the *Act*, by failing to keep records of the hours worked by the employee on each day.

The lack of the daily records became apparent during the course of the investigation, prior to the hearing before the Delegate on April 30, 2003. In this case the Delegate who heard the matter and issued the Determination, was a different Delegate from the Delegate who initially received the complaint, and made a Demand to the Employer for records.

A Delegate delivered to the Employer a Demand for Employer Records, which was undated, but provided for a requirement to produce all employment records by April 4, 2003. The records specified were:

> 1. any and all records relating to wages, hours of work and conditions of employment.
>
> 2. any and all documents relating to annual vacation earned, taken and outstanding, as well as, a copy of the Record of Employment.

A Delegate delivered to the Employer a second Demand for Employer Records dated April 30, 2003. The demand was for any and all payroll records for each pay period relating to wages and hours of work, from March 8, 2002 to October 25, 2002. The specified documents were:

> 1. the hours worked by the employee on each day (28(1)(d),
>
> 2. the benefits paid to the employee by the employer Sec. 28(1)(a)
>
> 3. each deduction made from the employee's wages (Sec. 28(1)(g), and
>
> 4. the dates of the statutory holidays taken by the employee and the amounts paid by the employer (Sec. 28(1)(h)

On both the demands made, the following warning was highlighted in bold print:

> Failure to produce these records as required, will result in a $500 penalty under Section 29 and 46 of the Employment Standards Regulation.

The Employer did not produce the documents sought in the demands. The Employer sent a letter dated May 7, 2003 which included a work record summary, a letter from the Automotive Retailers Association

dated May 6, 2003, pay stubs, and a letter from an accountant referring to an inaccurate T4, an amended record of employment, and an amended T4 slip. The Employer did not produce original payroll records, but rather a summary of information prepared for the purposes of the hearing.

The Employer did not produce daily time records, as required by the demand for records. The Delegate found that the Employer admitted, at the April 30, 2003 hearing, that the Employer did not keep daily time records for Mr. Simpson. The Delegate also found, based on Employer admissions at the hearing, that the Employer had nine days from the April 30, 2003 demand to produce the records, agreed to accept to demand by fax, and that nine days was a reasonable time given to respond to the demand.

The Delegate found that it was necessary to have all the records to ensure compliance with the overtime provisions of the *Act*. The Employer also "found" an error in the amount of the gross wages paid to the complainant, which had the effect of increasing the amount of annual vacation pay.

The Delegate found that the Employer breached 28(1)(d) of the *Act* by failing to keep records of the hours worked by the Employee each day. The Delegate imposed the $500 administrative penalty prescribed by the *Regulation*.

Employer's Submission:

The Employer has filed an appeal alleging that he did provide some information to the Delegate, and that he informed the Delegate if the information was insufficient, he would deliver further information. The full text of the appeal submission is set out below:

> 1) In replying to Mr. Smale's reply of March 13, 2003 letter. Records were Supplied (sic) for the hearing. They could not be totally complete as J.M.C. Industries was contesting Jessi Simpson's holiday pay and as of that date no determination for payment was made. I concluded my reply to Mr. Smale's request in my March 26, 2003 letter that if more information was required that I could be contacted at any time. At the hearing I questioned as to why I was not contacted for further information as Mr. Smale had my reply letter for some two weeks before the hearing date. The reply from Lynne Egan was that she had only just looked at this file that morning and that she could not have had time to contact myself.
>
> 2) As to Mr. Smale's request letter of April 30, 2003 for further information my reply to him again was if this information was insufficient then I would deliver the sufficient information to his office. Mr. Smale phoned myslef (sic) to tell me the information was received my fax, and that he was not presently in his office but would reply at a later time. No further reply was made to me I then delivered a copy of the information to his office.
>
> 3) Record to employee records as per sample are given to employee at the time employee starts. This form show deductions taken off each pay cheque. If changes are made to employee's wages a new form is give to the employee (sic) showing changes to pay cheque with increase to CPP, EI and other tax deductions.
>
> 4) I find for a small business operating in B.C. and having personnel (sic) contact daily with employee's (sic) that this information was accessible to employee at any time and if there were any concerns that I was available at most times for discussion. I also find the severity of the fine for a first time offender, especially when the information supplied was not sufficient or proper to be unfair and unjust. I was looking for help, but instead I was assessed a heavy fine.

The Employer filed an appeal on the basis that the Director failed to observe the principles of natural justice in making the Determination. The Employer seeks another hearing or a "leaster (sic) amount of penalty". The Employer believes that an oral hearing is necessary and

> believe (sic) fine should not have been imposed as I was continually request help to complete requirements as per thier (sic) letter.

