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. A Concrete Ltd.(the "Employer")

- of a Determination issued by -

The Director of Employment Standards (the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/698

DATE OF DECISION: December 22, 2000

DECISION

APPEARANCES/SUBMISSIONS

Mr. Steven Schwartz on behalf of the Employer Mr. Kevin Rooney on behalf of the Director

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director of Employment Standards (the "Director") issued on September 14, 2000 which imposed a penalty of \$500.00 on the Employer for "failing to produce proper payroll records". The Employer asks that the penalty be set aside.

FACTS AND ANALYSIS

On May 18, 2000, the Employment Standards Branch issued a Demand for Records. The Employer produced the records demanded except certain daily records. The Director's delegate found the records produced inadequate and issued a second Demand on July 25, 2000. The determination as follows:

"An employer must keep records of each employee as per section 28(1) and 28(2) of the Employment Standards Act. We received documents from M.A. Concrete Ltd. for the amount that each employee was paid per pay period. However, a second demand went out July 25, 2000 for each employee's daily hours in the form of time sheets, time cards or logs. M.A. Concrete Ltd. received an extension on the second demand until August 25, 2000 via a telephone conversation with Julie Brassington. Still the Employment Standards Branch as of the date of this letter received no records."

The Employer explains that it provided such records as it had. It complied with the first Demand and produced the documents it had. The Employer explains that it left several messages for the delegate in response to the second Demand. If these call had been returned, says the employer, he would have explained that these documents do not exist. The Employer seeks to have the penalty set aside.

The Director denies that the Employer left messages for Brassington and that she was absent from work during the months of July, August or September. The Director also says:

"Had the Employer advised the delegate that he did not keep the records requested in the demand, the delegate would have used their discretion to determine whether to issue a penalty for failure to keep records pursuant to the Act."

The Director argues that the penalty should stand.

Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it (*Randy Chamberlin*, BCEST #D374/97). Given that the power to impose a penalty is discretionary and is not to be exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. It is not adequate to simply state that the person has contravened a specific provision of the *Act* or *Regulation*. In *Narang Farms and Processors Ltd.*, BCEST #D482/98, at page 2, the penalty process is summarized as follows:

"In my view, penalty determinations involve a three-step process. First, the Director must be satisfied that a person has contravened the *Act* or the *Regulation*. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the *Regulation*."

I am of the view that the appeal of the Determination should be dismissed. Section 28 of the *Act* requires that the employer keep records of certain information. Section 46 of the *Regulation* provides that a person required under Section 85(1)(f) of the *Act* to produce records, must produce and deliver the records as and when required. In this case, a second Demand was issued. The Employer, while referring to messages left with (or for) the delegate, does not take issue with the assertion in the Determination, namely that there was a conversation between the Employer and the delegate whereby the Employer received an extension of the time to deliver the documents requested. Surely, if the Employer did not, in fact, have the documents requested, that would have been the time to raise this issue. There is no explanation in the Employer's submission for this failure. Despite the extension until August 25, 2000, the Employer had not produce the documents as of the time the Determination was issued on September 14, 2000. I am satisfied that the director exercised her discretion properly when she issued a penalty for failure to produce documents following an extension of time to deliver those documents.

In the result, the appeal fails.

ORDER

Pursuant to Section 115 of the Act, I order that the Determinations in this matter, dated September 14, 2000 be confirmed.

Ib S. Petersen

Ib S. Petersen Adjudicator Employment Standards Tribunal