

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 -

M.R. Smith Limited
("Smith")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 97/500

DATE OF DECISION: November 7, 1997

DECISION

OVERVIEW

This is an appeal by M.R. Smith Limited (“Smith”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated June 19, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Smith alleges that the delegate of the Director erred in the Determination by concluding that Smith had contravened Section 46 of the *Employment Standards Regulation* (the “Regulation”) by failing to provide records when required.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the penalty issued to Smith by the Director is appropriate ?

FACTS

The Director issued a “Demand for Employer Records” to Smith on March 12, 1997 requiring payroll records be produced. Smith did not produce any records in response to this demand.

Smith alleges that they advised the delegate of the Director with respect to the allegation of overtime wages owing that all drivers had signed a standard agreement which stated that the rate of pay would be “\$15.00 per hour for the first 40 hours per week plus overtime rates for each hour worked over that time, or \$20.50 per hour for each hour worked, whichever is greater”.

Smith, in a letter dated March 14, 1997 in response to the “Demand for Employer Records” issued by the delegate of the Director on March 12, 1997, stated “I also cannot allow my company records to leave this office as we require them here”. Smith then offers to make the records available for review by the delegate of the Director at Smith’s office.

The delegate of the Director replied to Smith’s letter of March 14, 1997 and on March 17, 1997 advised Smith that the records could be photocopied by Smith and then produced to the delegate of the Director in accordance with the Demand.

Smith responds by letter dated March 18, 1997 stating that the requirements of the National Safety Code prohibit the company from providing the original records and due to the volume of material, the suggestion of photocopying the records would be an “onerous and time consuming task”. Smith concludes this letter by stating “ You can come here at your leisure or charge me under section 85 of the act.”

The delegate of the Director, by letter dated March 24, 1997, then offered Smith the alternative option of conducting a self-audit for overtime compliance to be completed by April 25, 1997.

Smith did not conduct the self audit by April 25, 1997 as offered, nor did Smith produce the payroll records as required by the “Demand for Employer Records” dated March 12, 1997.

The delegate of the Director issued a penalty Determination on June 19, 1997 in the amount of \$500.00 for a contravention of Section 46 of the Regulation with regard to the failure by Smith to produce records as required.

Smith is appealing this penalty Determination.

ANALYSIS

The authority of the Director to inspect and require the production of records is found in Section 85 (1) (f) which states:

Section 85, Entry and inspection powers

(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 requirement to provide records as requested is found in Section 46 of the *Regulation* which states:

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.

Smith has not provided any evidence that they completed the self-audit by April 25, 1997., Smith was well aware that the failure to complete the self-audit would result in the penalty provisions of the “Demand for Employer Records” being applied.

There is no dispute that Smith failed to produce the payroll records as required by the “Demand for Employer Records” issued March 12, 1997.

This refusal by Smith to provide records constitutes a contravention of Section 46 of the *Regulation*.

Section 28 of the *Regulation* states:

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.*

Based on the evidence provided I conclude that the Director appropriately issued the penalty Determination on June 19, 1997

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination dated June 19, 1997 in the amount of \$500.00 be confirmed in all respects.

Hans Suhr
Adjudicator
Employment Standards Tribunal