

**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 -

Rainbow Angels Home Service Club Inc.

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** April D. Katz

**FILE No.:** 2000/587

**DATE OF DECISION:** October 30, 2000

## DECISION

### OVERVIEW

In a Determination dated August 3, 2000, the Director of Employment Standards, the “Director”, imposed a penalty of \$500 on the Employer, Rainbow Angels Home Service Club Inc. (“Rainbow”), for failing to produce payroll records by 3:30 PM on August 1, 2000.

Rainbow’s appeal states that Moe Esmaili was out of town “on business” at the time the Demand was sent by registered mail on July 14, 2000. Mr. Esmaili states he needed to find the records personally as his receptionist was new and could not have found the relevant records. He indicates that he provided the all the records on August 3, 2000.

The Director states that Rainbow made no attempt to seek an extension of time to produce the records. The Director submits that this is the fourth time Rainbow was issued a Demand for records. Rainbow was assessed a penalty on December 12, 1997 and September 7, 1999 for failing to produce records in response to Demands.

This decision is based on written submissions from the Rainbow and the Director’s Delegate.

### ISSUE TO BE DECIDED

The sole issue to be decided is if the penalty imposed on Rainbow was appropriate in the circumstances.

### FACTS

The Director received a complaint from F. Esposito alleging Rainbow had failed to pay her wages. The Director’s Delegate had sent a letter requesting information for another complainant on June 30, 2000. Rainbow had not replied. The Delegate sent a Demand for employee records for this complainant by registered mail on July 14, 2000 requiring the records to be provided to the Director no later than August 1, 2000 at 3PM.. No records were received.

The Delegate contacted Rainbow’s office on August 2, 2000. He was told that Mr. Esmaili was told about the Demand when it arrived and his instructions were to leave it on his desk. Mr. Esmaili’s assistant had not noticed that there was a time specified during which records were to be produced.

Rainbow has had 4 other complaints filed with the Director over the last 3 years. The Director has issued previous Demands specifying time periods for production of payroll records. The Director has issued penalties on two occasions for failure to produce records. The first penalty was appealed successfully based on the reference to sections of the former *Act* used in the form of Demand. The second penalty was not appealed.

In the Determination the Director found that Rainbow contravened Section 46 of the Employment Standards Regulations by failing to produce proper payroll records. The reasons for issuing the penalty as follows.

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*. The merits of a complaint can often only be determined through an inspection of records 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 not delivered. In this case, proper payroll records are required in order to determine if there was merit to the complainant's allegations.

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

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 proper payroll records.

## **THE LAW**

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the submissions from the appellant must demonstrate some error in the Determination, either in the facts accepted, or the conclusions reached or in the Director's analysis of the applicable law.

The imposition of a penalty under section 46 of the Regulations requires that there was a demand for records to be produced at a certain time and the records were not produced as required. Section 85 (1)(f) provides:

### *Entry and inspection powers*

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

- (a) enter during regular working hours any place, including any means of conveyance or transport, where*
  - (i) work is or has been done or started by employees,*
  - (ii) an employer carries on business or stores assets relating to that business,*
  - (iii) a record required for the purposes of this Act is kept, or*

- (iv) *anything to which this Act applies is taking place or has taken place;*
  - (b) *inspect, and question a person about, any work, material, appliance, machinery, equipment or other thing in the place;*
  - (c) ***inspect any records that may be relevant to an investigation under this Part;***
  - (d) *on giving a receipt for a record examined under paragraph (c), remove the record to make copies or extracts;*
  - (e) *require a person to disclose, either orally or in writing, a matter required under this Act and require that the disclosure be under oath or affirmation;*
  - (f) ***require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).***
- (2) *Despite subsection (1), the director may enter a place occupied as a private residence only with the consent of the occupant or under the authority of a warrant issued under section 120.*

In *Re Narang Farms and Processors Ltd.* BC EST #D482/99, Adjudicator Petersen was assessing the appropriateness imposing a penalty. He set out a three step process.

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 ESE #D230/99).

In dealing with the second step he stated that the Director must exercise her discretion reasonably. He set out the requirements of the Director as follows.

The Director's authority under Section 79(3) of the *Act* is discretionary: the Director "may" impose a penalty. The use of the word "may"--as opposed to "shall"-- indicates discretion and a legislative intent that not all infractions or contraventions be subject to a penalty. It is well established that the Director acts in a variety of capacities or functions in carrying out her statutory mandate: administrative, executive, quasi-judicial or legislative. In the case of a penalty determination, the Director is not adjudicating a dispute between two parties, an employer and an employee, rather the Director is one of the parties. As such, the Director is exercising a power more akin to an administrative rather than an adjudicative function. The Tribunal has had occasion to deal with appropriate

standard for the Director's exercise of discretionary power in the context of an administrative function in a number of cases. . . .

It is not adequate to simply state that the person has contravened a specific provision of the *Act* or Regulation. This means that the Director must set out--however briefly--the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention. In this case, the Determination makes reference to a second contravention of the same Section. In my view, this is sufficient.

In *Gain Suns Enterprises Ltd. (Re)* BCEST #D283/99, Adjudicator Thompson was dealing with an employer who had had two previous complaints filed in which a Demand for payroll records had been made. It was determined that the employer did not keep payroll records in compliance with section 28 of the *Act*. In reviewing the law on the appropriateness of a penalty the Adjudicator stated the following.

In this case, the Employer acknowledged that it had contravened the *Act*, so the first step is completed.

The second step addresses the exercise of the Director's discretion. Section 79(3) of the *Act* is discretionary. It states:

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

. . . The third step is the imposition of the penalty. The *Act* grants the Director the discretion to apply penalties of varying amounts against parties who have violated the *Act*. However, Section 29 of the Employment Standard Regulation requires a penalty of \$500 to be imposed for each contravention of Section 28 of the *Act*, among other provisions. This provision means that neither the Director nor the Tribunal can reduce the amount of the penalty imposed for failure to maintain payroll records, the Employer's violation in this case.

Section 28 of the Act states.

28. *Payroll Records*

- (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 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 principle place of business in British Columbia, and*
  - (c) *Be retained by the employer for 7 years after the employment terminates.*

## EVIDENCE AND ANALYSIS

Rainbow's letter of appeal says

“On the date of July 14,00 Jim Dunne requested the Records pursuant to section 85 (1) (f) of the *Employment Standard Act*. I was not able to provide these records due to the fact I was away on business, I don't believe that I am responsible to pay for the penalty I was not negligent I was just away on business, I would have had my receptionist find the papers but she had just started and I myself did not know where the papers were. When I returned I gave the papers they were delivered on the date of August 3,00 I was only 3 days late. I do not believe that I am Liable to pay since I have proof I was not even in town. “

On the facts Rainbow was not unfamiliar with the process under the *Act* or the requirements of a Demand for records.

In applying the Tribunal's three step process, the first question is if Rainbow has contravened the *Act* or *Regulations*. Rainbow does not dispute that the records were not produced on August 1, 2000 in compliance with the Demand issued on July 14, 2000. This was in contravention of section 46 of the regulations which states.

“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.”

The second step is to assess if the Director had reasons for exercising her discretion in these circumstances. The Determination set out the basis for the exercise of the Director's discretion in these circumstances. As in *Gain Suns Enterprises Ltd.* there were prior complaints and demands which had demonstrated a pattern that was inconsistent with the *Act's* purpose of a speedy investigation and resolution of the complaint based on the employer's records.

The third step is to ensure that the penalty was applied in accordance with the Regulation. The requirement to produce records under the *Act* is dealt with in Regulations section 46. Section 28(b) of the Regulations sets out the penalty for breach of section 46.

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

- (a) *section 25(2)(c), 27, 28, 29, 37(5) or 48(3) of the Act;*
- (b) *section 3, 13, 37.6(2), 38.1 (I) to (k) or 46 of this regulation.*

As stated in *Gain Suns Enterprises Ltd.* there is no discretion to change the amount of the penalty as it is prescribed in section 28.

On the basis of this analysis I do not find any new evidence to draw a conclusion that there is an error of fact in the Determination. There is no suggestion of error of law or fact in Rainbow's appeal.

The appellants have failed to meet the evidentiary burden on them to support a successful appeal.

**ORDER**

Pursuant to section 115 of the *Act*, Determination ER: 100686 dated August 3, 2000 is confirmed.

***April D. Katz***  

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**April D. Katz**  
**Adjudicator**  
**Employment Standards Tribunal**