

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 -

Horizon Fiberglass Products Ltd.
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Mark Thompson

FILE NO.: 97/503

DATE OF DECISION: October 1, 1997

DECISION

OVERVIEW

This is an appeal by Horizon Fiberglass Products Ltd. (the “Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a Delegate of the Director of Employment Standards on May 30, 1997. The Determination found that the Employer had violated Section 28 of the *Act* by failing to keep proper payroll records. A former employee, Mr. Kishore Nand (“Nand”) filed a complaint against the Employer alleging non-payment of overtime wages and annual vacation pay. The Director’s Delegate issued a Demand for Employer Records for the period December 1990 through February 20, 1997. Because the records listed in the demand were not provided within the time allowed, the Determination further imposed a penalty of \$500 on the Employer under Section 28 of the *Employment Standards Regulation*.

The Employer appealed the Determination on the grounds that all required records were submitted within a reasonable time and that the amount of money due to Nand was relatively small compared to the size of the penalty.

ISSUE TO BE DECIDED

The issue to be decided is: should the Employer be subject to a penalty for violating Section 28 of the *Act*?

FACTS

Nand was an employee of the Employer from December 4, 1990 through February 20, 1997. The Employer stated that it had approximately ten employees in 1997. On April 9, 1997, the Director’s Delegate wrote to the Employer requesting that it supply records of Nand’s daily hours for the period of February 20, 1995 to February 20, 1997 and payroll records for Nand’s entire period of employment. The letter referred to “Nand Kishore.” On April 10, 1997, Mr. Jeff Engelland (“Engelland”) called the Delegate on behalf of the Employer. He stated that he wanted to substantiate the complaint before providing any records. According to the Delegate, she told Engelland that the records were necessary for an audit and that he might wish to consult with legal counsel. The Delegate stated that Engelland told her that he would not provide any records until he consulted with counsel. On April 16, 1997, the Delegate sent a Demand for Employer Records to the Employer by certified mail, requesting the same information as the April 9 letter, setting a deadline of April 30, 1997. On April 21, 1997, Engelland sent a fax note to the Delegate stating that the Employer had never had an employee named Nand Kishore, but a Kishore Nand was a former employee. The Delegate sent a second Demand for Employer Records to the Employer on April 22, 1997, requesting the same data for Kishore Nand with a deadline of May 6, 1997. The following day, April 23, the Employer sent a fax note to the Delegate

requesting the complaint's address and social insurance so that it could verify Nand's employment. The Delegate informed Engelland by telephone that she could not provide the Employer with the complainant's address, but his social insurance number on the complaint form was the same as that contained in the April 21 fax. The Delegate also informed Engelland that two Demands for Employer Records had been sent, one for a Nand Kishore and a second pertaining to Kishore Nand. The post office returned both Demands for Employer Records to the Delegate, marked "refused by addressee."

The Employer sent a letter to the Delegate dated May 5, 1997 containing payroll records for Nand's last six months of employment with the Employer. The Delegate wrote to the Employer on May 7, 1997 acknowledging receipt of the summary records for the period August 9, 1996 to February 20, 1997. The Delegate further explained the particulars of the records that she required. She also reminded the Employer that the Demand for Employer Records had been sent on April 22 and that the Director was "considering issuing a \$500 penalty" against the Employer for failing to produce the records in question.

The Delegate received copies of a number of time cards for "Kishore" and payroll records for "Kishore for 1995, 1996 and 1997 on May 15, 1997. The Delegate conducted an audit based on the records available to her. She found that the Employer had not calculated the amount of vacation pay correctly and issued a determination regarding the vacation pay. Using the time cards provided, she also found that the Employer owed Nand \$69.69 for unpaid overtime. The Delegate issued the Determination containing the penalty on May 30, 1997.

The Employer argued that it had supplied all the records requested on Nand in "a reasonable amount of time considering the confusion over the identity of Nand Kishore AKA Kishore Nand" in their computer system. It further argued that the amount owed Nand for unpaid overtime was small and that Nand had made other complaints against the Employer, which consumed many hours of staff time. The Employer stated that all daily time records requested were sent to the Delegate. Finally, it asserted that it had been unable to contact the Employment Standards Branch to obtain information about its obligations.

ANALYSIS

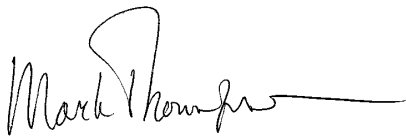
Based on the evidence before me, I conclude that the Employer did not provide the Director's Delegate with all of the records listed in the Demand for Employer Records of April 22, 1997 by the deadline of May 6, 1997. In particular, daily time records were not provided for the period from December 30, 1995 through February 22, 1997. Based on the records available, the Delegate found that Nand had not been paid for overtime. Although the amount was small, Nand might be entitled to a larger amount had the Employer provided the daily time records requested.

The Employer also based its appeal on the short time allowed to meet the requirements in the Demand for Employer Records. In fact, the Employer knew as early as April 10, 1997 that it would be required to produce records. It refused service of the Demand for Employer Records. With a labour force of approximately 10 people, it simply is not credible that the Employer was confused about the identity of the complainant, despite the apparent error in the Delegate's April 9 letter.

Section 28 of the *Employment Standard Regulation* establishes a penalty of \$500 for each contravention of Section 28 of the *Act*. The Employer failed to produce the records that Section 28 of the *Act* requires. It further attempted to thwart the Delegate's efforts to obtain those records in a manner prescribed by the *Act*.

ORDER

For these reasons, the Determination of May 30, 1997 is confirmed.

A handwritten signature in black ink, appearing to read 'Mark Thompson', with a long horizontal flourish extending to the right.

Mark Thompson
Adjudicator
Employment Standards Tribunal