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-

Mega Tire Inc. operating as Discovery Tire Service

("Mega Tire")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	97/349
DATE OF DECISION:	September 30, 1997

DECISION

OVERVIEW

This is an appeal brought by Mega Tire Inc., operating as Discovery Tire Service ("Mega Tire"), pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by the Director of Employment Standards (the "Director") on April 8th, 1997 under file number 079869 (the "Determination").

The Director determined that Mega Tire failed to keep certain payroll records as directed by section 28 of the *Act* and, accordingly, levied a penalty in the amount of $500 pursuant to section 28 of the *Employment Standards Regulation.*

On March 17th, 1997, W.H. Dennis, I.R.O., a delegate of the Director, issued a Demand for Employer Records (the "Demand") pursuant to section 85 of the *Act.* This Demand, sent by certified mail to Mega Tire's Registered and Records office as well as its ordinary place of business, directed Mega Tire "to disclose, produce and deliver employment records" (covering specified time periods) with respect to four named employees. The payroll records were to be produced at the Victoria office of the Employment Standards Branch on Friday, April 4th, 1997 at 10:00 A.M.

According to the information set out in the Determination, although certain payroll records were produced in response to the Demand, these records were deficient in various respects and did not otherwise comply with section 28 of the *Act.*

On May 7th, 1997, at 2:20 P.M., George Makow, apparently on behalf of Mega Tire, filed an appeal with respect to the Determination. This appeal was filed outside the statutory time limit for appealing determinations set out in section 112 of the *Act.* In this case, the Determination was served by registered (or as it is now known, certified) mail and thus, by reason of section 112(2)(a) of the *Act,* the time for filing an appeal had already expired prior to the actual filing of the appeal. Section 114(1)(a) of the Act provides that "the Tribunal may dismiss an appeal without a hearing of any kind if satisfied after examining the request that the appeal has not been requested within the [statutory time limit]" although the also has the statutory authority, found in section 109(1)(b), to extend the time limit in appropriate cases.

THE TIMELINESS ISSUE

The first issue that needs to be addressed is whether or not Mega Tire should be granted an extension of the time for filing an appeal?

In *Niemisto* [1996] B.C.E.S.T.D. 320.03.20-02 I specifically addressed the criteria that ought to govern a request for an extension of the time within which an appeal must be filed:

> Certain common principles have been established by various courts and tribunals governing when, and under what circumstances, appeal periods should be extended. Taking into account the various decisions from both courts and tribunals with respect to this question, I am of the view that appellants seeking time extensions for requesting an appeal from a Determination issued under the *Act* should satisfy the Tribunal that:
>
> i) there is a reasonable and credible explanation for the the failure to request an appeal within the statutory time limit;
>
> ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
>
> iii) the respondent party (*i.e.,* the employer or employee), as well the Director, must have been made aware of this intention;
>
> iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
>
> v) there is a strong *prima facie* case in favour of the appellant.

In the case at hand, an appeal form was filed by one George Makow, apparently a person who had authority to file an appeal on behalf of Mega Tire, approximately two weeks after the 15-day appeal period expired. The grounds of appeal set out in the documents appended to the appeal form raise a *bona fide* issue for consideration by the Tribunal. Further, I am not satisfied that the Director has been prejudiced by the delay in filing an appeal. Accordingly, the time for filing an appeal of the Determination is ordered to be extended until 4:00 P.M. on May 7th, 1997; thus, the within appeal was filed in a timely fashion. I now turn to the substantive grounds of appeal.

FACTS

As noted above, the Determination was issued as a result of Mega Tire's alleged failure to comply with a demand for production of payroll records. The Demand (for payroll records to be produced by 10:00 A.M. on April 4th, 1997) was accompanied by a letter, also dated March 17th, 1997, which stated, in part:

> "The Employment Standards Branch is in receipt of complaints filed against your corporation...alleg[ing] that your corporation has failed to pay wages...
>
> I would like to discuss this matter with you as soon as possible. Please contact me at [telephone number] in order to arrange a date and time to meet on this issue."

According to the sequence of events set out in the Determination, a representative of Mega Tire attended at the designated office of the Employment Standards Branch at 10:15 at which time

certain records (being all the records produced by Mega Tire at that time) were photocopied and some time later provided to the Industrial Relations Officer ("IRO") who had issued the Demand. The IRO noted certain deficiencies in the records and subsequently issued the Determination now under appeal.

