

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 -

West Coast Home Truss Ltd.
("West Coast")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 99/470

DATE OF DECISION: September 27, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by West Coast Home Truss Ltd. (“West Coast”) against a Determination issued on July 5, 1999 by a delegate of the Director of Employment Standards (the “Director”). In the Determination, the delegate found that West Coast had violated Section 46 of the Employment Standards Regulation by failing to produce proper payroll records. The Determination imposed a penalty of \$500.00 on West Coast.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether the penalty imposed on West Coast was appropriate under the circumstances.

FACTS

In the Determination, the delegate states that a Demand for Records was issued to West Coast on May 26, 1999 pursuant to Section 85(1)(f) of the *Act*. The Demand was necessary because complaints from Parmajit Sandhu (“Sandhu”) and Jasvir Hayer (“Hayer”) had been received alleging they were owed overtime wages. The delegate states that another delegate of the Director, Dave MacKinnon (“MacKinnon”), met with 2 officers of West Coast on May 26, 1999 who assured him they understood the Demand for Records and would deliver all required records. On May 26, 1999 West Coast forward a fax to MacKinnon providing partial records. On May 27, 1999 MacKinnon forwarded instructions to West Coast as to the records required, but received no response. Consequently, the penalty was issued to West Coast for failing to provide records that are required to be kept pursuant to Section 28(1) of the *Act*. The delegate justified the issuance of the \$500.00 penalty as follows:

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.

The Director is issuing this penalty in order to create a disincentive against employers who frustrate investigation through failure to provide records.

In its appeal West Coast confirms that the records it provided to MacKinnon did not meet the requirements of the *Act*. This was due to circumstances beyond its control. Sandhu was a shareholder/director/officer of West Coast and no employment records were kept for him although he was given a monthly salary that fluctuated based on the profitability

of the company. Sandhu kept daily employment time cards for each employee including Hayer but the daily records disappeared under mysterious/suspicious circumstances at about the same time Sandhu left West Coast. West Coast says that the best available records regarding the information requested were provided to MacKinnon. West Coast also makes reference to “backup records and summaries” kept by its accountant. These records and summaries were not provided to MacKinnon during his investigation, nor were they provided to the Tribunal on the appeal.

ANALYSIS

The principles for reviewing penalty determinations are set out in *Re Narang Farms and Processors Ltd.* BC EST #D482/99. In that decision, the adjudicator set out a three-step process before issuing a penalty determination:

First, the Director must be satisfied that a person has contravened the *Act* or the Regulation. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the Regulation. (See also, *Re James Cattle Co. Ltd.*, BC EST #D230/99).

In this case, West Coast has acknowledged that it contravened the *Act*. The records provided to MacKinnon only concerned Hayer and, among other things, the records did not include the wage rate or daily hours of work. Moreover, “backup records and summaries” have yet to be provided to the Director or her delegate.

Section 79(3) of the *Act* states:

If satisfied that a person has contravened a requirement of this *Act* or the regulations, the director *may* do one or more of the following:

- a) require the person to comply with the requirement;
 - b) require the person to remedy or cease doing an act;
 - c) impose a penalty on the person under section 98.
- (emphasis added)

Re Narang Farms and Processors Ltd., *supra* summarizes the Tribunal’s position on the appropriate standard for the Director’s exercise of her discretion. The central statement in that decision is a quotation from *Re Takarabe et al.*, BC EST #D160/98 at p.15:

In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant considerations.

Further, *Re Narang Farms and Processors Ltd.* states that Section 81(1) of the *Act* requires that the Director or her delegate must explain why she has chosen to exercise that discretion in a particular case.

The Determination under appeal sets out the undisputed fact that West Coast did not provide all records as required and it includes the rationale for imposing a penalty in the circumstances. West Coast did not produce proper records and it provided no explanation, prior to the appeal, as to why records were not produced. It was West Coast's responsibility to advise the delegate of its circumstances regarding the records and it should have raised those circumstances with the delegate before the penalty was issued. If West Coast had done so, the delegate may have been persuaded that a penalty was not deserving in the circumstances. Consequently, I find nothing in the appeal that convinces me that the delegate considered irrelevant factors or acted in bad faith or in an arbitrary fashion in deciding to impose the penalty.

Finally, Section 28 of the Regulation requires a penalty of \$500.00 to be imposed for a contravention of Section 46 of the *Act*. There is no question that West Coast contravened Section 46 of the *Act* by failing to produce records as required by the Director. Therefore, the delegate of the Director properly imposed a penalty of \$500.00.

For these reasons, I find that the penalty imposed by the Director's delegate was appropriate in this case.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination dated July 5, 1999 be confirmed.

Norma Edelman
Acting Chair
Employment Standards Tribunal

NE/sa