

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 -

550635 B. C. Ltd.
operating as Jack's Towing (1997)
("Jack's Towing")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/514

DATE OF DECISION: October 3, 2000

DECISION

This is a decision based on written submissions by Glenn Slusar on behalf of Jack's Towing (1997), and D. Lynne Fanthorpe for the Director of Employment Standards.

OVERVIEW

This is an appeal by 550635 B.C. Ltd operating as Jack's Towing (1997) ("Jack's Towing"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued June 28, 2000. The Director found that Jack's Towing contravened Section 46 of the *Employment Standards Regulation* in failing to produce proper payroll records, and Section 28 of the Act in failing to keep proper payroll records. Jack's Towing was ordered to pay \$500.00 to the Director for the contraventions, pursuant to Section 28 of the Act.

ISSUE TO BE DECIDED

Whether the Director erred in assessing a penalty for failing to provide payroll records.

FACTS

The facts found by the delegate are as follows.

On March 20, 2000, the Director's delegate issued a Demand for Records to Jack's Towing during an investigation of three complaints that had been made. Although some records, specifically the payroll registers, had been supplied, they were inadequate to determine the daily hours worked. The records were not provided to the delegate despite repeated requests that he do so.

On May 9, the delegate contacted Mr. Slusar and requested that he supply the daily record of hours worked, since one of the complainants indicated that he had recorded his hours on a timecard, which was handed in at the end of the pay period. Mr. Slusar indicated that he had sent the timecards had been sent to the payroll company and he was not sure whether they had been retained, but that he would inquire and report back to her the following day. He later confirmed that the cards had been retained, and that they would be provided to the delegate

Between May 9 and June 20, there were several telephone calls between the parties regarding the provision of the records. Ultimately, Mr. Slusar indicated that the records were unavailable, and denied saying that they had been. The Director's delegate asked Mr. Slusar to provide the documents by the end of the business day, June 23. They were not received, and on June 23, the delegate received a letter from Mr. Slusar stating that the documents had been misfiled or removed from Jack's offices.

The records were reviewed by the Director's delegate, and determined that they were deficient. Documents required to be kept by an employer were not produced, and the Director's delegate

found Jack's in contravention of Section 46 of the Employment Standards *Regulation*. A penalty of \$500.00 was imposed, pursuant to Section 28 of the *Regulation*, for Jack's failure to maintain and provide proper payroll records.

The Determination stated as follows:

"If there are no disincentives against employers who fail to participate in an investigation, then such conduct may be repeated. The Director issues a penalty in order to create a disincentive against employers who frustrate investigation through failure to provide proper payroll records."

ARGUMENT

Jack's contends that the determination is unfair and unreasonable since it has "cooperated fully and provided all payroll records available detailing the exact number of hours worked, rate paid, amount paid, amount and reason for deductions, CPP, EI, Income Tax, amount of holiday pay and amount of statutory holiday pay, etc". It alleges that the Director's delegate has been neither fair, reasonable nor professional in her investigation. Mr. Slusar states that the delegate called him on May 9 requesting time cards, and that he told her that he could not locate them, but if he did, he would call her immediately. He contends that the delegate "continued to harass me by phone no less than half a dozen times in the next 2 to 3 weeks." He states that Jack's office had been broken into several times during a period when the complainant worked for him, and that a number of items were removed.

Mr. Slusar argues that the delegate ought to be able to make a determination based on the payroll records that he supplied along with the complainant's statements. He contends that those records show that he paid the complainant for all wages and overtime pay he was entitled to. He seeks to have the penalty cancelled.

The Director's delegate submitted that although Jack's payroll records contain the total hours worked in the pay period, but not the breakdown of daily hours as required by the *Act*.

The Director's delegate further submitted that Mr. Slusar at first admitted that Jack's might be in default of its obligations under the *Act*, and that a search would be made for the documents. The delegate left several messages for Mr. Slusar over the next several weeks, which were not returned. The delegate also says that she spoke to Mr. Slusar on several occasions during which he stated he would provide the records. When the delegate finally told Jack's that it had until June 23 to provide the documents or a penalty would be assessed, Mr. Slusar indicated that he did not have the time cards.

Mr. Slusar's reply to the delegate's submission makes several allegations against the complainant, and suggests that the complainant was responsible for the missing records, but does not deny contravening the *Act*.

ANALYSIS

Section 2 of the *Act* outlines the purposes of the *Act*. Those include ensuring that employees in British Columbia receive at least basic standards of compensation and conditions of employment

and promoting the fair treatment of employees and employers. It is against these principles that other sections of the *Act* are interpreted.

Section 85(1) of the *Act* provides that for the purpose of ensuring compliance with the *Act* and the *Regulation*, the Director may (c) inspect any records that may be relevant to an investigation under this Part, and (f) require any person to produce or deliver to a place specified by the director, any records for inspection under paragraph (c).

Section 28 of the *Act* provides as follows:

- (1) *For each employee, an employer must keep records of the following information:*
 - (a) *the employee's name, date of birth, occupation, telephone number and residential address;*
 - (b) *the date employment began;*
 - (c) *the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;*
 - (d) *the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;*
 - (e) *the benefits paid to the employee by the employer;*
 - (f) *the employee's gross and net wages for each pay period;*
 - (g) *each deduction made from the employee's wages and the reason for it;*
 - (h) *the dates of the statutory holidays taken by the employee and the amounts paid by the employer;*
 - (i) *the dates of the annual vacation taken by the employee, the amount paid by the employer and the days and amounts owing;*
 - (j) *how much money the employee has taken from the employee's time bank, how much remains, the amount paid and dates taken.*

Section 46 of the *Employment Standards Regulation* provides that a person who is required under Section 85 of the *Act* to produce or deliver records to the director must produce or deliver the records as and when required. Section 28 provides for a \$500.00 penalty for a contravention of section 46 of the *Regulation*.

In *478125 B.C. Ltd. v. British Columbia (Director of Employment Standards)* BC EST #D279/98) the Tribunal emphasized that the requirement to maintain records pertaining to employment and

hours of work is on the employer. The Tribunal held that it was the employer's responsibility to structure its affairs to comply with the *Act*.

The law places the burden of maintaining records and providing them to the Director on the employer. There is no dispute that Jack's has failed to provide the records they are required by law to maintain, and I infer from Jack's appeal submission that it will not be providing those records.

However, the reasons for that failure are not clear. The evidence is that Mr. Slusar has not been entirely forthright with the delegate. He has failed to provide her the information requested, failed to return her phone calls, and promised her that he would supply the records to her for almost two months. On appeal, Mr. Slusar suggests that the contents of the safe disappeared when the office was broken into, but he does not say that the time cards were in the safe, or were stolen at any other time. Mr. Slusar may be failing to provide the documents because they are lost, because he does not want to, or because he chooses not to take the necessary steps to conduct a search to find out where they are located.

Mr. Slusar takes the position that if and when the time cards are discovered, he will provide them to the delegate. That is not good enough. The delegate is investigating a complaint, and the lack of records is hindering that investigation. Jack's has a duty to provide the documents to assist that investigation, and the penalty provisions of the *Act* operate as a financial incentive to do so.

Having no evidence that the Determination is in error, I dismiss the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination dated June 28, 2000 be confirmed in the amount of \$500.00, together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

C. L. Roberts

C. L. Roberts
Adjudicator
Employment Standards Tribunal