

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 -

Mr. and Mrs. Lal also known as Lata Lal, Madhu Lal
Lata Lal Prasad, Sanja Lal Prasad
operating as Lata's Cafe
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen
FILE NO.: 1999/321 and 1999/322
DECISION DATE: July 21, 1998

DECISION

SUBMISSIONS

Mr. Madhur Lata Lal on behalf of the Employer
(“Lal”)

Ms. M. Elaine Bellamore on behalf of the Director

FACTS AND ANALYSIS

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against two Determinations of the Director of Employment Standards (the “Director”) issued on May 3, 1999: one which found that Marciana B. Balaricia (the “Employee”) was entitled to \$1,148.32 on account of regular wages, statutory holiday pay and vacation pay (the “Balaricia Determination”). This Determination also includes a “\$0.00” penalty. The other Determination (the “Penalty Determination”) was in the amount of \$500.00 for failure to produce records.

I turn first to the Balaricia Determination.

According to the Determination, the Employee was employed by the Employer from June 17 to July 15, 1998. She complained that she did not get paid regular wages for the period July 1 through 15 and that she did not receive vacation pay. She provided records of her hours worked to the delegate and stated that her rate of pay was \$8.00.

The Determination states:

“A Demand for Employer Records was mailed to <the Employer> on April 12, 1999 along with a covering letter explaining Balaricia’s allegations and a check list of the information required for the investigation. The employer was required to produce this information on or before 3:00 p.m. on April 27, 1999. An acknowledgement of Receipts card signed by Madhu Lal on April 13, 1999 was received from Canada Post at this office on April 15, 1999. As of the date of this Determination the employer has not provided the information requested or contacted the delegate. Therefore, this Determination has been provided solely on the evidence of the complainant.”

The Employer's appeal may politely be characterized as a series of allegations to the effect that the Employee is lying about her hours, wages, amounts paid and other matters. In any event, the delegate argues that I ought not to consider the appeal as the Employer failed to participate in the investigation. In support of that proposition, the delegate refers to a number of decisions of the Tribunal, including *Kaiser Stables*, BC EST #D058/97.

I agree with the delegate. The issue is whether the Determination should be varied, confirmed or cancelled when the Employer refused to participate in the investigation. As stated in *Kaiser Stables*, *above*, and numerous other cases, the Tribunal will generally not allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the merits of the Determination. The issues raised by the Employer--including the claim that the Employee is lying--could have been addressed during the investigation. No explanation was given to the delegate. Indeed, as pointed out by the delegate, there appears to be nothing in the reasons for appeal to explain the fact that the Employer did not respond to the request for information. Clearly the Employer refused to participate in the investigation. I will not permit the Employer to raise the merits of the complaint at this stage and, therefore, the appeal of the Balaricia Determination must fail.

I now turn to the Penalty Determination. This Determination found that the Employer contravened Section 46 of the *Regulation*:

- The Employer failed to provide payroll records.
- The delegate issued a request for Information and a Demand for Employer Records.
- The Employer received the above.
- The Employer did not contact the delegate.

The Penalty Determination notes:

“No reasonable explanation for the failure to deliver was given. If a reasonable explanation had been given, the Director would have exercised discretion and a penalty would not have been issued.”
(Emphasis added)

In my opinion, this is sufficient (see, for example, *Hewitt Rand Corporation*, BCEST #D271/99). As noted in *Narang Farms and Processors Ltd.*, BCEST #D482/98, at page 6-7:

“..... In the case of a penalty determination, the Director is not adjudicating a dispute between two parties, an employer and an employee, rather the Director is one of the parties. As such, the Director is exercising a power more akin to an administrative rather than an adjudicative function. The Tribunal has had occasion to deal with appropriate standard for the Director's exercise of discretionary power in the context of an administrative function in a number of cases. In

Takarabe et al. (BCEST #D160/98), the Tribunal reviewed the case law and noted at page 14-15:

“... ”

In *Boulis v. Minister of manpower and Immigration* (1972), 26 D.L.R. (3d) 216 (S.C.C.), the Supreme Court of Canada decided that statutory discretion must be exercised within “well established legal principles”. In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant considerations.”

Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it (*Randy Chamberlin*, BC EST #D374/97). Given that the power to impose a penalty is discretionary and is not 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*. This means that the Director must set out--however briefly--the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. *It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention.* In this case, the Determination makes reference to a second contravention of the same Section. In my view, this is sufficient.” (Emphasis added)

In this case, the Employer did not explain the failure to produce records to the delegate. In my view, the penalty must stand.

ORDER

Pursuant to Section 115 of the Act, I order that the Determinations in this matter, dated May 3, 1998 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal