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 -

Dr. C. S. Vinnels Inc.

re: Penalty

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 1999/596

DATE OF DECISION: December 02, 1999

DECISION

OVERVIEW

This is an appeal by Dr C.S. Vinnels Inc ("Vinnels") pursuant to Section 112 of the *Employment Standards Act (the "Act"*) from a Determination dated September 20, 1999 (ER# 091485) by the Director of Employment Standards (the "Director").

The Director determined that Vinnels had contravened Section 46 of the *Employment Standards Regulation (the "Regulation")* by failing to produce proper records pursuant to a demand made under Section 85(1)(f) of the *Act* and imposed the stipulated $500.00 penalty.

Vinnels has appealed the penalty determination.

ANALYSIS

The appeal does not comply with the formal requirements of the *Rules of Procedure of the Employment Standards Tribunal.* Counsel for Vinnels wrote a letter to the Director's delegate on September 29, 1999 in which it is stated "Please accept this letter as application on behalf of the employer to appeal your determination". As a courtesy, the delegate forwarded the letter to the Tribunal. Vinnels provided the required Form 1 on October 5, 1999 which is within the time requirements of the *Act*. However the appeal does not fulfil the requirements set out in Rule 5 (ii), (iii) or (iv) in that it does not briefly outline the relevant facts, describe why the determination is being appealed, nor describe the order requested from the Tribunal.

The letter of September 29 submits that counsel had sent a letter to the delegate on September 10, 1999 and another on September 20, 1999. Those letters were not submitted with the Form 1 appeal and have not been provided to the Tribunal by Vinnels. The letter of September 29th then refers to a number of meetings and events that occurred subsequent to the issuing of the Determination.

On this appeal I must decide whether the appellant has satisfied this Tribunal that the Determination should be cancelled. I must consider the Determination on the facts leading up to the date it was issued and not on subsequent events.

This file involves a complaint by a former employee for wages owing including overtime. The file has been handled by three different delegates. On January 15, 1999 a Demand for records was sent to Vinnels. They were to be produced by February 05, 1999. They were not.

The delegate at that time decided that the employee's complaint was out-of-time. That decision was appealed to the Tribunal which ruled in favour of the employee and referred the matter back to the Director for determination.

On June 02, 1999 a further demand was sent to Vinnels and he was given 2 weeks to produce the required information.

On June 14, 1999 a further demand was made.

On August 23, 1999 a new delegate again sent a letter requiring the information by August 30, 1999.

On August 26, 1999 a formal demand was again made.

On August 30, 1999 Vinnells responded but did not produce the records required to be kept under the *Act*.

On September 01, 1999 the delegate replied to Vinnels pointing out that records of daily hours worked by the employee had still not been produced and extended the time for delivery to September 10, 1999.

On September 20, 1999 the penalty Determination was issued.

The correspondence from Vinnels dated August 30, 1999 states that Vinnels "relied on (the employee's) honesty" and that she worked a flexible schedule. It also refers to a written employment agreement. None of these matters relieve the employer from complying with Section 28 (d) of the *Act* and keeping records of the daily hours worked by each employee regardless of the basis upon which she is paid.

From reviewing the material provided by Vinnels it would appear that these records simply were not kept and that may be the reason they have not been produced. This has not been specifically argued by the appellant. Even if that were the case the employer would be in contravention of Section 28 which carries the same penalty.

Other than my conjecture in the preceding paragraph, Vinnels has presented no reasonable explanation for his persistent failure to comply with the demands made by the delegates from January through September 1999. The Director has been more than generous with time to the prejudice of the employee who still awaits completion of this investigation. That situation is untenable and is contrary to every intention expressed in the *Act.*

The penalty imposed in this case is well founded and the Determination is confirmed.

ORDER

I order, under section 115 of the *Act,* that the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal