

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-

A 1 Sweet Shop Ltd.
("A 1")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 1999/519

DATE OF DECISION: October 14, 1999

DECISION

This is a decision based on written submissions by Raman K. Kaura on behalf of A1 Sweet Shop, and Susanne de Diego for the Director of Employment Standards.

OVERVIEW

This is an appeal by A1 Sweet Shop Ltd. ("A1"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued July 29, 1999. The Director found that A1 contravened Section 46 of the *Employment Standards Regulations* in failing to produce proper payroll records without reasonable explanation, and Ordered that A1 pay \$500.00 to the Director for the contravention pursuant to Section 28 of the Act.

ISSUE TO BE DECIDED

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

FACTS

On January 26, 1999, Minder K. Cheema ("Cheema") filed a complaint with the Director contending that she had been terminated without just cause, and was owed regular wages, overtime wages, vacation pay and statutory holiday pay.

On March 24, 1999, the Director's delegate asked A1 to respond to Cheema's allegations by providing payroll records showing the wages and annual vacation pay given the employee during her employment, and asked whether two week's compensation for length of service was warranted.

On April 6, A1 responded by denying the allegations and enclosing a copy of a T4.

On July 5, the Director's delegate served A1 with a Demand for Records under Section 85(1)(f) of the Act. Records were to be provided by July 26, 1999.

On July 12, the Director's delegate met with Mr. Kaura, and advised him that the records delivered were incomplete, and requested written specifics about the circumstances that led to Cheema's termination. On July 19, Mr. Kaura advised the Director's delegate that he was relying on the payroll sheets already provided for the hours worked and days off, even though he had been advised that they were incomplete.

The records were reviewed by the Director's delegate, and determined that they were deficient in that they did not contain Cheema's daily hours of work, Cheema's gross and net wages for each

pay period, the dates of the statutory holidays and the amounts paid by A1, and the dates of Cheema's annual vacation.

The Director's delegate found A1 in contravention of Section 46 of the *Employment Standards Regulations*, and imposed a \$500.00 penalty, pursuant to Section 28 of the Regulation.

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 records." (sic)

ARGUMENT

A1 argues:

1. The Determination is incorrect because it is addressed to Raman K. Kaura, who is an employee of the company that hired Cheema;
2. In fact, all the relevant information required by Revenue Canada "or others" is contained in the records;
3. The Director's delegate listened only to the employee, not the employer, ignored all the facts, and unfairly penalized A1; and
4. The payroll records were personally delivered to the Director's delegate and contained the following information: name, social insurance number, date of birth, work hours, off days, wage rate, gross and net wages with all the deductions and annual vacation.

A1's submissions also suggest that the Director's delegate exhibited a bias in favour of the employee through the investigative process.

The Director's delegate argued that although A1 was aware of the Demand for Records, none of those records were provided. The Director's delegate argued that none of these documents provided any guidance as to the actual daily hours of work. All that was initially provided was a T4 which contains none of the information required to be maintained under Section 28.

The delegate's submission included the payroll records that were sent to her following the issuance of the Demand. It was following the receipt of these records that A1 was advised that the records were incomplete, specifically in relation to daily hours worked, statutory holidays and vacation taken or paid.

The Director contends that the payroll records submitted to the Tribunal had been fraudulently altered to conform to the requirements outlined by the delegate at the July 9 meeting. She states that the records submitted on appeal contradict both the copy of the letter of hire as well as the payroll records sent to the delegate. She also notes that the letter of hire, which Cheema denied receiving, requires the employee to pay A1 the sum of \$500.00 in the event she does not give a

notice of termination, which is contrary to the *Act*. The Director's delegate further notes that an "Earnings Slip", which was submitted on appeal but which was never provided to the delegate, provides evidence that A1 was intending to withhold \$500.00 from Cheema's wages for the failure to provide a notice of termination.

ANALYSIS

With respect to ground 1 of the appeal, Kaura is incorrect in noting that the Determination is against him personally. It is clearly issued against the employer, correctly noted as A1 Sweet Shop Ltd. I dismiss the appeal in this respect.

With respect to the balance of the grounds of appeal, I find it helpful to provide a background of the relevant provisions of the *Act* and *Regulations*.

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 *Regulations*, 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 Regulations* 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*.

It is the *Act*, or the law, which places the burden of maintaining records and providing them to the Director on the employer. The Director's delegate is not exhibiting bias against the employer in requiring them to provide this evidence, she is merely enforcing the law. I find no basis for the suggestions that the Director's delegate has listened only to the employee. At this point, no determination of liability for wages has been determined. The Director's delegate is still at the investigation stage, which is being hindered by A1's failure to provide the records they are required by law to maintain.

Having reviewed the documentation provided by A1 which I have compared to the copies provided to the Director's delegate, I find that they are deficient in that they failed to identify the hours worked per day, the dates of the statutory holidays, and the dates of the annual vacation. Further, I agree with the delegate's submission that the records do not reflect those given to the Director. They have been altered in a material respect, specifically the hours worked for the months of March through October, as well as reflecting days off. Consequently, I find the records submitted by A1 unreliable, and place no weight on them.

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 July 29, 1999 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.

Carol Roberts
Adjudicator
Employment Standards Tribunal