In a further submission to the Tribunal dated April 26, 2003 the Employer suggests that if it breached the demand, it was an honest error, and that the Branch should have contacted its representative. The Employer submitted that it produced all information at hand.

Delegate's Submission:

The Delegate provided the record, and a submission, through its counsel. Counsel for the Director argues that this penalty appeal is entirely devoid of merit. The Branch issued the demands on the Employer pursuant to s. 85(1)(f) of the *Act*. The Demands contained clear warnings that the failure to produce the records sought would result in a $500.00 penalty. The Employer did not produce the records, only summaries. Counsel submits that one of the purposes of the Act is to provide for the fair and efficient resolution of disputes. Counsel says that the Delegate need not delay the efficient resolution of a dispute in order to "coax" further records from an Employer.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employer, to demonstrate an error such that I should vary or cancel the Determination.

Section 112 (1)(c) of the *Act* provides for an appeal on grounds that:

> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was made.

The penalty in this case was imposed for the Employer's failure to keep records of the hours worked by the employee on each day. Section 28(1)(d) of the *Act*, sets out the mandatory record keeping requirements of an Employer:

> (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;

I note that the Employer submissions do not address the issue of failure to keep the records as required by the *Act*, but rather appears to have responded on the issue of its failure to respond to the Demand. The Director's submission replying to the Employer's submission, also does not address the point that the penalty was imposed because of the lack of record keeping. In the disposition of this appeal, I will address the issue of lack of records, and because the parties have addressed the response to the demand, I have also considered the arguments related to the response to the demand.

The penalty scheme in the Employment Standards Regulation, B.C. Reg. 396/95 as am. (the "Regulation") provides as follows:

> 29 (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, a person who contravenes a provision of the Act or this regulation, as found by the director in a determination made under the Act, must pay the following administrative penalty:
>
> (a) if the person contravenes a provision that has not been previously contravened by that period, or that has not been contravened by that period in the 3 year period preceeding the contravention, a fine of $500.00;
>
> (b) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under that paragraph occurred, a fine of $2,500;
>
> (c) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under paragraph (b) occurred, a fine of $10,000.

I note that the Delegate imposed the penalty because the Employer did not keep the daily hours records for Mr. Simpson, as required by section 28(1)(d). This mandatory section of the *Act* is there to ensure that records are available as to the hours worked by the Employee. It is not sufficient for the Employer to provide summaries, which are based on the assumption that the Employee worked 8 hours each day. I note that independent of whether an Employee was paid properly for the time worked, the Employer has a duty to keep proper records.

With regard to the Employer's plea for a lesser penalty, I note that the Tribunal has no jurisdiction to reduce the amount of the penalty, which is prescribed by section 29(1) of the *Regulation*. In my view, my comments above dispose of the Employer's appeal with regard to the keeping of records. The Employer and counsel for the Director addressed the issue of responding to the Demand, and therefore I wish to address this point, which may be of assistance to the Employer, should it face an investigation by the Director, in the future.

Response to the Demand:

I note that the Employer received two demands in this case. The Employer did not produce all the original records. These were not onerous demands, as the issue was vacation pay, and overtime, and the Delegate needed to verify the total earnings of the Employee. The length of the employment relationship was less than one year. During the course of the investigation, the Employer discovered that he had not correctly paid the Employee for all hours worked.

The Director is given extensive powers set out in section 85 in order to ensure compliance with the Act. One of those powers is section 85(1)(f):

> 85. (1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:
>
> (f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).

An employer who fails to produce the documents demanded, frustrates or delays an investigation. Once a demand has been properly made, in my view there is no legal requirement on the Delegate to "follow up and ensure the employer has produced all the documents". The demand clearly sets out the nature of the records sought, and the penalties for non-compliance. An employer who chooses to ignore a demand, or fails to produce the records sought is liable to a penalty.

Under section 77 of the *Act*, the Delegate is required to give a reasonable opportunity to a person under investigation to participate in an investigation. Having made a demand, the Director is not required to plead, coax, or follow up and ensure that the Employer produces the documents sought. A person receiving a demand is under a legal obligation to produce the records sought, on pain of an administrative penalty for a failure to produce. I note again, that an administrative penalty was not imposed in this case for the failure to produce the records, but for the failure to keep records. It is important, however, for this Employer to realize that once it has received a demand, it must comply with the Demand, and there is no legal obligation on the Delegate to take steps to ensure that it complies, prior to imposing an administrative penalty.

For all the above reasons, I dismiss the Employer's appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated May 30, 2003 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal