

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 -

Dhillon Investments Ltd.
operating as Da Tandoor Restaurant
("Dhillon" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/281

DATE OF DECISION: July 8, 1998

DECISION

APPEARANCES/SUBMISSIONS

Mr. Manjit Singh Dhillon on behalf of the Employer

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on April 8, 1998 which imposed a penalty of \$500.00 on the Employer for “failing to produce proper payroll records”. The Employer asks that the penalty be set aside.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the Determination should be varied, confirmed or cancelled.

FACTS

On January 12, 1998, the Employment Standards Branch issued a Demand for Records pursuant to Section 85(1)(f) of the *Act*. The Director’s delegate found the records produced inadequate and issued a penalty determination as follows:

“The employer only maintained and produced records for part of Mr. Phagura’s employment. By the employer’s own admission, Mr. Phagura was employed from January/97 to December/97. The employer only produced records for June to October/97.

....

Nupur Talwar reviewed the records and determined that the records failed to meet the requirement of Section 28(1) of the Act, because they did not contain the following information:

They were not for the full period of employment and did not state daily hours worked, and did not show full payment of wages and vacation pay.

....

Dhillon Investments Ltd. has contravened Section 46 of the *Employment Standards Regulations* 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 Regulations*.

The employer is aware of the need to keep and produce records, but wilfully did not do so. Two complaints were received against the employer in 1997. A \$500.00 penalty determination was issued.

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 be determined through an inspection of records the Act requires an employer to keep and deliver to the delegate when a request for production is made. Failure to deliver a record, at 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. No reasonable explanation for the failure to deliver was given. If one had been given, he Director would have exercised her discretion and not issued a penalty. If there are no disincentives against employers who fail to participate in an investigation, then such conduct may be repeated. In order to creation (sic) a disincentive against employers who frustrate investigation through failure to provide records, the Director issues a penalty for such conduct.”

The Employer responds that it provided such records as it had. The delay was caused by the Employer’s accountant being on vacation..

ANALYSIS

The Director’s authority under Section 79(3) of the *Act* is discretionary. Section 98 of the *Act* provides the Director’s delegate with the discretion to impose a penalty in accordance with the prescribed schedule. Section 28 of the *Employment Standards Regulation* (the “*Regulation*”) establishes a penalty of \$500.00 for each contravention of Section 28 of the *Act* and Section 46 of the *Regulation*. The Director, or her delegate, has no discretion to determine the amount of the penalty once she, or her delegate, has determined that a contravention of 28 of the *Act* or Section 46 of the *Regulation* has occurred (see Section 28 of the *Regulation*). There is nothing in Section 28 of the *Regulation* which limits the authority of the Director’s delegate to impose penalties only where contraventions are made knowingly.

However, 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 to be 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*. In this case, however, the Determination explain why the Director's delegate elected to exercise her power to issue a penalty. In particular, the Determination points to previous penalties against the Employer. The Employer does not dispute this. In my view, this would ordinarily be sufficient.

Nevertheless, I am still of the view that the Determination should be set aside. Section 28 of the *Act* requires that the 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 my view, the *Act* and the *Regulation* clearly 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.

The Determination states that the records produced by the Employer failed to meet the requirements of Section 28 of the *Act*. Section 28 of the *Act* imposes an obligation on an employer to "keep" certain records. However, the reason for the Determination is the failure to produce "proper" records contrary to Section 46 of the *Regulation*. The Determination acknowledges that the Employer produced "some" inadequate records. However, as the Employer delivered what records it had "as and when required," in a timely fashion, the Employer did not breach Section 46 of the *Regulation*. In the result, therefore, the Determination 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, in my view, as the penalty provisions of the *Act* and *Regulation* are in the nature of quasi-criminal regulatory offence provisions, a party against whom a penalty has been imposed, is 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 Employer correctly argued that it had provided what records it had "as and when required". As such, the failure of the Director's delegate to correctly state the statutory provision alleged to have been breached, deprived the Employer of the opportunity to properly appeal the Determination, or explain why a penalty should not have been imposed.

In the result, I find that the failure of the Director's delegate, is not a mere "technical irregularity" and the penalty must be set aside.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated April 8, 1998 be cancelled and the amount of the penalty returned to the Employer together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal