

**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-

Alpha Yaya Diallo operating as “Bafing Productions”

(“Diallo” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 98/360

**DATE OF HEARING:** September 23rd, 1998

**DATE OF DECISION:** November 2, 1998

**DECISION**

**APPEARANCES**

Alpha Yaya Diallo                    on his own behalf  
No appearance                    on behalf of the Director of Employment Standards

**OVERVIEW**

This is an appeal brought by Alpha Yaya Diallo operating as Bafing Productions (“Diallo” 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 May 19th, 1998 under file number 084-158 (the “Determination”).

By way of the Determination, the Director’s delegate levied a \$500 penalty against Diallo for failure to produce employment records as demanded. A \$500 penalty for failing to produce employment records is mandated by section 28(b) of the *Employment Standards Regulation*. While the Director has a discretion regarding the levying of a penalty if an employer fails to produce employment records, once the Director determines to levy a penalty, she has no discretion as to the amount of the penalty.

**FACTS AND ANALYSIS**

On November 26th, 1998 a “Demand For Employer Records” (“Demand”) was issued to the employer requiring him to produce, on or before 10:00 A.M. on December 10th, 1997 at the Vancouver Employment Standards Branch office, employment records relating to one Aboubacar Camara for the period July 7th, 1995 to December 21st, 1996. The Demand was issued pursuant to section 85(1)(f) of the *Act*; at the bottom of the page, in boldface, the employer was advised that if he failed to produce the requisite records, a \$500 penalty could be imposed. The Demand was delivered by way of a fax transmission.

It should be noted that the Demand was not the first communication received by the employer--earlier, in mid-September 1997 the investigating officer had telephoned the employer and at that time Diallo indicated that he would forward certain records although he ultimately failed to do so. Indeed, another officer had been dealing with Diallo with respect to Camara’s unpaid wage complaint in late June 1997 and at that time wrote to Diallo requesting certain employment records relating to Mr. Camara--none of which were ever produced.

Not having received any records, the investigating officer [who was not the delegate who issued the Determination and thus no issue arises under section 117(2) of the *Act*], wrote to Diallo on March 10th, 1998 enclosing the November 26th Demand and requesting that the records relating to

Mr. Camara be produced by no later than 10:00 A.M. on March 25th, 1998. Once again, and in boldface type, the officer advised Diallo that a \$500 penalty could be issued in the event the records were not produced. On March 12th, 1998 Diallo had a further telephone communication with the Employment Standards Branch and he again indicated that he would forward the records but he never did so and, in due course, the Determination was issued.

Diallo's evidence is that he was away in Eastern Canada performing (Diallo is a musician) in July 1998 and that there must have been some confusion or other mix-up attributable to the individual who was retrieving Diallo's mail while Diallo was away. Diallo initially testified that he had "no recollection" of any letters or telephone calls from the Employment Standards Branch at any time. Later on in his testimony Diallo stated that he "never spoke with anyone from the Employment Standards Branch at all"--I do not find this statement to be credible. For one thing, *in his own document*--namely a letter dated June 7th, 1998 addressed to the Tribunal--Diallo states that he spoke with the investigating officer after the Demand was issued and arranged for a time extension for production due to the fact that he was having difficulty "obtaining the required documents" as a result of ongoing divorce proceedings (his spouse was also his former business manager).

For my part, I cannot understand how Diallo's evidence about being out of the province in July 1998 relates to the issues raised by the Determination; he may well have been away from the B.C. lower mainland in July 1998 but the relevant time frame here is from November 1997 to May 1998--Diallo simply has no explanation for his failure to deal with the Demand during this latter period. I might also add that Diallo's *viva voce* evidence before me is not consistent in other respects with his letter of June 7th, 1998. In his June 7th letter Diallo acknowledges having received a letter from the Employment Standards Branch "on November 26th, 1996" [sic--Diallo must have intended to write 1997] and the actual Demand on March 17th, 1998 (*i.e.*, more than a week prior to the expiration of the extended deadline for production)--Diallo was not able to adequately account for these clearly incompatible versions of his story.

There is no suggestion in the evidence before me that the Director was acting in anything other than good faith when she issued the penalty now under appeal before me. Simply put, a Demand was issued, the employer was given a more than fair opportunity to comply with the Demand and yet he continually failed to do so. He was at all times made aware of the potential financial consequences of ignoring the Demand.

## 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**