

An appeal

- by -

Ziad Ardat aka Ziad Elardat aka Ziad El Ardat aka Ziad Abouelardat aka Ziada
Bou El Ardat aka Ardat El Abou and Maha Ardat
("the Ardats")

- 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: W. Grant Sheard

FILE No.: 2001/284

DATE OF DECISION: June 18, 2001

DECISION

SUBMISSIONS:

Ziad Ardat on behalf of himself and Maha Ardat

Gillian MacGregor on behalf of the Director

OVERVIEW

This is an appeal based on written submissions by the Ardats (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 March 20, 2001 finding that the Ardats had contravened section 46 of the *Act* by failing to produce payroll records and imposing a \$500.00 penalty pursuant to section 28(b) of the *Employment Standards Regulation* (the “Regulation”).

ISSUE

Was the Director’s delegate correct in finding that the Ardats had contravened a requirement of this *Act* or the *Regulation* and imposing a penalty under section 28 of the *Regulation*?

ARGUMENT

The Position of the Employer

In an appeal form dated April 5, 2001 and received by the Tribunal on April 9, 2001, the Employer submits that there were errors in fact, a different explanation of the facts, and other facts that were not considered. He makes various submissions regarding the merits of this case and whether the putative Employee was an Employee and whether she was paid in full. More to the point on this particular appeal, the Employer says “late on March 20, 2001 I received the determination and penalty of \$500.00. Since I had an extended time, March 29, 2001 from Sharon Cott, Employment Standards office where I gave her all the documents that I have.” (sic) As I understand it, the Employer is submitting that he had received an extension prior to the determination dated March 20, 2001 to provide these documents on March 29, 2001 from a delegate other than the one who issued the determination and that he did provide the documents requested by March 29, 2001.

The Director’s Position

In a written submission dated April 20, 2001 received April 25, 2001 the Director’s delegate notes that the Employer failed to contact the delegate or return to the Employment Standards

Branch to produce records as had been agreed with another delegate by March 13, 2001 and a determination was therefore issued on March 20, 2001. The delegate further states “since no records had been provided to date, a demand for Employer records was issued on March 19, 2001, requiring the Employer to produce the records on March 29, 2001, by 4:00 p.m. Documentation was subsequently received from the Employer on March 29, 2001, at approximately 3:50 p.m.”

The Director’s delegate had noted in her determination dated March 20, 2001 that, where there had been 2 earlier demands to produce records which were not complied with, this failure to comply delayed and frustrated the Branch’s investigation of this matter. She further noted that, “if there are no disincentives against Employers who fail to participate in an investigation, then such conduct may be repeated.”

THE FACTS

In a determination dated March 20, 2001 the Director’s delegate found that the Employer had employed the complainant to provide child care services in their home. Following a complaint made, a delegate of the Director, Glen Smale, issued a demand for records pursuant to section 85(1)(f) of the *Act* on December 13, 2000. No response was received. On February 13, 2001, another delegate, Sharon Cott, issued a demand for records under the same section. The Employer contacted the delegate by the deadline date in that demand, March 6, 2001, and requested an extension to comply. The delegate provided a verbal extension to March 12, 2001.

On March 12, 2001 Mr. Ardat came to the Employment Standards Branch with original documents. He had not provided advance notice of his intention to come to the office and was not prepared to leave the original documents with the delegate. The delegate explained that she required these documents for review and Mr. Ardat was given a choice of leaving the documents and having them returned to him later or bringing back photocopies. The delegate told the Employer that he could return the documents (photocopies) the next day, March 13, 2001. The Employer failed to contact the delegate or return to the Employment Standards Branch the next day and a determination was issued by another delegate, Ms. Gillian MacGregor, on March 20, 2001. In the written submission filed by the delegate dated April 20, 2001 she states “since no records have been provided to date, a demand for Employer records was issued on March 19, 2001, requiring the Employer to produce the records on March 29, 2001, by 4:00 p.m. Documentation was subsequently received from the Employer on March 29, 2001, at approximately 3:50 p.m.”

In his appeal filed the Employer states “late on March 20, 2001 I received the determination and penalty of \$500.00. Since I had an extended time until March 29, 2001 from Sharon Cott, Employment Standards office where I gave her all the documents I have.” (sic)

ANALYSIS

Section 28 of the *Act* provides that an Employer must keep payroll records for each Employee. Section 85(1)(f) provides as follows:

85(1) for the purposes of ensuring compliance with this Act and the Regulation, the Director may do one or more of the following:

- (f) require a person to produce or deliver to a place specified by the Director any records for inspection under paragraph (c).*

Section 28 of the *Employment Standards Regulation* provides as follows:

Penalty for Contravening a Record Requirement

28. *The penalty for contravening any of the following provisions is \$500.00 for each contravention sub section*

(b) section 3, 13 or 46 of this Regulation.

Section 46 of the *Regulation* provides that a person who is required under section 85(1)(f) of the *Act* to produce or deliver records to the Director must produce or deliver the records as and when required.

The Director's delegate noted in her determination that the failure to provide necessary payroll records has frustrated the Branch in its investigation and that it is contrary to section 2(d) of the *Act* which states that one of the purposes of the *Act* is to provide fair and efficient procedures for resolving disputes. She continues, "if there are no disincentives against Employers who fail to participate in an investigation, then such conduct may be repeated."

I agree with all of the foregoing observations made by the delegate. However, on the facts of this case, with the file apparently being handled by several different delegates, the delegate here acknowledging that a third demand was sent out the day before the determination requiring production by March 29, 2001 and the Employer's claim that another delegate had given him a further extension to that same date, I am satisfied on a balance (though far from certain) that the Employer did believe that he had until March 20, 2001 to provide those documents. Indeed, I note that he did provide those documents by that date.

I note that earlier cases decided by this Tribunal have found that a contravention of the requirements of the *Act* for keeping records need not be wilful for a penalty to be imposed (see, for example, *Lakeside Office Systems Ltd.* BCEST #D166/97 and *Re Piete* BCEST #D032/99). However, this case does not involve a penalty for failing to keep records, but failure to produce them. As there is evidence of extensions of time for compliance being granted, it is not clear that the Employer contravened the *Act* and *Regulation*.

I expect that reviews of these penalties will all turn on their own particular facts and I do not think that this decision should promote non-compliance with similar demands by others.

I find that the Employer did not contravene the second and third demands delivered upon him, considering extensions granted to him.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated March 20, 2001 be cancelled.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal