



An appeal

- by -

872786 Alberta Ltd. operating as Highline Oxyzone Oxygen Therapies
("Highline")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: James Wolfgang

FILE No.: 2001/524

DATE OF DECISION: October 1, 2001

DECISION

OVERVIEW

This is an appeal by 872786 Alberta Ltd. operating as Highline Oxyzone Oxygen Therapies (“Oxyzone”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* of a Determination issued by the Director of Employment Standards (the “Director”) dated June 28, 2001. The Determination found Oxyzone had failed to produce proper employment records as per Section 46 of the Employment Standards Regulations. A penalty of \$500.00 was imposed under Section 28(b) of Employment Standards Regulations.

ISSUE

Was the Director correct in assessing Oxyzone \$500.00 for failure to produce proper employment records?

THE FACTS AND ARGUMENT

It is reported Oxyzone operates a Hyperbaric Oxygen Therapy Treatment Centre.

Two former employees of Oxyzone filed complaints with the Employment Standards Branch regarding improper payment of wages.

The delegate for the Director requested the employment records for the first former employee of Oxyzone in a letter dated May 7, 2001. The letter indicates the complainant worked for the first 83 hours without pay as training and then was only paid 20 hours for 35 hours worked in the third week. In addition to the above amounts claimed she is claiming two additional days pay for the last two days worked. On receipt of a second complaint the delegate issued a Demand for Records for both former employees dated May 29, 2001 in accordance with Section 85(1)(f) of the *Act*. The records were to be produced by 11:00 am June 12, 2001. The Demand indicated that failure to comply with the record requirement may result in a \$500 penalty being imposed.

On June 28, 2001 a Determination was issued imposing a \$500 penalty for failure to provide the records in the Demand of Records.

Oxyzone appealed that Determination on an Appeal Form received by the *Employment Standards Tribunal* (the “Tribunal”) on July 11, 2001. The accompanying letter dated July 5, 2001 addressed to the “Director of Employment Standards, Larry Bellman, 107- 1664 Richter Street, Kelowna”, indicated Oxyzone was appealing the Determination, feeling it was unfair. They claim their premises were burglarised on May 8, 2001 and that, in addition to the equipment taken, all their client files and employment records were missing. They indicate the

matter is under investigation by the RCMP. They maintain their records were hand produced and therefore have no computer back up.

ANALYSIS

We have no record of the date the first former employee of Oxyzone complained to the Director. According to the May 7, 2001 letter to Oxyzone, the complaint was made by e-mail indicating the last day worked was May 1, 2001. The employment information on the Demand for Records indicates the first complainant was employed in April 2001. The second was apparently employed from February 9, 2001 until May 1, 2001.

We have no information to indicate if the delegate attempted to contact Oxyzone by telephone regarding these two complaints. In the submission to the Tribunal dated August 20, 2001 from Larry Bellman, who was not the investigating officer, there is an indication:

There was contact long before the alleged break in and there was opportunity to provide documents in a timely fashion. The appellant failed to do so. The appellant made no reasonable attempt to contact the investigating officer with information, which would have allowed a discretion to be exercised. Had there been appellant contact the Penalty Determination may not have been issued. In the circumstances at hand there is no evidence on file the appellant made any request or provided documents.

The information provided indicates a letter was written May 7, 2001, a Demand for Records was written May 29, 2001 and a Determination was issued June 28, 2001. There was no response from Oxyzone until the penalty of \$500 was assessed in the Determination.

Oxyzone then appealed to the Tribunal, citing what might be considered legitimate reasons for failure to provide employment records. According to Oxyzone, they were stolen or at least are missing following a break in on their premises. The first problem I have is the failure of Oxyzone to respond in any way to the Employment Standards Branch. From all the evidence before me I find the first response from Oxyzone was, not to the Branch, but to the *Tribunal* in the form of an appeal. The appeal was sent to the Employment Standards Branch office but was on an *Employment Standards Tribunal Appeal Form*. The second problem is the fact Oxyzone claim they only maintained manual records without computer backup however, according to their letterhead, they have an email address. Most companies that owned a computer, I believe, would maintain some form of employee records electronically.

In the appeal by Oxyzone there is no explanation as to why they did not respond to the contacts from the Branch. The fact a break in took place is hardly a reason to not respond to two written notices sent 22 days apart. There is a responsibility on the appellant to prove the Determination erred in fact or in law. Oxyzone has failed in that regard and the Determination is confirmed.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated June 28, 2001.

James Wolfgang
Adjudicator
Employment Standards Tribunal