

An appeal

- by -

Wallace Anderson operating Arbor Vitae Contracting
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: W. Grant Sheard

FILE No.: 2001/382

DATE OF DECISION: July 18, 2001

DECISION

APPEARANCES:

Wallace Anderson	on his own behalf
Hans Suhr	on behalf of the Director

OVERVIEW

This is an appeal by Wallace Anderson operating Arbor Vitae Contracting (the “Appellant”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), of a Determination issued by the Director of Employment Standards (the “Director”) issued on May 3, 2001 wherein the Delegate ruled that the Appellant had contravened a requirement of Section 85 of the *Act* and Section 46 of the *Employment Standards Regulation* (the “*Regulation*”) and imposed a penalty of \$500.00 pursuant to Section 28 of the *Regulation*.

ISSUE

Was the Director’s Delegate correct in finding that the Appellant had contravened a requirement of this *Act* or the *Regulation* and imposing a penalty under Section 28 of the *Regulation*?

ARGUMENT

The Position of the Appellant

In an appeal form dated May 7, 2001 received by the Employment Standards Tribunal on May 16, 2001 the Appellant says the reason for appealing the Determination is as follows:

“The request for information was never requested. Received except 1 letter - the information was forwarded to Vancouver by the first aid person. The registered letter was unclaimed as I was out of town working and did not get back in time. Since I have been in town, I have been contacted by Hans Suhr and asked him to phone my accountant. The bookkeeper there has given him the information he requested.” (sic)

The Director’s Position

In a written submission dated May 28, 2001 the Delegate submits that the Appellant does not provide any reasonable explanation for his failure to provide the information requested. Further, the Delegate notes that he contacted the first aid attendant who the Appellant refers to and learned that this first aid attendant mailed the information to the address on the bottom of the

Delegate's letter of March 16, 2001 which was sent to the Appellant and that the address there is the Delegate's address in Prince George, B.C. (not an address of the Appellant).

The Delegate further submits that the demand which was sent by registered mail and returned by Canada Post "undelivered" has been deemed to be properly served pursuant to section 122 of the Act which provides as follows:

Service of determinations and demands

122. (1) *A determination or demand that is required to be served on a person under this Act is deemed to have been served if*

(a) served on the person, or

(b) sent by registered mail on the person's last known address.

(2) 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.

(3) At the request of a person on whom a determination or demand is required to be served, the determination or demand may be transmitted to the person electronically or by fax machine.

(4) A determination or demand transmitted under subsection (3) is deemed to have been served when the director receives an acknowledgement of the transmission from the person served.

The Delegate further submits that, "the fact that the Appellant either chooses not to pick up registered mail items or did not have an arrangement for such items to be picked up if he was unavailable does not, in our view, relieve the Appellant of his liabilities under the *Act*."

The Delegate acknowledges that the Appellant did make arrangements for his bookkeeper to provide the information requested after the Determination and penalty were issued, but he submits that this was only as a result of the penalty and determination. The Director's Delegate concludes by submitting that the Tribunal should dismiss the Appeal.

THE FACTS

On March 13, 2001, following a complaint made to the Employment Standards Branch, an investigating officer of the branch (the Delegate) left a message at the Appellant's telephone number requesting the Appellant contact the Delegate. No response was received by the Delegate to this message. On March 16, 2001 the Delegate then sent a letter to the Appellant requesting that the Appellant contact him. That letter stated, in part, as follows:

“If, however, you have evidence to dispute the above allegations, please forward in writing your reasons, along with a copy of your payroll records along with any supporting documentation regarding Nick R. Lozinski. Once again, I would ask that you respond by April 2, 2001.”

No response was received by the Delegate in respect of this correspondence, however, the Appellant acknowledges in his appeal form filed that one letter was received by him. This was the only letter sent by the Delegate and must, therefore, be the letter which the Appellant acknowledges having received.

On April 6, 2001, the Delegate then sent a demand by registered mail to the Appellant which was subsequently returned by Canada Post as “Unclaimed”. On May 2, 2001, the Delegate again tried to contact the Appellant by telephone without success.

In a Determination dated May 3, 2001 the Director's Delegate found that the Appellant had contravened Section 85 of the *Act* and Section 46 of the *Regulation* in failing to produce payroll records and imposed a penalty of \$500.00 pursuant to Section 28 (b) of the *Regulation*.

On May 8, 2001 a fax letter was sent by Craig R. Hilton Inc., C.G.A. (the Appellant's accountant) to the Delegate copying the complainant's pay slips and a breakdown of hours worked.

ANALYSIS

Section 28 of the *Act* provides that an Employer must keep payroll records for each Employee. Section 85(1)(f) provides as follows:

85 (1) *for the purposes of ensuring compliance with this act and the regulations, the Director may do one or more of the following:*

(f) *require a person to produce or deliver to a place specified by the Director any records for inspection under paragraph (c).*

Section 28 of the *Employment Standards Regulation* provides as follows:

Penalty for Contravening a Record Requirement

28. *The penalty for contravening any of the following provisions is \$500.00 for each contravention sub section*

(b) section 3, 13 or 46 of this regulation.

Section 46 of the *Regulation* provides that a person who is required under section 85(1)(f) of the *Act* to produce or deliver records to the Director must produce or deliver the records as and when required.

The Director's Delegate stated in the Determination issued May 3, 2001 as follows:

“Section 2(d) of the *Act* states that one of its purposes is to provide fair and efficient procedures for resolving disputes over the application of the *Act*. The merits of a complaint can often only be determined through an inspection of records the *Act* requires employers to keep and to deliver to the Delegate when a request for production is made. Failure to deliver a record, at the very least, delays investigation. It may deny an Employee a minimum employment standard. The records demanded were relevant to an investigation, the Employer was aware of the demand for production of records, and the records were not delivered.

Further in the Determination, the Delegate states:

“If there are no disincentives against Employers who fail to participate in an investigation, then such conduct may be repeated.”

I find that the Appellant has not met the onus upon him to demonstrate on a balance of probabilities an error in the Determination. It is acknowledged by the Appellant that he received the Delegate's letter of March 16, 2001 requiring production of these records and that he did not provide them in a timely fashion. Further, I do not find that he adequately explains his failure to pick up the demand which was sent by registered mail and it was properly served upon him pursuant to Section 122 of the *Act*.

Although the Appellant did ultimately provide the material requested after the Determination was issued, I agree with the Delegate in that it appears that this was only done as a result of the Determination of the penalty imposed. Further, I agree that, if there are no disincentives against Employers who fail to participate in an investigation, then such conduct may be repeated. Also, the failure to provide information in a timely fashion is clearly contrary to Section 2(d) of the *Act* which provides that one of the purposes of the *Act* is to provide fair and efficient procedures for resolving disputes over the application of the *Act*. Delays without adequate explanation, must be discouraged.

I find that the payroll records requested and demanded by the Delegate were relevant to his investigation under the *Act* and that they were not produced. I find that the Appellant did contravene Section 46 of the *Regulation* by failing to produce proper payroll records within the

time required and that the Delegate properly imposed a penalty of \$500.00 under Section 28(b) of the *Regulation*.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination of this matter, dated May 3, 2001 and filed under number 2001/382, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal