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 -

Shelley Fitzpatrick
operating as
Docker's Pub and Grill

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 98/587

DATE OF DECISION: November 20, 1998

DECISION

OVERVIEW

This is an appeal by Shelly Fitzpatrick (Fitzpatrick), operating as Docker's Pub and Grill, pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination (File No. 089861) dated August 20, 1998 by the Director of Employment Standards (the "Director").

The Determination ordered Fitzpatrick to pay a penalty of five hundred ($500.00) dollars for failing to produce proper payroll records. Fitzpatrick has appealed on the grounds that she did keep proper payroll records and that production of such records was rendered impossible by the actions of a third party and that the imposition of a penalty under such circumstances is an unfair and unreasonable exercise of the Director's discretion.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether it is a fair and reasonable exercise of the Director's discretion to impose a penalty upon an employer for failing to produce proper payroll records where such failure is caused by the actions of a third party and beyond the control of the employer.

FACTS

In May, 1998, an Industrial Relations Officer (IRO) acting on behalf of the Director was conducting an investigation of a complaint on behalf of an employee of Dockers Pub and Grill which was a business owned and operated by Ms Fitzpatrick. The IRO made a request for the business payroll records but Ms Fitzpatrick explained that the records were with her accountant because of a Revenue Canada review.

On May 19, 1998 the IRO issued a request for the payroll records. On June 23, 1998 the IRO sent a copy of this request to Ms Fitzpatrick's accountant. The cover sheet requested the records by July 06, 1998. The accountant did not contact the IRO nor comply with the request.

On July 10, 1998 the IRO sent a Demand for Employer Records pursuant to section 85 of the *Act* to Ms Fitzpatrick by certified mail to her business address but it was returned undelivered. The Demand was re-issued July 30, 1998 and sent to Ms Fitzpatrick's home address. On August 14, 1998 the IRO telephoned Ms Fitzpatrick who still had not actually received the Demand but there was a discussion about the ongoing problem that Ms Fitzgerald was having in complying with the Demand. Ms Fitzpatrick requested and was granted an extension of time to comply until August 18, 1998. The penalty Determination was issued on August 20, 1998.

Ms Fitzpatrick says that in the spring of 1998 all her payroll records were delivered to Revenue Canada through her accountant. She says that the accountant had been recommended to her by a staff member at Revenue Canada. The records were later returned by Revenue Canada to the accountant. Ms Fitzpatrick says that the IRO knew about the situation because the IRO and Ms Fitzpatrick together spoke to the accountant on the telephone in May and that is why a copy of the request was sent to the accountant.

Ms Fitzpatrick says that she made every possible effort to retrieve her records from the accountant without success. She has tried phoning him at his office and his home. She has attended to his office in Vancouver. There was a notice on the office window saying that the accountant was in ill health and that his office was closed temporarily. Ms Fitzpatrick called various hospitals and found that the accountant had been released from Vancouver General Hospital on August 31, 1998. She has been unable to locate him since that time and he has not returned to his office.

ANALYSIS

Section 98 of the *Act* provides:

> *98 (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.*

Penalty determinations involve a three step process. First, the Director must be satisfied that a person has contravened one of the requirements. 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 set in accordance with the *Regulation.* (*Narang Farms and Processors Ltd,* BC EST #D482/98).

In this case the first and third steps are not in question. The issue is whether there is any obligation upon the Director to exercise her discretion in a fair and reasonable manner and, if so, whether the imposition of a penalty in the circumstances of this case was fair and reasonable.

In *Narang Farms and Processors Ltd*.,the adjudicator reviewed the law relating to the exercise of the Director's discretion and the short version is that the Tribunal will not interfere with the exercise of discretion unless it can be shown that the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity, or the decision was "unreasonable". The adjudicator goes on to point out that "unreasonable" has been defined as including such things as directing herself properly on the law, considering all those things she should consider, and not considering irrelevant matters. (*Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at 229).

I would go further when applying these general principles of law to the British Columbia Employment Standards Act. The purposes of the *Act* are set out in section 2 and include ensuring the promotion of fair treatment of both employers and employees and encouraging fair and efficient procedures for resolving disputes. It is very clear that "fairness" is a fundamental principle underpinning all of the provisions of the *Act* and the *Regulation*. Therefore, in my opinion, the exercise of discretion by the Director must be both "fair" as required by the *Act* and "reasonable" as required by the general principles of law. This two fold test is an objective one and is therefore open to review by the Tribunal as a matter of law.

It is clear from the Determination (page 2, lines 2-7) that the IRO had known about the problems Ms Fitzpatrick was having in retrieving her records from her accountant. The IRO had even faxed a copy of a request for payroll records to the accountant on June 23, 1998. The IRO participated in a telephone call to the accountant. It is apparent on the face of the Determination itself that this was not a situation where the employer was deliberately failing to produce the records. It was completely beyond her control and the IRO knew this.

The lack of records certainly impedes the investigation. As the Director's Delegate states in the Determination: *"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"*. However it also often the case that investigations have to proceed without records when an employer has not kept the required records at all. The Tribunal has held in a number of decisions that where employer records are not produced the evidence of the employee will usually be preferred. Thus the lack of records may in fact be more prejudicial to the employer than the employee in some cases.

As stated above, this was not a case where the employer failed to keep proper records or deliberately failed to produce them. It is not a case of an employer attempting to frustrate the investigation as implied in the Determination (page 2, line 33). Imposing a penalty in this case would not, and could not, create a disincentive to this employer or to any employer where a third party has control of the records and can not be located.

In the reasons given for imposing a penalty the Delegate states that, *"No reasonable explanation for the failure to deliver was given"* (page 2, line 29). This conclusion is in direct contradiction to the facts as set out in the Determination itself. It is more than evident that a reasonable explanation was given. The Delegate goes on the state that, *"If one* (a reasonable explanation) *had been given, the Director would have exercised her discretion and not issued a penalty"* (page 2, line 30-31).

This Determination is "unreasonable" on its face. It is not internally logical. The facts as set out in the Determination disclose a reasonable explanation for the failure to produce the records yet the Determination states that if one had been given no penalty would be imposed. It then goes on to impose a penalty. The stated principle for imposing the penalty is to create a disincentive yet there could be no disincentive in this case as the problem was beyond the control of the employer.

Over and above the facts stated in the Determination itself, I am satisfied by the material presented from the employer on this appeal, which is not challenged by the Director, that the employer simply could not produce the records demanded. It would be both unfair and unreasonable to impose a penalty in these circumstances.

ORDER

I order, under Section 115 of the *Act*, that the penalty Determination is cancelled.

JOHN M. ORR
ADJUDICATOR,
EMPLOYMENT STANDARDS TRIBUNAL