

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 -

Dan Valgardson operating as
Rocky Mountain Sandblasting and Painting
("Valgardson")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/550

DATE OF DECISION: November 17, 1999

DECISION

OVERVIEW

This is an appeal by Dan Valgardson (“Valgardson”) operating as Rocky Mountain Sandblasting and Painting under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated August 20, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Valgardson alleges that the delegate of the Director erred in issuing a Penalty Determination without providing notice.

ISSUE

The issue to be decided in this appeal is whether the delegate of the Director properly exercised discretion in issuing a Penalty Determination ?

FACTS

The following facts are not in dispute:

- the delegate of the Director sent a letter dated April 23, 1999 to Valgardson requesting certain records pursuant to an investigation in regard to a former employee Quentin Schmitke, the records were requested within 14 days;
- there was no response to the April 23, 1999 letter;
- the delegate of the Director then sent a Demand for Employer Records dated May 19, 1999 to Valgardson which required that the records specified be delivered by 10:00 o'clock on June 3, 1999;
- the acknowledgment of receipt which accompanied the Demand for Employer Records was signed on May 20, 1999;
- Valgardson sent a letter dated June 1, 1999 to the delegate of the Director indicating that he had not employed a Quentin Schmithe (the Demand inadvertently mis-spelled the name), however, if there had been a clerical error he would be happy to comply;
- Valgardson sent a letter dated June 2, 1999 to the delegate of the Director advising that he required at least 6 weeks to recruit a new accountant and bring the books in order;
- the delegate of the Director granted the extension and issued a new Demand for Employer Records on June 7, 1999 requiring that the records be provided on July 19, 1999;
- the acknowledgment of receipt which accompanied this Demand for Employer Records was signed on June 8, 1999;

- on July 19, 1999, Valgardson sent a letter to the delegate of the Director requesting a further 3 days extension in order to complete the work;
- Valgardson also requested that a representative contact him;
- the delegate of the Director left a message on Valgardson's answering machine that a representative would be in contact;
- on July 21, 1999, Valgardson sent another letter to the delegate of the Director advising that he needed more time to complete the request;
- the delegate of the Director left a message for Valgardson indicating that he would be contacted by a representative in due course and to please submit the records requested as soon as possible;
- when no records had been supplied by August 20, 1999, the delegate of the Director issued a Penalty Determination.

Valgardson argues that the Determination is wrong as he believes he received no notice of the fine being imposed. Valgardson further argues that as he has not received any information from the delegate of the Director with respect to his (Valgardson's) rights and he has lost confidence in the delegate of the Director being able to fairly represent both parties. Valgardson further argues that as some issues between the former employee and himself appear to be "civil" in nature, he is concerned that this may become a problem before the courts. Valgardson finally argues that the delegate of the Director is abusing his position and violating the appeal process by threatening another fine if the records are not provided.

The delegate of the Director states that attempts were made to contact Valgardson in mid August and they were told that Valgardson was attending a baseball tournament in Alberta and was not available. The delegate of the Director further states that when Valgardson was finally contacted, he had no matters of substance to discuss other than advise he was considering taking civil action against Schmitke. The delegate of the Director states that Valgardson was accommodated by *twice* giving him an extension to provide the requested records and yet no records were provided. The delegate of the Director finally states that Valgardson has provided no reasonable explanation as to why the records were not produced as requested even though in his July 21, 1999 letter Valgardson states "*...we have received today, by Loomis Courier, what we believe to be the balance of our books, included is the bank statements*".

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Valgardson.

The *Act* sets forth a number of requirements to enable the Director to properly investigate complaints. Among those is the requirement to produce records as requested. Section 85 (1) (f) provides:

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

.....

(f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).

The evidence is that Valgardson was given three opportunities to provide the records requested, once by letter dated April 23, 1999 and twice by a Demand for Employer Records, dated May 19, 1999 and June 7, 1999. Despite acknowledging in his letter dated July 21, 1999 that he had the records requested, Valgardson did not provide those records prior to the Penalty Determination being issued August 20, 1999.

Valgardson is required pursuant to the provisions of Section 46 of the *Employment Standards Regulation* (the "*Regulation*") to provide the records as requested. Section 46 of the *Regulation* provides:

Section 46, Production of records

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.

A person who does not produce or deliver the records as required is subject to penalty as set forth in Section 28 of the *Regulation*. Section 28 provides:

Section 28, Penalty for contravening a record requirement

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 or 46 of this regulation.*

The authority for the Director to impose a monetary penalty is found in Section 98 of the *Act* which provides:

Section 98, Monetary penalties

(1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.

(2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

(3) A person on whom a penalty is imposed under this section must pay the penalty whether or not the person

(a) has been convicted of an offence under this Act or the regulations, or

(b) is also liable to pay a fine for an offence under section 125.

(4) A penalty imposed under this Part is a debt due to the government and may be collected by the director in the same manner as wages.

Earlier decisions of the Tribunal have found that the authority of the Director to impose a penalty is a discretionary authority and the Director must provide reasons for exercising this discretion and imposing a penalty.

After careful review of the Determination, the Delegate of the Director has, in my view, provided sufficient reasons for imposing the penalty.

Valgardson argues that he was not notified of the imposition of a penalty. The evidence is that on the first page of each Demand for Employer Records the following statement is found:

“Failure to comply with a record requirement may result in a \$500 penalty for each contravention as stated in Section 28 of the Regulations. See Attached sheet”

The attached sheet contains copies of a number of sections of the *Act* and *Regulation*, among which are Section 85 of the *Act* as well as Sections 28 and 46 of the *Regulation*.

The argument with respect to lack of notice of a penalty is, in my view, without credibility in light of the evidence provided.

For all of the above reasons, on the evidence provided and on the balance of probabilities, I conclude that the delegate of the Director appropriately exercised discretion in imposing a penalty for failure to provide the records required.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Penalty Determination dated August 20, 1999 be confirmed in the amount of \$500.00 together with whatever interest may have accrued pursuant to Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal