

**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 -

The Root Beer Cafe Inc.  
("Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Richard S. Longpre

**FILE NO.:** 1999/495

Date of Decision: October 25, 1999

**DECISION**

**WRITTEN SUBMISSIONS**

Marshall Cooper	on behalf of the Employer
Ian MacNeill	on behalf of the Director

**OVERVIEW**

This is an application by the Employer pursuant to Section 112 of the *Employment Standards Act* seeking review of a Determination by the delegate of the Director of Employment Standards, dated July 20, 1999. Ms. Karen Jensen filed a complaint alleging that the Employer failed to pay her for overtime hours worked. On July 5, 1999, the Industrial Relations Officer (the "IRO") issued a Demand for Records. These records were necessary to his investigation of the complaint.

The delegate found that the Employer failed to comply with Section 28(1) of the *Act*. The Determination reads:

The daily time records that were provided in response to this Demand for Records were incomplete as they did not contain daily time sheets for May 19-June 1, 1997; December 15-28, 1997; and December 29-January 11, 1998. In addition, the payroll records provided for 1997 were incomplete.

The delegate concluded that the Employer contravened Section 46 of the *Employment Standards Regulations*. Pursuant to Section 28 of the *Regulations*, the delegate imposed a penalty of \$500.00 on the Employer.

In its appeal, dated August 4, 1999, the Employer argued that it cooperated with the delegate in a timely fashion. It responded to three requests for information made by the delegate. It acknowledged that the information that it provided the delegate "did not meet the letter of the law", however, it sought to provide alternative information. Operating the family business resulted in a "four day delay on the final request for information."

**ISSUE TO BE DECIDED**

The issue is whether the \$500.00 penalty should be rescinded.

**FACTS**

Jensen was a former employee of the Employer when she filed a complaint alleging that she was not paid properly for overtime hours worked. In response to her complaint, Employment Standards requested the Employer to produce the following. The letter, dated July 5, 1998, requested the following:

1. all records relating to wages, hours of work, and conditions of employment
2. all records an employer is required to keep pursuant to keep pursuant to Part 3 of the Employment Standards Act and Part 8, Section 46 & 47 of the Employment Standards Act Regulation

The Employer produced certain records. On July 14, 1999, the IRO wrote to the Employer noting that certain records had not been sent. The IRO's memo reads:

Thank you for the records that you forwarded to our office. I appear to be missing time sheets for the following days: May 19 to June 1/97; Dec 15-28/97; Dec 29/97 to Jan 11/98. Ms. Jensen claims her last day of work was Jan7/99. Your records show her last day to be Jan3/99. Could you clarify this for me. Also the Demand for Records requested copies of Ms. Jensen's Payroll records as well. I did not receive them in the package you sent. Could you please send all of this information to my office by fax this afternoon. Thank you.

In its appeal submission, the Employer says it responded to this request the same day. Its letter informed the IRO that it was missing Jensen's time sheets for May 19 to June 1, 1997.

In response to the Employer's July 14, 1999 reply, the IRO faxed the Employer another memo, dated July 15, 1999, clarifying the information he wanted. The letter reads:

Thank you for the payroll records you sent. I need more information. The schedules you forwarded for the time periods I requested do not contain the information I needed. I need hours worked, not the hours she was scheduled. As an example, 3-c does not tell me the hours she worked that shift. Time sheets are needed, similar to the sheets you provided previously. I also would like to see a print out of the 1997 payroll similar to that provided for 1998 showing individual pay periods. If you do not have the time records for May 19-June 1/97, I need to be able to deduct the wages you have on the payroll for that pay period. Please forward this information today.

The Employer did not provide the IRO with further information until July 20, 1999, five days later.

On that same day, July 20, the delegate issued the Determination imposing a \$500 penalty on the basis that the Employer had not provided the requested information by July 19. The Determination reads:

The daily time records that were provided in response to this Demand for Records were incomplete as they did not contain daily time sheets for May 19-June 1, 1997; December 15-28, 1997; and December 29-January 11, 1998. In addition, the payroll records provided for 1997 were incomplete.

In assessing whether to impose a \$500 penalty the Determination made the following points:

This employer was aware that they had an obligation to produce these records as requested. When the records produced were incomplete, they were asked to provide the complete information on July 14, 1999 and have failed to do so as of July 19, 1999.

Section 2(d) of the Act states that one of its purposes is to provide fair and efficient procedures for resolving disputes over the application of the Act requires employers to keep and to deliver to the delegate when a request for production is made. 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 delivered.

