

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 -

Edward Terrance Lowe, also known as Eddy Lowe, operating as Sweepers
Canada and also known as Sweepers Canada Furnace Cleaners & Gas Fitters
("Lowe")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 98/347

DATE OF HEARING: September 22, 1998

DATE OF DECISION: November 10, 1998

DECISION

APPEARANCES

Edward T. Lowe	Appellant
Dan C. Freeman	Complainant

OVERVIEW

Edward Terrance Lowe, also known as Eddy Lowe, operating as Sweepers Canada and as Sweepers Canada Furnace Cleaners & Gas Fitters (“Lowe”), appeals, pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), a Determination by a delegate of the Director of Employment Standards dated May 7, 1998. In that Determination, Lowe is found to have contravened section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in failing to produce proper payroll records, and a penalty of \$500 is imposed under section 28 (b) of the *Regulation*.

The above Determination was issued in conjunction with another against Lowe and dated May 7, 1998. In that Determination, Lowe is found to have employed Dan Freeman and he is ordered to pay wages and other moneys to Freeman. Lowe appealed the Determination. The appeal was denied in *Edward Terrance Lowe ...*, BC EST #D448/98.

ISSUES TO BE DECIDED

The sole issue before me is the matter of the penalty. Lowe argues that the Director’s delegate has got the cart before the horse in that she finds that he has failed to provide “employer’s records” before first deciding whether or not he is the employer. He is unable to see how the *Act* requires “that an individual not yet deemed an employer must provide any records on demand to the Employment Standards Branch”. He goes on to argue that, in any event, he should not be penalized for failing to produce hours worked records given that the records are of no importance to the Complaint. He says Freeman was paid by the job, not the hour. Moreover, Lowe says that Freeman’s invoices were always available for viewing, the delegate simply refused to do so.

The delegate says that it was made perfectly clear to Lowe that she would be deciding all issues, the matter of whether Freeman was or was not employee as well as what Freeman was entitled to under the *Act*, if anything, in a single Determination, not a series of decisions. Moreover, the delegate says that Lowe, through a Demand for Employer Records and later, what the delegate called a “Demand for Records”, was told exactly what was considered relevant to the investigation and requested by her, and yet he declined to provide the records.

FACTS

The penalty stems ultimately from the Complaint filed by Dan Freeman. Freeman claimed that he had not been paid for work. On being assigned the Complaint, a delegate contacted Lowe for a response to the Complaint but found him uncooperative. That led her to issue a Demand for Employer Records.

The Demand for Employer Records ordered production of records relating to wages, hours of work and conditions of employment, and all records required by Parts 3 and 8 of the *Act* and sections 46 and 47 of the *Regulation*. Lowe's response was that Freeman was not his employee but was engaged as an independent contractor.

Lowe was sent a broader request for records, a "Demand for Records". That required Lowe to "disclose, produce and deliver" the following records:

1. *all records relating to hours of work, payments relating to work and conditions of association with Sweepers Canada.*
2. *all records requested by Theresa Robertson pursuant to Section 85(1) in her letter of January 28, 1998.*

Lowe was given until 3:30 p.m., February 11, 1998, to disclose, produce and deliver the records demanded by the Demand for Records to the office of the Employment Standards Branch on 176th Street in Surrey. The Demand for Records ends with the statement, "Failure to comply with a record requirement may result in a \$500 penalty for each contravention as stated in Section 28 of the Regulations."

Lowe asked that he be given additional time in which to produce records. He was given until March 23, 1998.

Lowe produced some records. The only record of work by Freeman, namely what are called "invoices", was available for viewing. But it is clear that he did not provide a record of hours worked by the employee and other records that an employer is required to keep by virtue of section 28 of the *Act*. Lowe in fact never kept such records. As far as he was concerned, Freeman was not his employee.

In the Determination on the merits of the Complaint, the delegate first decides the matter of whether or not Lowe was Freeman's employer. She decided that he was the employer, and, on deciding that, she decided the other issues which arose with the Complaint.

The delegate that issued the penalty, did so on the basis that Lowe contravened section 46 of the *Regulation* by "failing to produce proper payroll records". The delegate found that Lowe produced some records but not records of hours worked and wages paid. She indicates that she understood that was because Lowe did not think that he was Freeman's

employer, but states, “No reasonable explanation for the failure to deliver was given. If one had been given, the Director would have exercised her discretion and not issued a penalty. If there are no disincentives against employers who fail to participate in an investigation, then such conduct may be repeated. In order to create a disincentive against employers who frustrate investigations through failure to provide records, the Director issues a penalty for such conduct.”

ANALYSIS

Contrary to what Lowe appears to think, the Director or a delegate need not decide that someone is an employer before ordering the disclosure of information and the production and delivery of documents. It is not only the records which an employer is expected to keep under section 28 of the *Act* that the Director may demand but any record relevant to the investigation (section 85 (1)(c) of the *Act*).

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

...

(c) *inspect any records that may be relevant to an investigation under this Part;* (my emphasis)

(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).*

Clearly, records which might assist in establishing the nature of the relationship between Lowe and Freeman are records relevant to the Complaint’s investigation. Moreover, nothing prevents a delegate from ordering the production of all documents relevant to an investigation, at the same time, or so that a delegate can deal with all matters that arise with a Complaint a single Determination. That is efficient and consistent with the purposes of the *Act* (section 2 (d) of the *Act*).

Section 46 of the Regulation requires that any records that are ordered pursuant to section 85 (1)(f) be produced as and when required.

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.*

Lowe produced some records but he did not produce or deliver all of the records that he was ordered to produce through the Demand for Records and the Demand for Employer's Records. He is unable to do that. Some of the required records were just never kept.

Section 98 (1) of the *Act* provides the Director with the power to impose a penalty in the event of a contravention of the *Act*. The power is discretionary.

98 (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.* (my emphasis)

In failing to provide records, Lowe contravened section 46 of the *Regulation*. The Director was in a position where she, or a delegate, could exercise her discretionary power to impose a penalty.

A determination must include the reasons for it. That is what section 81 (1)(a) of the *Act* requires. Any decision by the director under section 98 of the *Act* is a "determination" as that term is defined by the *Act* (section 1). In assessing whether a delegate has complied with that section of the *Act*, the Tribunal has said that there must be an explanation of why the power to impose a penalty has been exercised under the specific circumstances (*Randy Chamberlin and Sandy Chamberlin*, BCEST No. D374/97). In this case, the delegate indicates that the penalty is imposed in the absence of some reasonable explanation for the failure to provide records, and because there was a failure to participate in the investigation, the employer acted to frustrate the investigation, and a deterrent is thought to be needed. That may explain when the Director will impose a penalty but it does not explain why a penalty is imposed in the particular circumstances of this case. If, for example, the Director imposes a penalty when the employer deliberately and repeatedly acts to frustrate an investigation, or demonstrates an utter disregard for the record keeping requirements of the *Act*, the Determination which imposes the penalty must explain how the particular employer has acted to meet the condition for imposing the penalty. As the circumstances which led to the penalty are not explained in this case, the penalty is cancelled.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination which is dated May 7, 1998, and which imposes a penalty of \$500, be cancelled.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal