

**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 -

Tabor Arms Pub Ltd.

("Tabor Arms")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

**ADJUDICATOR:** C. L. Roberts

**FILE No.:** 2000/650

**DATE OF DECISION:** December 19, 2000

**DECISION**

This is a decision based on written submissions by Brock Gable for Tabor Arms Pub Ltd. and Pat Cullinane for the Director of Employment Standards.

**OVERVIEW**

This is an appeal by Tabor Arms Pub Ltd. ("Tabor Arms"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued August 29, 2000. The Director's delegate found that Tabor Arms had contravened Section 46 of the Employment Standards Regulations in failing to produce payroll records, and imposed a \$500.00 penalty for the contravention, pursuant to Section 28 of the Regulations.

**ISSUE TO BE DECIDED**

Whether the Director wrongfully exercised her discretion in assessing a penalty for failing to provide employment records pursuant to a Demand under section 85(1)(f) of the Act.

**FACTS**

On or about May 25, 2000, Sherri Zoldy ("Zoldy") filed a complaint with the Employment Standards Branch contending that she was owed compensation for length of service plus reimbursement for money she alleged she was required to pay the employer for shortages at Tabor Arms.

On or about July 18, the Director's delegate requested a meeting with Mr. Gable to discuss Zoldy's allegations. The delegate understood that Mr. Gable was available between 10:00 and 12:00 noon on the following day. When the delegate arrived at Tabor Arms on July 19, she was told that Mr. Gable had waited for her and that she had not arrived at the agreed upon time. Mr. Gable states that he waited for the delegate from 9:50 until 11:05, and then left for an 11:30 appointment, instructing his staff to reschedule the meeting.

The following day, the delegate issued a Demand for Employer Records relating to Zoldy's hours of work, wages and conditions of employment for the period January 2, 2000 to May 7, 2000. The records were to be provided by August 3, 2000. The Demand was delivered to Tabor Arms by hand the following day.

On August 1, the delegate received a fax from Mr. Gable indicating that Tabor Arms' accountant was on vacation until mid-August. Mr. Gable stated that he would also be away until August 23, and sought an extension of time to provide the documents. The delegate extended the time for Tabor Arms to provide the documents to 4:30 p.m. August 24.

The records had not been produced by August 29, the date the Determination was issued.

The Determination states, in part, 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.

## **ARGUMENT**

Mr. Gable argues that he was unable to meet the deadline, which, as I understand it, he claims is unreasonable. He states:

I was originally sent a demand for payroll records on July 21, 2000. My accountant's office was closed at that time and I was granted an extension from August 3, 2000 until August 24, 2000. This extension in effect allowed me one day as I anticipated being out of town until August 23, 2000 as indicated in my letter dated August 1, 2000. In fact I was out of town until Saturday September 2, 2000 and as a result was unable to meet the already unreasonable one-day deadline imposed by your agent Ruth Atterton. (emphasis in original)

The balance of Mr. Gable's submission consists of criticism of the behaviour of the delegate investigating the complaint. Mr. Gable suggests that, in the past ten years that he has been in business, he has always managed to successfully resolve complaints, and that his record should "speak for itself". Mr. Gable argues that he has not, contrary to the finding made by the delegate, failed to participate in the investigation. He states that, ultimately, Zoldy's complaint was resolved in his favor, and that the approach taken by the Director was heavy handed and unfair.

He seeks to have the penalty set aside.

The Director's delegate argues that Tabor Arms was granted an extension of time to August 24 at Mr. Gable's request, and that there was no indication that there would be any difficulty complying with the new date. The delegate further contends that, if the records were in the accountant's possession, regardless of the date Mr. Gable returned from vacation, the accountant could have been instructed to provide the records upon his return. The delegate notes that the Determination was not issued until one week after the deadline had expired, and that, in fact, as of September 27, the Director still did not have the records.

## **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(1)(f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required. Section 28 provides that the penalty for contravening section 46 of the Regulations is \$500.00.

The imposition of a penalty is within the Director's discretion:

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. (Section 98(1)) (emphasis added)

The use of the word "may" in section 28 indicates that the Director's power to impose a penalty is discretionary. In exercising her discretion, the Director must act reasonably, in good faith, and for bona fide reasons. (see *Takarabe and others BCEST #D160/98* and *Ludhiana Contractors Ltd. BC EST #D361/98*)

Further, the Tribunal has held that penalties are quasi-criminal penalty provisions (*Royal Star Plumbing, Heating & Sprinkler Ltd. (BC EST #D034/98)*). As such, they should only be imposed where there are clear instances of a failure to comply.

The issuance of a penalty determination involves several steps. The first is to disclose a complaint to an employer, and to request the records necessary to investigate it. This step may or may not include advising an employer of the employer's obligations and the Director's powers to obtain records. The next step is to issue a formal Demand. If an employer still fails to comply, the Director has the discretion to issue a penalty for that failure. The exercise of discretion involves, among other things, an assessment of the actions of the employer to that stage, and an evaluation of whether the employer is likely to co-operate or not. That evaluation should take into consideration factors such as whether the employer has maintained records according to the Act or not, whether those are easily accessible, whether there is any indication the employer is attempting to comply, as well as the employer's previous history, if any, with the branch. The Director must determine whether the employer is frustrating the investigation. Only if there is a clear instance of a failure to comply should a penalty be imposed.

I turn now to the facts.

### **Request for records**

The delegate attempted to set up a meeting with Mr. Gable on July 19. It is possible to conclude that there was a misunderstanding between the parties as to the time of the meeting. Mr. Gable says he had another meeting to attend, and asked his staff to reschedule the meeting. The delegate says that she showed up during the two hour "window" the parties agreed upon, and was instructed by Mr. Gable's staff to leave immediately. That evidence is disputed by one of Mr. Gable's staff, who states that it was the delegate who was "very rude and aggressive". However, even if the delegate's evidence with respect to her treatment by Mr. Gable's staff is to be believed, that behaviour is not a sufficient reason to conclude that the employer did not intend to co-operate. If Mr. Gable's submissions are accurate, and the delegate did not deny that they were, he has had a long-standing cordial relationship with the Employment Standards Branch until this incident. It may have been prudent to attempt to have a meeting with Mr. Gable before to issuing the Demand.

### **Issuance of Demand for Records**

The Demand for records was served the following day. Although this action might be regarded as precipitous, Mr. Gable advised the delegate that he would not be available to deal with the matter until after August 23. In his August 1 letter to the delegate, Mr. Gable states:

In reference to your letter dated July 20, 2000 entitled "Demand for Employer Records" you are certainly welcome to any and all records pertaining to the employment of Sherri Zoldy.

The Tabor Arms Pub Ltd employs the services of an accountant. The name of the accounting firm is Ferland Accounting. Irene Ferland does our payroll and all employee records such as date employed, wages, hours, deductions and record of employment forms. At this time Irene Ferland is on summer vacation and her office is closed until mid August. As a result I don't have access to archived employment records at this time.

I will be out of the office from Thursday August 3, 2000 until Wednesday August 23, 2000. If convenient for you it may prudent to deal with this matter after August 23, 2000. If after August 23 does not fit your schedule, alternatively I am in the office Wednesday August 2, 2000. (sic)

### **Contravention**

The delegate extended the deadline until after Mr. Gable's return, at his request. I cannot conclude this was in any way unfair to Mr. Gable. Mr. Gable knew what that date was, and if he was unhappy with it, he had an opportunity to seek a further extension. The documents were not provided, and had not been as of September 27. There is no dispute that the Demand was not complied with, and thus, there was a contravention of section 46 of the Regulations.

It is at this point that the Director's discretion to issue a Determination to impose a penalty arises.

Although Mr. Gable failed to provide the delegate with the records as required by the Demand, given Mr. Gable's history with the branch, there appears to be no evidence on which to conclude that he would not comply with the delegate's request for information on this occasion. His letter to the Branch sets out his intention to do so, and provides the delegate with the name of his accountant, who had possession of the requested records. Further, Mr. Gable's evidence was that he has been in business for over ten years, and has successfully addressed all other complaints with other delegates in the regional office. In other words, Mr. Gable has no history of non-compliance, or no record of frustrating an investigation. It would appear then, that it was unnecessary to issue a penalty to "create a disincentive" against Mr. Gable, since he had at all other times complied with delegates investigating complaints against him. I note that the complaint that was the subject of this investigation was also resolved in favor of the employer.

I do not find this to be a clear case of an employer failing to comply, and I conclude that the Director's delegate erred in exercising her discretion in assessing a penalty against Tabor Arms.

**ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination dated August 29, 2000 be cancelled.

***C. L. Roberts***  

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