

EMPLOYMENT STANDARDS TRIBUNAL

In the Matter of an Appeal Pursuant to Section 112 of the
Employment Standards Act, S.B.C. 1995, c. 38

- by -

Robert D. Crane

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE NO.: 96/599

DATE OF DECISION: December 17, 1996

DECISION

OVERVIEW

This is an appeal by Robert D. Crane pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"). The appeal is from Determination No. CDET 004144, issued by Mark Tatchell as a delegate of the Director of Employment Standards on October 7, 1996.

The Determination imposed a penalty of \$500.00 on Mr. Crane for failure to retain employment records pursuant to Section 28 of the *Act*, and also for failure to produce records as required under Section 85(1)(f) of the *Act*. Mr. Crane filed an appeal on October 17, 1996. The appeal was decided on the basis of written submissions without an oral hearing.

FACTS

Maxheat Services Ltd. went into receivership and Robert D. Crane CA, of the accounting firm Crane, Lawson, Magnusson & Chase, was appointed receiver-manager on May 31, 1996. The Director of Employment Standards then received a complaint from several employees regarding unpaid wages. Industrial Relations Officer Robert Krell was assigned to investigate the matter. It appears that Mr. Krell advised Mr. Crane of the complaints on June 18, 1996. Mr. Crane's associate, Derek Chase, was assigned to deal with the complaints. Mr. Chase advised Mr. Krell that payroll records and other information would be provided.

Mr. Krell spoke with one of the directors of the company, Ms. Lorene Tanner, and learned of the location of personnel files and employee timecards. These files were located inside the business premises, which were then under the control of Mr. Crane. Mr. Krell arranged to meet Mr. Chase at these premises on June 27, 1996 to search for the files, but it appears from the submission of the Director that Mr. Crane refused to allow Mr. Krell and Mr. Chase to visit the premises. In a discussion between Mr. Krell and Mr. Crane, Mr. Crane stated that some records were "thrown out," but it is disputed between the parties whether Mr. Crane specified that the discarded files were personnel files or merely "certain old files."

A Demand for Employer Records was issued to Mr. Crane pursuant to Section 85 of the *Act* on August 14, 1996. The Demand required the production of: 1) all records relating to wages, hours of work, and conditions of employment; 2) all records an employer is required to keep pursuant to Part 3 of the *Act* and Sections. 46 and 47 of Part 8 of the *Employment Standards Regulation*.

In a letter to Mr. Krell dated August 20, 1996, Mr. Crane stated:

"... we have thrown out certain old files and have retained other more current files. Specifically, I am uncertain if the files you noted were ever on hand, were thrown out or are still in storage at Ironwood Street."

Some employee information was stored in a computer at the business premises. In his written submissions on the appeal, Mr. Crane states that portions of this information were printed in hard copy from the computer, but that "'everything' was not run off the computer as this may have taken several days due to the speed of the computer and printer." Mr. Crane also states that he retained a computer printout of information necessary to compile employee T4 slips, "Dean" payroll books and records of employment on file. He states this information would be "the standard records searched and retained by a Receiver-Manager in order to prepare T4's and respond to the many queries from the Unemployment Insurance Commission and Employment Standards Branch." The remaining information on the computer was purged and the computer was then sold at an auction. It appears that the personnel files containing employee timecards were either not retained, not located, or not produced. It also appears that no other information was provided to the Director by Mr. Crane in response to the Demand for Employer Records.

The Determination under appeal found that Mr. Crane either failed to retain employment records pursuant to Section 28 of the *Act*, or failed to produce records as required under Section 85(1)(f) of the *Act*. In either case, the penalty provided for in the *Employment Standards Regulation* is \$500.00 and Mr. Crane was assessed a single penalty in that amount.

ISSUE TO BE DECIDED

This appeal requires me to decide whether Mr. Crane failed to comply with the Section. 85 Demand for Employer Records, and also whether he failed to retain records as required by Section 28 of the *Act*.

ANALYSIS

In his notice of appeal, Mr. Crane alleges that the Determination is in error because certain information is inaccurate and not all relevant facts were considered. He also states that he feels the Determination arose not from a lack of records but from a personality clash between himself and Mr. Krell. In his submission, Mr. Crane asserts that "at no time did I advise Mr. Krell that I had 'thrown out' any employee personnel files." In my review of Mr. Crane's submission, I find that he does not in fact take issue with the relevant facts as I have set out above.

Section 28 of the *Act* sets out a comprehensive list of records that an employer must keep on each employee. These records include the date each employee's employment began and the hours of

work performed by the employee each day, regardless of whether the employee is paid on an hourly or other basis. Section 85 of the *Act* enables the Director to inspect any records that may be relevant to an investigation and to require an employer to produce such records on demand. Sections 46 and 28 of the *Employment Standards Regulation* impose a \$500.00 penalty for failure to comply with a Section 85 Demand and also for failure to retain records required by Section 28 of the *Act*.

Section 98 of the *Act* provides as follows:

1. If the Director is satisfied that a person has contravened a requirement of this *Act* or the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.
2. If a corporation contravenes a requirement of this *Act* or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

I am satisfied that a receiver-manager of a company in receivership would not only be a "person" for the purpose of subsection 98(1), but would also be an agent of the corporation under subsection (2).

It is clear from the evidence and submissions that Mr. Crane paid insufficient attention to the important requirement imposed on every employer to keep employment records and produce them on demand. When a company is placed in receivership, our Legislature has determined that unpaid wages be given higher priority than any other competing claims. It is a corollary that when a company is in receivership, records of wages paid and owing to employees are of great importance. The Legislature has accordingly provided for penalties to be imposed on employers who fail to retain or produce employee records.

While there is a dispute as to whether Mr. Crane told Mr. Krell that he had thrown out some personnel records, Mr. Crane does admit to not knowing whether the information sought by Mr. Krell might have been discarded. At best, Mr. Crane appears to have been somewhat careless in retrieving and retaining personnel information from the company. Important information was stored on a computer, but only part of the computer contents were printed and retained. For reasons known only to Mr. Crane, the contents of the computer memory were not saved in their entirety before being purged. Mr. Chase located a personnel file on one employee, which confirms that such files were in existence, yet little care appears to have been taken to locate and preserve any others. I note the allegation, undisputed by Mr. Crane, that he refused to allow Mr. Krell to enter onto the business premises for the express purpose of searching for these files.

Mr. Crane appears to have prejudged, erroneously, what employment information Mr. Krell might need in the course of his investigation. As Mr. Crane states in his submission, he retained only the "standard records" he thought receiver-managers normally retain. Even if he applied a standard of care common among other receiver-managers, the fact there had been complaints of unpaid wages

by several employees should have alerted Mr. Crane that the utmost care should be taken in searching for and preserving all employment records in the company's possession. Indeed, receiver-managers would likely owe a fiduciary duty to unpaid employees as well as to creditors of the company and the Court in these circumstances.

Mr. Crane has failed to meet the burden resting upon him to establish that the Determination under appeal is erroneous. I rely in that finding upon information provided chiefly by Mr. Crane himself.

I consider the Director to have been lenient in imposing only a single \$500.00 penalty, when there was a basis for imposing penalties for both the failure to retain records and the failure to produce them.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by Mr. Tatchell is correct and the appeal should be dismissed. Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 004144 be confirmed.

Ian Lawson
Adjudicator
Employment Standards Tribunal