

An appeal

- by -

#1 Low-Cost Moving & Hauling Ltd.
("Low-Cost")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/433

DATE OF DECISION: October 30, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by #1 Low-Cost Moving & Hauling Ltd. (“Low-Cost”) of a penalty Determination that was issued on July 18, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Low-Cost had contravened Section 46 of the *Employment Standards Regulation* (the “Regulation”) and ordered Low-Cost to cease contravening and to comply with the Act and, under Section 28(b) of the *Regulation*, imposed a fine of \$500.00.

Low-Cost says the Determination should be cancelled because they were given only three days from the time they received the Demand for Employer Records.

ISSUE

The issue in this appeal is whether the penalty Determination should be cancelled.

FACTS

Low-Cost is a moving company operating in and around Kelowna, BC. On, or about March 8, 2002, a former employee of Low-Cost, Nicholas Kirschner (“Kirschner”) filed a complaint alleging non-payment of wages. The Director communicated the complaint to Low-Cost by telephone on April 23, 2002. Subsequently, the investigating officer sent correspondence to Low-Cost relating to the complaint on April 24, 2002, May 13, 2002, May 23, 2002 and June 4, 2002. Low-Cost responded in a letter, received by the investigating officer on June 18, 2002, taking the position, among other things, that Kirschner was lying about being owed any wages. Low-Cost attached some cancelled cheques to the letter.

On the same day as she received the letter, the investigating officer spoke to Mr. Jeremy Scott-Walker, a director or officer of Low-Cost, and requested that he provide the daily records of hours worked by Kirschner as well as copies of any other payments made to Kirschner. The mailing address for Low-Cost was confirmed during that conversation and the investigating officer informed Mr. Scott-Walker that a Demand for Employer Records would be issued and that failure to comply with the Demand could result in a fine of \$500.00 being issued against Low-Cost.

On June 19, 2002, the Director issued a Demand for Records pursuant to section 85(1)(f) of the Act to Low-Cost. The Demand was unclaimed and was returned to the Director by Canada Post on July 9, 2002. On the same day the Demand was faxed to, and received by, Low-Cost. The Demand required Low-Cost to “disclose, produce and deliver the employment records on July 12, 2002.”

Low-Cost did not produce any records by the date required by the Demand. A Determination on Kirschner’s claim and the Determination under appeal were issued on July 18, 2002. On the same day, the Director received some records from Low-Cost, consisting of a letter summarizing Kirschner’s employment hours, attaching a page from the employer’s dispatch book, which contained a hand written notation stating, “these are examples of how records of employee hours are kept”, and a series of moving contracts “pertaining to work performed” by Kirschner. The copy from the dispatch records also

contained the notation, “if this info is not sufficient please forward any further requests to my lawyer’s office . . .”.

ARGUMENT AND ANALYSIS

Section 46 of the *Regulation* states:

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.*

Section 28(b) of the *Regulation* states:

28. *The penalty for contravening any of the following provisions is \$500 for each contravention:*
- (a) *section 3, 13, 37.6, 37.9 (2) (b) (ii), 38.1 (i) to (k), or 46 of this regulation;*

I am satisfied that Low-Cost failed to comply with the Demand and, as such, there was non-compliance with requirements of Section 46 of the *Regulations*. Low-Cost argues for relief because there was insufficient time to respond to the Demand when it was delivered by facsimile on July 9, 2002. In response to that argument, I make two points. First, it ignores that a letter was sent by facsimile to Mr. Scott-Walker by the investigating officer on June 18, 2002, asking him to provide payroll records showing the number of hours worked by Kirschner for each day of his period of employment. This letter confirmed a discussion in which the investigating officer advised Mr. Scott-Walker that a Demand was being issued and the consequences of ignoring it. Second, the Demand to Low-Cost was deposited with Canada Post for service by registered mail on June 19, 2002. Pursuant to Section 122 of the *Act*, service was deemed to have been made on June 27, 2002. In other words, the *Act* deems Low-Cost to have had more than two weeks to comply with the demand. I simply do not accept that Low-Cost can avoid the consequences of Section 122 by failing or refusing to claim the registered mail.

In all the circumstances, Low-Cost had ample opportunity to respond in a productive way to the Demand. I also note that even the information provided did not comply with the Demand, which required the production of “all records an employer is required to keep pursuant to Part 3 of the . . . *Act*”. No such documents have ever been produced.

I am equally satisfied from the nature of the complaint and the material on file that the records sought were relevant to the complaint and that Low-Cost’s failure to keep proper records of hours worked interfered with the Director’s ability to investigate and decide the complaint effectively and expeditiously.

A penalty was appropriate and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 18, 2002 be confirmed in the amount of \$500.00.

David B. Stevenson
Adjudicator
Employment Standards Tribunal