

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

Ludhiana Contractors Ltd.

("Ludhiana" or the "employer")

-of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth W m. Thomicroft

FILE No.: 98/519

DATE OF DECISION: October 27, 1998

DECISION

OVERVIEW

This is an appeal brought by Ludhiana Contractors Ltd. ("Ludhiana" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 30th, 1998 under file number 84657 (the "Determination").

By way of the Determination, the Director levied a \$500 penalty against Ludhiana, pursuant to sections 79(3)(c) and 98 of the *Act*, for failure to keep proper payroll records.

ISSUES TO BE DECIDED

The employer, through its legal counsel, has advanced four grounds of appeal

- i) the delegate who issued the Determination was not authorized by the Director to do so'
- ii) "the payroll record was demanded under an "industry-wide" audit which offends section 8 of the Canadian Charter of Rights and Freedoms, and therefore the payroll record should be excluded as evidence";
- iii) "the appellant was not informed of his right to legal counsel under the Canadian Charter of Rights and Freedoms"; and
- iv) "the Determination is void for the lack of particularization'

The employer does not challenge any findings of fact set out in the Determination,

FACTS AND ANALYSIS

An employer's obligation to keep and maintain certain payroll records, for all employees, is established by section 28 of the *Act*, the \$500 penalty for failing to keep or maintain such records is set out in section 28(a) of the *Employment Standards Regulation*.

A demand for production of payroll records was delivered to the employer on June 17th, 1998 and in accordance with that demand the employer delivered certain records to the Director on July 2nd, 1998. These records did not include any reference to four particular individuals (named in the Determination) who were found to have been employed by the employer during the period set out in the demand. Indeed, the employer's position during the Director's delegate's investigation was that the four individuals in question were not employed by Ludhiana although the employer's principal, Mr. Sadhu S. Dhaliwal, apparently at some earlier point in the investigation conceded that the four individuals were, in fact, Ludhiana employees.

In any event, the employer apparently now concedes that these four individuals were Ludhiana employees and that Ludhiana failed to keep and maintain proper (or any) payroll records with respect to these four individuals. I have no evidence before me from the employer to show that such payroll records were, in fact, ever kept.

As noted above, the employer does not challenge, in this appeal, the findings of fact made by the Director's delegate; rather its submission is limited to the legal arguments noted above.

For the reasons set out in my decision in *Ludhiana Contractors Ltd.* (EST Decision No. 361/98, August 24th, 1998) I reject the employer's submission that the Determination ought to be set aside because the demand was issued as part of some "industry-wide audit". Apart from the fact that there is *no* evidence before me of such an audit taking place, I would also note that the Determination was issued for failure to *keep* records (section 28 of the *Act*), not for failure to *produce* records pursuant to demand (section 46 of the *Regulation*). While there is a \$500 penalty for either contravention, the former is levied under section 28(a) of the *Regulation* whereas the latter is levied under section 28(b) of the *Regulation*.

The right to be informed of the right to retain and instruct legal counsel is set out in section 10(b) of the *Charter*. However, this right is triggered only upon *arrest or detention* --clearly, this section has absolutely no application to the present case where the Director *never* purported to arrest or detain an officer of the employer .

I cannot find any merit in the employer's other two grounds of appeal. I do accept the employer's assertion that the Determination is not adequately particularized. Nor has the employer explained how or why this Determination lacks particularity. I consider this ground of appeal, which itself is not adequately (or at all) particularized, to be entirely frivolous. The Determination clearly sets out, in greater detail than is even necessary , why the Determination was issued.

Section 117(1) of the *Act* permits the director to delegate her authority under the *Act* including her authority to levy penalties. The only limitation on the ability to delegate--section 117(2)--is not relevant here. The delegate in question, as is evidenced by a letter from the Director dated May 20th, 1997, had the delegated authority to issue this Determination.

ORDER

Pursuant to section 115 of the" *Act*, I order that the Determination be confirmed as issued in the amount of \$500.

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Kenneth Wm. Thornicroft, Adjudicator
Employment Standards Tribunal