

**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-

Meadowvale Holdings Ltd. operating Video Stop  
("Video Stop")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** C. L. Roberts

**FILE NO:** 1999/572

**DATE OF DECISION:** December 8, 1999

## DECISION

This is a decision based on written submissions by H. K. Urschitz for Meadowvale Holdings Ltd. operating Video Stop and J. Paul Harvey for the Director of Employment Standards.

### OVERVIEW

This is an appeal by Meadowvale Holdings Ltd. operating Video Stop ("Video Stop"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued September 15, 1999. The Director's delegate found that Video Stop had contravened Section 46 of the Employment Standards Regulations in failing to produce proper payroll records, and Ordered that Video Stop pay \$500.00 to the Director for the contravention pursuant to Section 28 of the *Act*.

### ISSUE TO BE DECIDED

Whether the Director erred in assessing a penalty for failing to provide adequate employment records.

### FACTS

On or about May 7, 1999, Russel-James Marshel ("Marshel") filed a complaint with the Employment Standards Branch contending that he was owed regular wages. On May 21, the Director's delegate requested payroll records from Video Stop, and advised it that it was illegal to withhold or deduct wages for any reasons except as permitted in Sections 21 and 22 of the *Act*. In early June, the delegate spoke to the owner, Harry Urschitz ("Urschitz") as the records had not been produced. During that conversation, the delegate advised Urschitz that he could delay providing the information until July 9, pending receipt of a letter from Urschitz and a police report addressing his allegations. The delegate advised Urschitz that wages could only be offset or withheld in accordance with the *Act*, and that if a counterclaim was made, payment of Marshel's wages into court might be appropriate.

On or about July 3, the delegate received a letter from Video Stop. It outlined the dates Marshel was employed, and set out Video Stop's suspicions about Marshel's responsibility for missing money and computer equipment. Although it did not contain a police report, it indicated that the police report was unavailable.

On July 23, 1999, the Director's delegate issued a Demand for Records under Section 85(1)(f) of the *Act* relating to Marshel's hours of work, wages and conditions of employment to Video Stop. Records were to be provided by August 9, 1999. Video Stop had contended that it had a counterclaim against Marshel and had delayed responding to a May 21 letter. The demand was issued by registered mail, but was unclaimed.

The determination was issued on September 15, and records were received on September 22, 1999.

The Determination stated as follows:

"If there are no disincentives against employers who fail to participate in an investigation, then such conduct may be repeated. The Director issues a penalty in order to create a disincentive against employers who frustrate investigation through failure to provide proper payroll records. A claim of offset or counterclaim is not permitted for any reasons the employer noted." (sic)

## ARGUMENT

Video Stop argues that it has at no time refused to give payroll records to the Employment Standards Branch, and was told to hold off providing them. Urschitz states that he did not receive a reply to his July 3 letter, nor did he receive any notification about the need for documents by registered or any other mail until September 15 when the delegate's letter and determination were received.

Urschitz states that although Marshel was dismissed for theft, no charges were laid because of insufficient proof.

The Director's delegate argued that Video Stop was given extra time to reply to his initial request for records, and although the documents have since been received, the demand for records had not been complied with by the required date.

## ANALYSIS

Section 85(1) of the *Act* provides that for the purpose of ensuring compliance with the *Act* and the Regulations, the Director may (c) inspect any records that may be relevant to an investigation under this Part, and (f) require any person to produce or deliver to a place specified by the director, any records for inspection under paragraph (c).

Section 46 of the Employment Standards Regulations provides that a person who is required under Section 85 of the *Act* to produce or deliver records to the director must produce or deliver the records as and when required. Section 28 provides for a \$500.00 penalty for a contravention of section 46 of the Regulation.

The Tribunal has held that penalties are quasi - criminal penalty provisions (Royal Star Plumbing, Heating & Sprinkler Ltd. (ESTD#034/98)). As such, they should only be imposed where there are clear instances of a failure to comply.

The delegate had a telephone conversation with Urschitz in early July in which the requirement to provide records was discussed, and the delegate advised Urschitz to delay sending the records. The delegate told Urschitz that he would hold the matter in abeyance until July 9 pending receipt

of his letter and a police report. Urschitz did send the delegate a letter on July 3 indicating his position, and advising the delegate that the police report was "still not available."

Upon receipt of Urschitz's letter, the delegate issued a Demand for Records because he "found nothing in it that would change the course of my investigation or the record requirements. No police report was received. There was nothing in the employer letter that required a reply."

The determination states "The records demanded were relevant to an investigation, the employer was aware of the demand for production of records, and the records were not delivered." In fact, the evidence is that Video Stop was not aware of the demand for records.

There is no explanation as to why the letter was not claimed, although I accept that there may be a number of reasons Video Stop was not aware that there was a certified letter to be picked up. Despite the provisions of the Interpretation Act as to service, the fact that mail was returned to the delegate negates service. Having had prior discussions with Urschitz, the delegate ought to have been aware that there were issues around Marshel's employment, and given the discussions regarding the delay in providing documents, a telephone call to Video Stop may have been in order, particularly when the delegate was contemplating the imposition of a penalty. (see also D. E. Installations Ltd. BCESTD#397/97).

I find that Video Stop complied with the delegate's request to send a letter outlining its position, and acted on the advice given. Records were provided immediately after Video Stop received a copy of the determination.

## **ORDER**

I order, pursuant to Section 115 of the Act, that the Determination dated September 15, 1999 be cancelled.

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C.L. Roberts  
Adjudicator  
**Employment Standards Tribunal**