In a letter to the Tribunal dated May 25th, 1997, the IRO acknowledged the following:

> • A representative of Mega Tire arrived at the designated office shortly before 10:00 A.M. on April 4th, 1997;
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> • Upon asking to see the IRO, the representative was incorrectly advised that the IRO was temporarily away from the office;
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> • The representative then left the Employment Standards Branch office in order to get a cup of coffee; on his return, he was advised that the IRO had been in the office, but had now left and would not be returning until noon;
>
> • an Employment Standards Branch staff member then "arranged to have [Mega Tire's] documents photocopied by another staff member".

Much of the foregoing appears to be consistent with the position of the appellant as set out in its "Reasons for Appeal" appended to the notice of Appeal of Determination. Specifically, Mega Tire asserts that:

> • "...our agent, Mr. George Makow did attend the offices as requested, and that upon his arrival, was informed that the scheduled officer, was out on a break";
>
> • "...Mr. Makow did briefly leave the premises, to purchase coffee, and did return to the offices within minutes, to await the return of the officer";
>
> • "Upon his return, Mr. Makow was informed that the receptionist had erred, and that the attending officer...was out in the field. She then proceeded to photo copy [sic] selected files from our folder...";
>
> • "We included a specific note, stating that if there was any other material needed, to contact us and further more [sic], to contact us to reschedule the appointment if necessary."

There is a dispute as between Mega Tire and the Director as to the contents of the document folder in question. The Director asserts that the folder contained only a few documents and that all such documents were copied whereas Mega Tire's position is that not all the documents contained in the folder were copied.

ANALYSIS

In the circumstances of this case, I do not find it necessary to resolve the factual dispute regarding the nature of the documents that were produced on April 4th, 1997. In my view, the Determination must be set aside regardless of how that factual issue might be resolved.

The original demand for production of payroll records directed Mega Tire to "disclose, produce and deliver" certain employment records. The Demand was issued under section 85 of the *Act*, and, presumably (the Demand itself only refers to section 85), was issued in accordance with subsections 85(1)(c) and (f).

The Director's "Finding", as set out at page 2 of the Determination, is that Mega Tire:

"contravened section 28 of the ***Employment Standards Regulation*** by failing to keep proper payroll records. The penalty for this contravention is $500 which is imposed under section 28 of the ***Employment Standards Regulation.***" (my underlining).

Thus, the Director imposed a penalty in the amount of $500 pursuant to section 28(a) of the *Employment Standards Regulation* for an alleged failure to "keep" payroll records--the latter being a statutory obligation imposed by section 28 of the *Act.*

There is no evidence before me upon which I can reasonably conclude that Mega Tire failed to "keep" the requisite employment records. It is clear that the Determination was, in fact, issued for a failure to "disclose, produce and deliver" certain employment records. This failure, if in fact Mega Tire actually failed to disclose all of the relevant employment documents, would be a breach of section 46 of the *Employment Standards Regulation* rather than, as set out in the Determination, a failure to "keep" the records mandated by section 28 of the *Act.*

Whether a party has violated the record-keeping requirement set out in section 28 of the *Act,* or has failed to "produce or deliver" records in violation of section 46 of the *Employment Standards Regulation,* the penalty prescribed by sections 28(a) and (b) of the *Employment Standards Regulation* is the same--$500 for each contravention. However, it must be remembered that the penalty provisions set out in the *Act* and accompanying *Regulation* are in the nature of quasi-criminal regulatory offence provisions and, as such, a party against whom a penalty has been imposed has the right to know what specific statutory provision they are alleged to have breached, and such alleged breach must be strictly proved. In my view, this is the minimum that is called for by sections 7 and 11 of the *Canadian Charter of Rights and Freedoms.*

In the instant appeal, there is absolutely no evidence before me that Mega Tire failed to "keep" proper payroll records (*i.e.,* a violation of section 28 of the *Act*) for the four complainant employees in question. The most that could be said in favour of the Director's position--and the evidence is equivocal on this point--is that Mega Tire failed to "disclose, produce and deliver" documents pursuant to a lawful demand notice. One cannot infer from a simple failure to produce records that the actual records in question are not available for production (*i.e.,* that the party has failed to "keep" the records).

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated April 8th, 1997 and filed under number 079869, be cancelled.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal