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 -

HOC Hyperbaric Care Centre Inc.
("HOC")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No: 1999/671

DATE OF DECISION: January 5, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by HOC Hyperbaric Care Centre Inc. ("HOC") of a Determination which was issued on October 18, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that HOC had contravened Section 46 of the *Employment Standards Regulations* (the *"Regulations"*) by "failing to produce proper payroll records" and, under Section 28(b) of the *Regulations*, imposed a penalty in the amount of $500.00.

The Tribunal has concluded that an oral hearing is not necessary in this case.

ISSUES TO BE DECIDED

The issue is whether HOC has shown that the Determination was wrong in its conclusion that HOC contravened Section 46 of the *Regulations.*

FACTS

On September 23, 1999, the Director issued and served a Demand for Employer Records pursuant to Section 85 of the *Act* on HOC. The Demand indicated that HOC was required to "disclose, produce and deliver" employment records for Jean-Paul Tremblay for a period from November 20, 1998 to July 13, 1999. The Demand also contains the following wording, which I believe is standard wording on a Demand issued by the Director:

> The employment records required to be disclosed, produced and delivered for each employee listed in this Demand include:
>
> 1. all records relating to wages, hours of work, and conditions of employment.
>
> 2. all records an employer is required to keep pursuant to Part 3 of the *Employment Standards Act* and Part 8, Section 46 and 47 of the *Employment Standards Act - Regulations.*

Mr. Tremblay had filed a complaint with the Director alleging unpaid regular wages, overtime wages, statutory holiday pay, vacation entitlement and compensation for length of service.

In the Determination, the following finding was made:

> The records that were produced were incomplete. The letter attached to the Demand specifically mentioned the requirement to include the daily hours of work for the entire period of employment, November 20, 1998 - July 13, 1999. There were no daily hours of work supplied even though a log of all employees working in the chamber is kept for safety reasons and for patient tracking. The only record

> received was a hand written summary showing an identical salary paid every two weeks for 80 hours of work starting in March, 1999. There was no payroll supplied for the period between November 20, 1998 and March 4, 1999.

In its appeal, HOC says:

> We produced the only payroll records we have. The company had no payroll until 25th February, 1999. At that time we contracted with ADP payroll services. ADP continues to process and maintain the company's payroll information.

HOC also notes in its appeal that the reason there was no payroll records for Mr. Tremblay before 25th February, 1999 was that Mr. Tremblay was billing and being paid for his services as a "consultant".

In reply to the appeal, the Director makes several points:

> The records are incomplete as there was no record of daily hours kept or supplied, even after the contract with ADP started. The *Act* requires employers to keep records which include the daily hours of work. The employer failed to keep these records. These records were required for our investigation. . . .
>
> Whether the complainant is a contractor or an employee under the *Employment Standards Act* has not yet been determined. Complete records are required in order to make a determination in the matter. If the complainant was a contractor and supplied the employer with invoices, then these invoices would form part of the "Employer Records" under Section 85(1)(c) . . .
>
> There was no contract supplied, neither were there any invoices supplied. This emphasizes the reason for issuing the penalty because the records supplied were incomplete. All records are required in order to complete an investigation.

ANALYSIS

As noted by the Tribunal in *Royal Star Plumbing, Heating & Sprinklers Ltd.*, BC EST #D168/98:

> The offence created by section 46 of the *Regulation* for delivery of records under Section 85(1) is part of a larger regulatory scheme designed to regulate employment relationships in the non-unionized sector of the economy. There is nothing in the provisions that calls for proof of intention in the traditional sense of the word or that implies an offence of absolute liability. Thus, according to the criteria above, the offence is one of strict liability, which allows the party charged to be acquitted where there is proof of due diligence.

HOC says it took reasonable steps to comply with the Demand by producing the only payroll records it had for Mr. Tremblay. Those records consisted of a hand written payroll summary for

several pay periods commencing 3/19/99 and ending 7/16/99 and Mr. Tremblay's Record of Employment (ROE). HOC also notes that no payroll records existed for Mr. Tremblay until February 25, 1999. In essence, HOC's position is consistent with a defence of due diligence.

Section 28 of the *Act* identifies what records an employer is required to keep for each employee. Section 28 is found in Part 3 of the *Act* and a copy of that provision was included with the Demand.

There are two concerns raised by this appeal.

First, HOC says it was unable to produce any employee records for Mr. Tremblay before 25th February, 1999 because he was considered to be a consultant, not an employee. I am inclined to agree that there is some merit in HOC's position when it is considered relative to the contents of the Demand. While it is clear from Section 85(1) that the Director may require the production and delivery of "any records that may be relevant to an investigation", it is also clear that the Demand only required HOC to disclose, produce and deliver Mr. Tremblay's **employment records**. The Director could have asked for production of all records relevant to the investigation, but they did not do so, confining the Demand to "employment records". In such a case, it would be unreasonable for the Director to have imposed a penalty on HOC for failing to produce employment records for Mr. Tremblay for the period that HOC genuinely believed Mr. Tremblay was not an employee and during which they believed they had no obligation to comply with the requirements of Section 28 in respect of him. If that were the only concern raised by this appeal, it would probably succeed on the particular facts present here.

There is, however, a second concern, one which has been specifically addressed in the *Royal Star Plumbing, Heating & Sprinklers Ltd., supra.*, case. Simply put, after 25th February, 1999, HOC failed to observe the substantive obligations imposed by Section 28 of the *Act* to keep a payroll record for Mr. Tremblay. In such circumstances, the following comments from *Royal Star Plumbing, Heating & Sprinklers Ltd.* are applicable:

> If they failed to produce documents simply due to the vagueness of the Demand, their actions would have shown due diligence. But where they fail to observe their substantive obligations to maintain certain records, they cannot rely on due diligence as defence to a Demand for Documents.

As indicated above, the only document provided by HOC in response to the Demand was a one page hand written summary of wages paid. Additionally, HOC cannot rely on their contract with ADP Payroll Services to suggest they are not responsible for meeting the statutory requirements of Section 28. ADP Payroll Services would only an agent of HOC for the purpose of the *Act.* The obligation to ensure compliance with the *Act,* and in this case with Section 28, is on HOC.

HOC has the burden of showing the Determination is wrong. They have not met that burden and the appeal is dismissed. The Director should note the concerns raised in respect of the form of the Demand in this particular case and she may wish to make some adjustment to the form of the Demand to avoid potential problems in the future with the operative scope of the Demand.

ORDER

Pursuant to Section 115 of the *Act,* I order the Determination dated October 18, 1999 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal