

**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 -

Star Labour Supply Ltd.  
("Star Labour")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 98/546

**DATE OF DECISION:** September 30, 1998

## DECISION

### OVERVIEW

This is an appeal by Star Labour Supply Ltd. (“Star Labour”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination which was issued by a delegate of the Director of Employment Standards on August 11, 1998. The Determination imposed a penalty of \$500.00 because Star Labour contravened Section 28 of the *Act* by failing to keep proper payroll records.

Counsel for Star Labour gave the following grounds for this appeal:

- The Determination lacks particularization;
- The Director missed a name which was submitted(sic);
- The appellant thought that the Director only requested active payroll records and that some of those who were mentioned in the Determination were only employed for a few days and quit – their names were kept in a separate binder which was not requested; and
- The Director did not afford the appellant a sufficient opportunity to respond.

Star Labour requests that the Determination be cancelled. In making the appeal on behalf of Star Labour, counsel noted that “...further reasons are to follow.” No additional reasons or submissions were received from Star Labour prior to September 23, 1998 (the date set by the Tribunal).

This appeal has proceeded by way of written submissions.

### FACTS

The essential facts giving rise to this appeal, which are not in dispute, were set out in the Determination.

On June 16, 1998 a Demand for Employer Records was issued by J. V. Walton, delegate of the Director of Employment Standards. On July 3, 1998 Star Labour delivered those records to J. V. Walton.

Another delegate of the Director reviewed the records and discovered that Kulwinder Atwal, Gurbachan Kainth, Resham Sidhu, Bhag S. Gandam, Jasmal K. Brar and Mohinder Brar were working for Star Labour but were not found in the payroll records. These employees were working on June 10, 1998 at Boudwyn Farm located at North Parallel Road, Abbotsford and on June 11, 1998 at Khakh Farms, Chilliwack. The employees were sharing a picking card with their family members.

The Director's delegate imposed a penalty of \$500.00 for Star Labour's contravention of Section 28 of the *Act*.

**ISSUE TO BE DECIDED**

Did the Director's delegate err in imposing a penalty on Star Labour for its contravention of Section 28 of the *Act*.

**ANALYSIS**

The Demand for Employer Records served on Star Labour was issued pursuant to Section 85 of the *Act*. Section 85(1) of the *Act* outlines the Director's entry and inspection powers. Subsections (c) and (f) pertain to production of records and documents:

85 (1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:

- ...
- (c) inspect any records that may be relevant to an investigation under this Part;
- ...
- (f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).

The Demand sought for all employees employed between January 1, 1998 and June 20, 1998 "all records relating to wages, hours of work, and conditions of employment" and "all records an employer is required to keep pursuant Part 3 of the *Employment Standards Act* and Part 8, Section 46 & 47" of the *Regulation*. Part 3 of the *Act* contains Section 28 which identifies payroll records which an employer must keep:

- 28(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 take by the employee, the amounts 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 amounts paid and dates taken.
- (2) Payroll records must
- a) be in English;
  - b) be kept at the employer's principal place of business in British Columbia, and
  - c) be retained by the employer for 7 years after the employment terminates.

Section 46 of the *Regulation* governs the production of records:

*Production of Records*

46. 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.

A breach of Section 46 is covered under Section 28(b) of the *Regulation*:

28. The penalty for contravening any of the following provisions is \$500 for each contravention:

...

- b) Section 3, 13 or 46 of this regulation.

The Director of Employment Standards is responsible for the administration and enforcement of the *Act*. Among the many tools available to her to ensure compliance with various aspects of the *Act* is Section 46 of the *Regulation* which makes it an offence to not produce records under Section 85(1) of the *Act*. Section 28(b) of the *Regulation* sets out a penalty of \$500 for contravention Section 46.

Counsel for Star Labour submits that the Determination should be cancelled on the following grounds:

- it lacks particularization;

- the Director missed a name which was submitted(sic);
- the appellant (Star Labour) “...thought that the Director only requested active payroll records...”; and
- the Director did not afford the appellant a sufficient opportunity to respond.

I will deal with each of these grounds in order.

*Determination Lacks Particulars.*

Section 81(1) of the *Act* requires that any determination which the Director issues must include the following:

81. (1) On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:
  - (a) the reasons for the determination;
  - (b) if an employer or other person is required by the determination to pay wages, compensation, interest, a penalty or another amount, the amount to be paid and how it was calculated;
  - (c) if a penalty is imposed, the nature of the contravention and the date by which the penalty must be paid;
  - (d) the time limit and process for appealing the determination to the tribunal.

When I review the Determination under appeal I find that it complies in all respects with the requirements of Section 81(1) of the *Act*. The reason for its issuance is readily apparent – Star Labour’s payroll records which it delivered to the Director’s delegate were incomplete in that there were no records for six employees who were working on June 10, 1998. Star Labour was required to pay a \$500.00 penalty for its contravention of Section 28 of the *Act*. The amount of the penalty and the authority to impose it are set out in Section 28 of the *Regulation*. The time limit for payment of the penalty and/or for making an appeal to the Tribunal were set out clearly in the Determination.

*Missed Name*

The appeal provides not a single word of explanation for this ground of appeal. It is, therefore, rejected as a ground for an appeal.

*Active Payroll Records*

The “Demand for Employer Records” dated June 17, 1998 clearly states that Star Labour is required to disclose, produce and deliver employment records for “All Employees” employed during the period January 1, 1998 to June 20, 1998.

I find that there is no substance to Star Labour’s submission on this ground of appeal. It offers no plausible explanation for its belief that the “...the Director only requested active payroll records...”

I reject this ground of Star Labour’s appeal.

*Reasonable Opportunity to be Heard*

Counsel for Star Labour submits that the Determination should be cancelled because the Director did not afford it a sufficient opportunity to respond.

Section 77 of the *Act* contains the following provision:

Section 77, Opportunity to respond

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

In a memorandum dated September 2, 1998 (which was disclosed to Star Labour and its counsel but to which there has been no response as requested by the Tribunal), the Director’s delegate stated, at page 2:

The appellant was made aware of the issues to be discussed at the interview when the appointment was set. The interview lasted for more than one hour and there was ample opportunity for the appellant to respond to each of the determinations before they were issued. In fact one of the determinations for a 6(1) f violation was not served after listening to the appellants explanation.

I find that there is no merit to this ground of Star Labour’s appeal.

In *Insulpro Industries Ltd. and Insulpro (Hub City) Ltd* (BC EST #D405/98), the Tribunal noted that while at all times the Director is required to afford the parties involved in a proceeding under the *Act*, including an

investigation, a measure of procedural protection, the level of procedural protection required is flexible and will depend on the function being exercised by the Director at any given time:

The Branch is not unique among administrative bodies. As noted above, the Director exercises functions which, if being characterized, would include legislative, investigative and judicial decision making processes. In that context there is no specific or set level of procedural protection that must accompany a function of the Director. The decision of *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602 stresses that the attributes of natural justice that apply in a given context will vary according to the character of the decision made:

A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision. On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. Between the judicial decisions and those which are discretionary and policy oriented will be found a myriad of decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum.

It is clear, as the facts are presented to me, that Star Labour was made aware of its non-compliance with Section 28 of the *Act* and that there was ample opportunity for it to respond during the meeting with the Director's delegate on August 11, 1998.

*Concluding Comment*

Section 114(1)(c) of the *Act* allows the Tribunal to dismiss an appeal if it is "...frivolous, vexatious or trivial or is not brought in good faith." Black's Law Dictionary (6th edition) defines "frivolous" as:

A pleading (which) is clearly insufficient on its face and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purpose of delay or to embarrass the opponent. A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense.

Similarly, a frivolous appeal is defined as "...one in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed."

As the appellant, Star Labour bears the onus of proving its case. To have some prospect of meeting that onus Star Labour must submit some evidence or argument which challenges the material point in the Determination. When I review the Determination and Star Labour's appeal submissions I find that this appeal is devoid of merit because Star Labour has not made any submission nor given any evidence to challenge or controvert the findings made by the Director's delegate in the Determination. I also find that the Employer has not

challenged the rationale set out in the Determination. For all of these reasons I dismiss the appeal under Section 114 of the *Act* as I find that it is a frivolous appeal.

**ORDER**

I order, under Section 115 of the *Act* , that the Determination be confirmed.

---

**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**