

**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-

CDI Enterprises Ltd.  
("CDI ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	C. L. Roberts
<b>FILE NO:</b>	97/691
<b>DATE OF DECISION:</b>	November 7, 1997

## DECISION

This is a decision based on written submissions by William Jurgenson, President of CDI Enterprises Ltd.

### OVERVIEW

This is an appeal by CDI Enterprises Ltd. ("CDI"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards ("the Director") issued August 20, 1997. The Director found that CDI contravened Section 46 of the *Act* in failing to produce or deliver records as and when required by the Director. The Director Ordered that CDI pay \$500.00 to the Director as a penalty for the contravention, pursuant to Section 28 of the Employment Standards Regulations.

CDI claims that the dispute between the company and the employee was resolved on September 8, 1997, and that no records could be provided as the comptroller had left the company in March 1997. CDI was unable to get the employee records until some time after that. CDI contends that the money garnisheed pursuant to the penalty determination should be returned.

### ISSUE TO BE DECIDED

Whether the Director correctly determined that CDI was in contravention of the *Act*.

### FACTS

Following a complaint by a former employee, the Director wrote a letter to CDI regarding the complaint on June 30, 1997. No response was received. On July 3, the Director issued a Demand for Employer Records. No response was received to that Demand.

A second Demand for Employer Records was issued on July 31, 1997. A penalty Determination was also issued that day. The second demand was received by the Registered Office of CDI three days after being issued. Both demands and the first penalty determination were also sent to Mr. Jorgenson's home, and were returned by the post office as "unclaimed".

On August 20, 1997, a second penalty Determination was issued, which is the subject of this appeal. That was sent to Jorgensons' home, and was returned as it was "refused by addressee".

On September 8, Mr. Jorgenson contacted the Director's delegate, and indicated he had not received any of the certified mail. Following that conversation, CDI and the complainant settled the dispute between themselves, and the complaint was withdrawn. CDI made no attempt to contact the Director, provide the Director with the records, or explain the problem with the comptroller prior to filing this appeal.

## ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Section 28 of the *Employment Standards Act* provides that for each employee, the Employer must keep records of a number of matters, including

- (b) the date the employment began;
- (d) the hours the employee worked on each day;
- (e) the benefits paid to the employee;
- (f) the employees gross and net wages for each pay period; and
- (g) each deduction made from the employee's wages and the reason for it.

Section 85(1) of the *Act* provides that for the purpose of ensuring compliance with the *Act* and the Regulations, the Director may (c) inspect any records that may be relevant to an investigation under that Part, and (f) require any person to produce or deliver to a place specified by the director, any records for inspection under paragraph (c).

Section 125 provides that a person who contravenes a requirement of that section commits an offense.

Section 46 of the *Employment Standards Regulations* provides that a person who is required under Section 85 of the *Act* to produce or deliver records to the director, must produce or deliver the records as and when required. Section 28 provides for a \$500.00 penalty for a contravention of section 46 of the regulation.

These five sections, along with 5 other sections of the *Act*, and 2 other sections of the *Regulations* are excerpted and enclosed with the Demand for Records. A large notice stating "Failure to comply with this Demand may result in a penalty against you and without further notice" is stamped on the bottom of the enclosure.

The evidence is that the Penalty was issued as a result of CDI's failure to comply with the Director's second Demand for records. It was issued on August 20, 1997, some time before the matter was settled between CDI and the complainant. The fact that CDI may have resolved the matter directly with the employee after the Determination was issued is not relevant to this appeal. This Tribunal has determined that even where matters have been resolved, an employer is not relieved of producing records pursuant to a demand (*South China Food Enterprises Ltd. v. British Columbia (Director of Employment Standards BC EST #D286/97, Western Campus Resources Inc. v. British Columbia (Director of Employment Standards, BC EST #D335/97)*).

The *Act* and *Regulation* provides that where an employer fails to comply with certain legislative provisions, a contravention is deemed, for which a penalty may be imposed under the Regulations.

Section 122 (1)(b) of the *Act* provides that a determination or demand that is required to be served on a person under this *Act* is deemed to have been served if sent by registered mail to the person's last known address. Section 122 (2) provides that if service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office. Registered mail is also certified mail.

The evidence is that the documents were served by certified mail both at the Pitt Meadows office from which Mr. Johnson operates his business, as well as CDI's registered office in Maple Ridge.

I am satisfied that the Demands were properly served on CDI, and that CDI failed to respond to the Demands. Consequently, I am unable to conclude that the Director erred in imposing a penalty for CDI's failure to comply with the second Demand.

**ORDER**

I Order, pursuant to Section 115 of the *Act*, that the Determination be confirmed.

**Carol Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**