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 -

Waysafer Wholefoods Ltd. and Janice Louise Hartley
("Waysafer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/404

DATE OF HEARING: December 10, 1996

DATE OF DECISION: December 24, 1996

DECISION

OVERVIEW

The appeal is by Waysafer Wholefoods Ltd. ("Waysafer") and Janice Louise Hartley pursuant to section 112 of the *Employment Standards Act* (the "*Act*") against Determination # CDET 003044 and Determination # CDET 003046 of the Director of Employment Standards (the "Director"), decisions dated June 26, 1996. In the first determination a penalty is imposed on Hartley for contravention of section 28 of the *Act.* In Determination #CDET 003046, Leonard H. Rose is found to have been terminated by Hartley without discharging her liability pursuant to section 63 of the *Act* , two weeks' compensation for length of service is awarded.

The appeal alleges that Waysafer was the employer of Rose, not Hartley. Waysafer also argues that the records required by section 28 the *Act* were kept and that it had just cause in terminating the employment of Rose.

APPEARANCES

Walter Anderson	Representing Waysafer Wholefoods
Janice Louise Hartley	Witness for Waysafer
Glen Smale	For the Director

FACTS

Leonard Rose worked as a nanny in the home of Walter Anderson and Janice Louise Hartley from February 1, 1995 to January 8, 1996 when he was fired for not showing up for work on that day. Rose worked days from Monday to Friday and did not live in the home.

Rose, on being terminated, filed a claim for overtime pay and compensation for length of service. Rose gave his employer as Waysafer. Waysafer was contacted for employment records and certain records were provided. Rose was interviewed. The investigating officer then advised Hartley by letter dated May 3, 1996 that it appeared that Hartley rather than Waysafer was the employer. In that letter the Director's delegate goes on to suggest that the payroll records, which are said to be her payroll records, do not conform with Part 3 of the *Act* and Hartley is asked to "forward all records which can more objectively define Mr. Rose's daily hours of work". Hartley was advised that monetary penalties may be imposed for violations of the *Act* and a highlighted *Guide to the Employment Standards Act* was sent with the letter to Hartley.

Hartley responded by letter, one dated May 10, 1996, in which she says, "I employ no one in my personal capacity", that she "will not entertain the notion that (she) was the employer rather than Waysafer" and that she is sending the Branch's correspondence on to Walter Anderson of

Waysafer. The letter ends with Hartley asking that future correspondence be addressed to Anderson.

Hartley's letter led to another by the investigating officer, one dated May 14, 1996. In that letter Hartley is informed that her comment that she "will not entertain the notion that (she) was the employer rather than Waysafer" is understood to constitute her evidence on the issues raised by Rose. The letter also informs Hartley of the authority of a Director's delegate to determine who is an employer, even to the extent of associating individuals and corporations through section 95 of the *Act.* It goes no further however in resolving the matter of who it the employer.

Nothing further being heard from either Waysafer or Hartley, determinations 3044 and 3046 were issued on June 26, 1996.

On July 10, 1996, the Employment Standards Branch received a letter dated June 26, 1996 from Waysafer. The letter sets out Waysafer's position in detail, including its view that it is the employer. Waysafer says that the letter was written before it received the determinations.

Determination 3044 recapitulates correspondence, notes that no further records were received from either Hartley or Waysafer, states the conclusion that "the employer failed to keep and provide the hours worked by the employee . . . as required by section 28(1)(d) of the *Act*" and then imposes a penalty on Hartley pursuant to section 98 of the *Act.* It is not made clear in determination 3044 whether the penalty imposed on Hartley is because she is the employer but that is made clear by Determination 3046.

Determination 3046 awards Rose two weeks' compensation for length of service on the basis that the employer failed to discharge her liability pursuant to section 63 of the *Act*.

The appeal by Waysafer argues that no penalty should be imposed on Hartley because she is not the employer of Rose, Waysafer is, and because the required records were in fact kept. A record of Rose's hours is submitted. Waysafer also says that compensation for length of service is not owed, that the Director "erred in a finding of fact that was manifestly incorrect" and "erred in law and failed to consider all the evidence or, in the alternative, did not give due consideration to the evidence provided". In finally presenting its case, Waysafer says that it had just cause in terminating Rose, given the nature of his being absent on January 8, 1996 and because Rose had been verbally warned about being late and about absent without reason on three prior occasions. Waysafer says that Rose is not to be believed. Evidence is submitted on that point.

The Director's delegate states that the determinations were made on the basis of the information available and complains that despite his long letter of May 3, 1996 and his subsequent letter, he 'heard' nothing from Waysafer in response to those letters until the letter of June 26, 1996 arrived in the mail, on July 10, 1996 he notes.

ISSUES TO BE DECIDED

I am asked to decide two issues. There is a need to decide whether the penalty imposed on Janice Hartley should be confirmed or cancelled. Waysafer also asks that I consider whether it had just cause in terminating the employment of Leonard Rose?

ANALYSIS

A penalty has been imposed on Janice Hartley for a failure to keep a record of the hours worked by Rose. Records of a sort have now been submitted. The Director's delegate complains of their late arrival but does not suggest that they should not be accepted as evidence that the required record of hours was kept. Hearing nothing to the contrary, it is my conclusion that hours of work records were kept and that Determination CDET # 3044 should be cancelled.

Had records not been submitted, I would still be inclined to cancel the determination 3044. I am concerned that Hartley is found to have failed to keep records required by section 28 of the *Act* without it ever being made clear why it is concluded that she is the employer. Prior to the determinations, the Director's delegate said only that Hartley was ". . . probably the employer and not Waysafer Wholefoods", which was to leave open the possibility that she is not. Clearly, if she is not then no penalty should have been imposed on her for the failure to keep records. The fact that no Demand for Payroll Records was issued Hartley prior to the imposition of a penalty for a violation of section 28 is a further source of concern. And finally it is not made clear why a penalty was imposed on Hartley when penalties have not been imposed in so many of the other cases with which I am familiar. That the power to impose a penalty for contravention of the *Act* is discretionary requires that it be exercised in a consistent fashion. I am not convinced that was done in this case.

I now turn to the appeal of Determination 3046, the finding that the employer did not have just cause in terminating Rose's employment and that as such he is owed compensation for length of service.

Waysafer speaks vaguely of an error in a finding of fact by the Director's delegate and broadly of a failure to consider all evidence and to give due consideration to evidence but I see no fault on the part of the Director's delegate in those regards. As matters are presented to me, it is clear that the delegate had not much more than information from the complainant on which to rely and that the reason for that is simply that neither Waysafer, nor Hartley as an officer of Waysafer, chose to reply to the investigating officer's letters to Hartley until two months had passed and the determination had been issued.

In appealing the determination, Hartley and Waysafer turn to the Tribunal with a view to being heard and presenting evidence. While there is no bar to the Tribunal's acceptance of new evidence, an appeal to the Tribunal is not in the nature of a *trial de novo*, a complete re-examination of all issues, but is much more limited than that. The Tribunal cannot allow itself to be used for the making of cases that could have been, indeed, **should** have been made to the Director's delegate, given no reasonable explanation for that lack of a submission. As another

Adjudicator dealing with a discharge matter has put it, appellants cannot be allowed "to 'sit in the weeds', failing or refusing to co-operate with the delegate in providing reason for the termination of an employee and later filing appeals of the Determination when they disagree with it" [*Tri-West Tractor Ltd.* (1996) BCEST #D268/96].

In the case at hand, Anderson of Waysafer merely speaks of being busy with other matters. That does not explain why there was no contact with the investigating officer at all, after the last of his May letters, not even a request for more time. That Waysafer knew of the investigating officer's May letters, did not respond to them in the time taken to issue the determinations, and now offers no reasonable explanation for the lack of a response, leads me to conclude that the Tribunal should not hear from Hartley and Waysafer now. The appeal is dismissed.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination # CDET 003044 be cancelled.

I order, pursuant to Section 115 of the *Act*, that Determination # CDET 003046 be confirmed.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

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