No reasonable explanation for the failure to deliver was given. If a reasonable explanation had been given, the Director would have exercised discretion and a penalty would not have been imposed.

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 to provide records.

On July 20, 1999, the Employer provided Employment Standards with its payroll records for January 1, 1997 to August 29, 1997 and from January 1, 1998 to January 1, 1999. It gave a hand written account of each day Jensen worked from December 15, 1998 to January 7, 1999, Jensen's last day of work. It also provided a hand written note stating that Jensen worked 74 hours between May 19 and May 30, 1997. In its appeal submission, the Employer explained why it believed the \$500 was not appropriate in the circumstances:

I received three requests from [the IRO] to produce records for Karen Jensen a former employee of Root Beer. The first request came on July 14, 1999 and was fulfilled that same day. However, we were missing three sheets so we sent along the schedules showing hours worked for the time periods requested. The third request came for further information on July 15, 1999 and we responded to this request July 20, 1999.

We recognize that all the information that was requested was not provided due to poor record keeping on our part, but we try to provide alternative information to help [the IRO] carry out his investigation. We provided information on a timely basis upon request as best we could. This is a family run business and we are not in the office on a nine to five basis everyday as we work in the restaurant as well. This resulted in the four day delay on the final request for information.

In response to the Employer's appeal, the IRO written submission states that Employment Standards' has yet to receive specific documents from the Employer. Specifically, the delegate had requested payroll information for all of 1997. The submission also reads:

In addition, the time records that were provided for the pay period December 29, 1997 to January 11, 1998 contain only a record of 49.25 hours. The dates for December 8, 9, 10 & 11 are blank. The record does not indicate the employee was off on these days as it does at other times, the dates [are] just blank. The payroll indicate that there were 69 hours worked during that pay period.

In its reply to the IRO's submission, on September 7, 1999, the Employer sent the Tribunal Jensen's payroll record for all of 1997.

### **ANALYSIS**

The Determination sets out the basis on which the Director will impose a penalty on an employer's failure to comply with the *Act* and its *Regulations*. The issue is whether the Employer's conduct in this case met those criteria.

The Employer's submission has some merit. Between July 5 and July 15, the Employer talked to the IRO and attempted to meet the IRO's request for information. In his memo to the Employer on Thursday, July 15, the IRO explained that he needed further information. He wanted it the same day. The Determination explains that a delay in an investigation "may deny an employee a minimum standard." On Tuesday, July 20, the Employer sent more information. Five days, including a weekend, is not a lengthy delay. In his reply submission, the IRO did not suggest that the five day delay disrupted the investigation.

The IRO's appeal submission states that other information was not provided on July 20. The July 15 memo states that he wanted time sheets for May 19 to June 1/97; Dec 15-28/97; Dec 29/97 to Jan 11/98, "similar to the sheets you provided previously." The Employer's submission on July 20 showed only the total hours worked between May 19 to June 1, 1997. However, the Employer provided the hours Jensen actually worked each day from December 15, 1998 to January 7, 1999. The record showed that Jensen worked seven of the eight days prior to her termination on January 7, for a total of 49.25 hours during this eight day period.

The IRO's appeal submission raised concerns about the Employer's record between December 8 to 11, 1998. Neither the IRO's July 14 memo nor his July 15, 1999 memo to the Employer requested clarification of these dates.

The IRO's appeal submission, however, noted that Employment Standards had not received all of the documents it requested from the Employer on July 5, 1999. In its reply submission, the Employer provided this panel with the computer print out of Jensen's hours worked from September 1, 1997 to December 31, 1997. It provided no reasons for not providing these to the IRO, as requested.

As noted above, the Employer's July 20 submission states that Jensen worked 74 hours from May 19 to May 30, 1997. The Employer acknowledged that it did not have a record

of hours worked each shift during that period. The *Act* required the Employer to maintain that record.

Finally, the Determination states that had the Employer provided a "reasonable explanation for the failure to deliver" the documents, "a penalty would not have been issued." The July 15 letter requested that the information be forwarded to him that day. The Employer did not contact Employment Standards and request a short extension of time to make its submission.

The delegate had reason for imposing the \$500 penalty.

**ORDER**

Pursuant to Section 115 of the *Employment Standards Act*, the Determination, dated July 20, 1999 is confirmed.

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**Richard S. Longpre**  
**Adjudicator**  
**Employment Standards Tribunal**