

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 -

Smoother Movers Limited

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/518

DATE OF DECISION: August 12, 1997

DECISION

OVERVIEW

This is an appeal by Smoother Movers Limited, under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued by a delegate of the Director of Employment Standards on June 20, 1997. The Determination imposed a penalty of \$500.00 based on a finding that Smoother Movers Limited had contravened Section 28 of the *Act* by failing to keep proper payroll records.

I have made this decision following a review and analysis of the Determination and the parties’ written submissions.

ISSUE TO BE DECIDED

Should the Determination be cancelled, varied or confirmed?

FACTS

This appeal is made by Douglas J. Bensley on behalf of Smoother Movers Limited of which Mr. Bensley is the President/Secretary. The Determination sets out the following facts, which are not disputed in this appeal:

On February 13, 1997, a Demand for Employer Records was issued by Murray Superle, Industrial Relations Officer. ...On February 25, 1997, you delivered those records to Murray Superle.

Murray Superle reviewed the records and determined that the records were incomplete. As per Section 28(d) of the *Employment Standards Act* records must include,

“the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis.”

It is also undisputed that: Smoother Movers Limited was incorporated on September 27, 194; a cheque dated November 1, 1996 was made payable to Larry Darrell in the amount of \$150.00 for a payroll advance, was signed by Doug Bensley and was drawn on Smoother Movers Limited’s bank account; and, the response to the Demand for Employer Records took the form of a letter dated February 25, 1997 which was signed by Doug Bensley on behalf of Smoother Movers Ltd. (sic).

ANALYSIS

As the appellant, Smoother Movers Limited bears the onus of proving that the Director's delegate erred in issuing the Determination.

When I review the reasons for this appeal and Mr. Bensley's submission dated August 5, 1997 it is clear that the primary reason for the appeal is the style of cause. That is, should the Demand and the Determination show the Employer as "Smoother Movers Limited" or should it be "Douglas J. Bensley doing business as Smoother Movers?"

Mr. Bensley argues that the employer should be the proprietorship rather than the limited company. He makes that argument for several reasons:

- Smoother Movers Limited did not commence operations until February 1, 1997;
- Smoother Movers Limited was not Lawrence Darrell's employer; and,
- the bank made an error by printing "Smoother Movers Limited" rather than "Smoother Movers" on new batch of cheques (one of which was issued to Larry Darrell on November 1, 1996).

He also argues that Smoother Movers Limited should not be required to provide records that do not exist ("...a non-existing entity was demanded to provide non-existent records in error as in fact no transactions had occurred regarding the employee (L. Darrell) and the company Smoother Movers Limited"). That argument contains a fundamental flaw - Smoother Movers Limited is not a "non-existing entity." It is undisputed that the company was incorporated on September 22, 1994. All of the records which the Demand required to be produced may or may not exist. Clearly certain records exist because they were delivered to the Director's delegate on February 25, 1997 along with the letter which was signed by Doug Bensley on behalf of Smoother Movers Limited, which stated in the opening paragraph:

In response to your demand of records dated February 13, 1997 I have prepared only the additional information about Mr. Lawrence Darrell that you asked me for as you acknowledged you had received records from me several weeks ago and had misplaced them in error.

I note that Mr. Bensley acknowledges in his submission of August 5th that as a proprietorship he had "several past dealings" with the Director's delegate since 1994. I also note that while the appeal makes certain assertions of fact (as set out above), I have not been provided with any evidence (documentary or otherwise) which supports or confirms those assertions.

A recent decision of the Tribunal (*Monchelsea Investments Limited* BC EST #D315/97) made the following comments concerning the Director's entry and inspection powers under Section 85 of the *Act*:

Section 85 of the *Act* provides the Director with broad powers of entry and inspection. A combination of Sections 28 and 46 of the *Regulation* provide for a penalty if a third party does not "produce or deliver records to the Director ... as and when required" (Section 46 of the *Regulation*).

These are onerous provisions. In my view in order to rely on these provision the Director must have reasonable grounds to issue a Demand and he must act within established procedure.

I agree with that reasoning. When I consider all of the evidence and the submissions in this appeal I find that the Director's delegate had reasonable grounds to issue the Demand. He had had several dealings with proprietorship; wages had been paid from the bank account of Smoother Movers Limited; a search of company records confirmed that Doug Bensley was its president/secretary; and the letter of February 25,1997 does not dispute that Smoother Movers Limited was Mr. Lawrence's employer. The Determination shows that it was issued because the records submitted to the Director's delegate were incomplete - they did not include the hours worked by the employee on each day. The appeal contains no explanation for the failure to maintain payroll records which comply with Section 28(1)(d) of the *Act*.

ORDER

I order, under Section 115 of the *Act* , that the Determination be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal