

Citation: Columbus Meat Market Ltd. (Re)
2024 BCEST 98

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Columbus Meat Market Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

SUBMISSIONS: George Douvelos, legal counsel for Columbus Meat Market Ltd.
Courtney Milburn, delegate of the Director of Employment Standards

FILE NUMBER: 2024/035

DATE OF DECISION: October 18, 2024

DECISION

OVERVIEW

1. On March 4, 2024, Jackson Kemmis, a delegate of the Director of Employment Standards (“delegate”), issued a Determination under section 79 of the *Employment Standards Act (ESA)* ordering Columbus Meat Market Ltd. (“employer”) to pay \$10,000 as a monetary penalty (see section 98) for having contravened section 46(1) of the *Employment Standards Regulation (“Regulation”)*. The delegate also issued his “Reasons for the Determination” (“delegate’s reasons”) concurrently with the Determination.
2. Section 46(1) of the *Regulation* concerns demands issued for various employment records: “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 85(1)(f) of the *ESA* states: “For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following...(f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c)” [“inspect any records that may be relevant to an investigation under this Part”].
3. The employer appeals the Determination, asserting that the delegate erred in law, failed to observe the principles of natural justice in making the Determination, and on the basis that “new evidence” is now available (see sections 112(1)(a), (b) and (c) of the *ESA*).
4. In my view, this appeal is not meritorious and thus must be dismissed. My reasons for reaching that conclusion now follow.

THE PENALTY REGIME UNDER THE ESA AND THE DELEGATE’S REASONS

5. Section 98(1) of the *ESA* states that “a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.” Section 29 of the *Regulation* establishes a scheme of successively higher penalties for the same contravention of the *ESA*, ranging from \$500 for a first contravention, to \$2,500 for a “subsequent contravention [that] occurs within 3 years after the date of the most recent contravention of the same requirement in relation to which there has been a determination,” to \$10,000 for a third contravention that “occurs within 3 years after the date of the most recent contravention of the same requirement.”
6. During the investigation into a complaint filed by a former employee of the employer, an Employment Standards Branch (ESB) officer issued a section 85(1)(f) demand for records, with which the employer did not comply – at least according to the delegate. The delegate set out the employer’s contravention history in relation to section 46(1) of the *Regulation* in his reasons as follows (at pages R2-R3):

On November 30, 2022, the investigating delegate issued a Demand for Employer Records (Demand) pursuant to section 85(1)(f) of the *Employment Standards Act* (the Act) to the Employer. The Employer was required to deliver records to the investigating delegate **on or before** December 14, 2022, to resolve this dispute. The Employer was

informed that a penalty would be issued pursuant to section 29(1) of the Employment Standards Regulation (the Regulation) if the records specified on the Demand were not produced...I could not review the records because the records were not produced. [**boldface** in original text]

...

On August 31, 2021, a delegate of the Director of the Employment Standards [*sic*] issued a corporate determination finding that the Employer contravened section 46(1) of the Regulation by failing to produce records required by a Demand for Records. The date of the contravention was August 26, 2021, which is within three years of the date of this contravention, December 15, 2022. The corporate determination issued on August 31, 2022, found that the Employer had contravened section 46(1) of the Regulation within three years of the date of that contravention, and the administrative penalty was \$2,500.00.

I find that the Employer must pay \$10,000.00 for contravening section 46(1) of the Regulation on December 15, 2022.

THE EMPLOYER'S REASONS FOR APPEAL AND THE DIRECTOR'S RESPONSE

7. In this appeal, the employer indicated on its Appeal Form that it was relying on all three statutory grounds.
8. The penalty Determination now before me in this appeal arose out of an investigation into a complaint filed by a former employee ("complainant"). This complaint ultimately led to the issuance of a determination awarding the complainant section 63 compensation for length of service. This determination is the subject of a separate appeal by the employer (see EST File No. 2024/034).
9. The employer appears to be asserting that the delegate erred in law and proceeded on an erroneous view of the facts:

It should furthermore be noted that ES commenced an investigation of Columbus with regards to Mr. White on November 30, 2022. ES had requested for records of his hours and pay. This was all submitted by Columbus to ES. Columbus received no response from ES with regards to this issue, until ES issued demand a notice on March 4, 2024 (the "ES March 2024 Letter").

The ES March 2024 Letter it says [*sic*] that the Employer was required to deliver records to the investigating delegate on or before December 14, 2022 to resolve this dispute.

The ES March 2024 Letter states that ES could not review the records because the records were not produced and then they conclude that because Columbus failed to produce records, Columbus are getting fined. However, it is important to note that Columbus did produce the records, following a request for an extension to get the records because it was the busy season for Columbus.

...

As submitted above, on or about May 17, 2023, Columbus received a letter from ES dated May 16, 2023 that included records submitted by Columbus previously. This we submit shows that ES received the records submitted by Columbus previously, and

that is the only inference that can be drawn, namely, that ES did indeed received [sic] records from Columbus.

10. Although the employer indicated in its Appeal Form that it was also relying on the “natural justice” and “new evidence” grounds of appeal, its submissions do not include any evidence or argument regarding an alleged breach of natural justice, nor any new evidence, in relation to the Determination. The employer’s submissions principally address the determination awarding the complainant section 63 compensation. Accordingly, this appeal turns on a factual dispute, namely, whether the employer complied with the section 85(1)(f) demand issued on November 30, 2022.
11. The Director maintains that there is nothing in the record indicating that the employer complied with the section 85(1)(f) demand for the production of employment records. The Director further notes that the payroll records that were included in the record were produced by the *complainant*, not the employer.

EVIDENCE IN THE SECTION 112(5) RECORD

12. A critical document when adjudicating appeals is the “record” that was before the Director of Employment Standards (“Director”) and upon which the determination was based. Section 112(5) of the *ESA* states that once the Director has been advised that an appeal to the Tribunal has been filed, the Director “must provide the tribunal with the record that was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director.”
13. The Tribunal provided a copy of the record in this matter to the employer and requested that the employer confirm that it was accurate and complete. In an email to the Tribunal sent on August 14, 2024, the employer’s legal counsel confirmed: “The Appellant submits that the record is complete from its end.” [sic]
14. The record in this appeal includes several documents that are particularly relevant to this appeal. Two section 85(1)(f) demands for payroll records were issued on November 30, 2022, in relation to, first, the complainant’s payroll records and, second, a broader demand for all employees’ records (within a defined time frame). This latter demand was made as part of an audit of the employer’s overtime pay practices. The demand was sent, together with an explanatory covering letter, by email and registered mail. The employer was given three weeks to provide the requisite records. In addition to sending the demands to the employer’s business address and registered and records office, the demands were also sent to three other individuals who were directors and/or officers of the employer. Both the covering letter and demands expressly stated that a failure to comply would result in a \$10,000 monetary penalty.
15. The record also includes the registered mail trace sheets confirming delivery of the demands to the employer (both business and records/registered offices), and to the three corporate directors.
16. Even though the ESB officer’s letter accompanying the demands clearly stated why the second broader demand for records was issued, on December 2, 2022, the employer’s legal counsel

(not the same counsel who now represents the employer) sent an email to the ESB officer querying “why are you requesting ALL employee records?” (CAPITALIZATION in original text). The ESB officer responded later that same day explaining, once again, why each demand was issued. There is nothing in the record showing that the employer ever complied with either document production demand.

17. On May 16, 2023, the ESB officer issued an “Investigation Report” summarizing the parties’ evidence and argument. In this report, the officer specifically identified the following issue, among the five addressed in the report: “Did the [employer] fail to provide payroll records to the Branch?” With respect to this latter issue, the officer stated:

As before, the purpose of this investigation was to determine if [the employer] had failed to pay overtime wages to all of its employees. Accordingly, a Demand for Employer Records was issued on November 30, 2022. The [employer] was required to deliver any and all payroll records relating to wages, hours of work, and conditions of employment for all employees in a 12-month period. The deadline to respond was December 21, 2022. The [employer] did not submit any payroll records to the Branch by this deadline.

18. The officer’s report was sent by registered mail to the employer’s business office and its registered and records office. In addition, the report was also sent to the employer’s directors and its then legal counsel. The report directed the parties to respond to the contents of the report by no later than May 30, 2023, and that the “report and any responses made by the parties will be considered in making a final determination regarding the complaint.”
19. On May 30, 2023, the employer’s legal counsel submitted a written response to the ESB officer’s report. In this response, counsel addressed the merits of the complainant’s position, but never questioned, or otherwise responded to, the officer’s finding regarding the employer’s failure to comply with the section 85(1)(f) demands.

CONCLUSION

20. Although the employer submits that it submitted the records that were the subject of the section 85(1)(f) demands, there is nothing in the employer’s submission that confirms that assertion. Indeed, the evidence in the record overwhelmingly shows that the employer failed to comply with either demand.
21. There is also no doubt that this latter failure to comply was a third contravention and, that being the case, a \$10,000 penalty was mandated by section 29(1)(c) of the *Regulation*.

ORDER

22. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the amount of \$10,000.

/s/ Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal