

An appeal

- by -

Gary Sumner carrying on business as Student First Chocolates  
(“Sumner”)

- 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 (as amended)

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE No.:** 2014A/61

**DATE OF DECISION:** November 21, 2014

## DECISION

### SUBMISSIONS

Gary Sumner on his own behalf carrying on business as Student First Chocolates

### INTRODUCTION

1. Section 98 of the *Employment Standards Act* (the “*Act*”) provides for the imposition of monetary penalties on parties who contravene the provisions of the *Act*. The administrative details of the penalty scheme are set out in Part 6 of the *Employment Standards Regulation* (the “*Regulation*”). Section 29 of the *Regulation* provides for an escalating scale of penalties from \$500, to \$2,500, to \$10,000 for each successive contravention within a 3-year period of the most recent contravention.
2. On March 31, 2014, a delegate of the Director of Employment Standards (the “delegate”) issued a Determination pursuant to which Gary Sumner carrying on business as Student First Chocolates (“Sumner”) was assessed a \$10,000 monetary penalty based on his third contravention of section 46 of the *Regulation*. This latter provision states that where a person has been issued a demand for the production of employment records under subsection 85(1)(f) of the *Act*, that person must produce or deliver the records as and when required.
3. Sumner appeals the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b) of the *Act*) – this is the ground Mr. Sumner checked off on his Appeal Form. However, in a subsequent submission filed on September 30, 2014, he expanded his grounds of appeal to include allegations that the delegate erred in law (subsection 112(1)(a)) and that he now had evidence that was not available when the Determination was being made (subsection 112(1)(c)).
4. At this juncture, I am considering whether the appeal should be summarily dismissed under subsection 114(1)(f) as having no reasonable prospect of succeeding. If this appeal passes this threshold, the respondent party will be notified and her submissions will be invited (and Mr. Sumner will be given an opportunity to respond to those submissions); otherwise, this appeal will be dismissed and the Determination confirmed.
5. I have before me the Determination and accompanying “Reasons for the Determination” (the “delegate’s reasons”), Mr. Sumner’s Appeal Form and his written submissions, and the subsection 112(5) “record” (226 pages) that was before the delegate when she issued the Determination.
6. Mr. Sumner, in his May 8, 2014, submission, states: “I am requesting an oral meeting face to face with all parties please”. He says “I would like to bring up a few things to both parties in person”. The Tribunal is not obliged to hold an oral hearing (see section 36 of the *Administrative Tribunals Act* and section 103 of the *Act*) and, in fact, virtually never does so. While there may be circumstances where the Tribunal would, due to natural justice or other concerns, hold an oral hearing, I am not satisfied that an oral hearing is required in order to ensure that Mr. Sumner is afforded a fair and reasonable opportunity to present his case. This is not a complicated case, no oral testimony is required, and Mr. Sumner has filed detailed written submissions with the Tribunal setting out his position.

## BACKGROUND FACTS

7. Mr. Sumner operates a business known as “Student First Chocolates” headquartered in Vernon. On April 21, 2011, Mr. Sumner was assessed a \$500 monetary penalty for having contravened section 46 of the *Regulation*. On August 4, 2011, a second monetary penalty – in the amount of \$2,500 – was levied against Mr. Sumner based on a second contravention of section 46 of the *Regulation*.
8. Mr. Sumner filed an appeal relating to these two penalties on October 7, 2011, – this appeal was filed after the applicable statutory appeal periods had expired. The appeal period relating to the first penalty determination expired on May 30, 2011, and the appeal period relating to the second penalty determination expired on September 12, 2011. Accordingly, Mr. Sumner applied for an extension of both appeal periods under subsection 109(1)(b) of the *Act*. On December 1, 2011, Tribunal Member Bhalloo issued written reasons for decision refusing to extend the appeal period and confirming the two penalty determinations (see *Sumner*, BC EST # D134/11).
9. As noted in the delegate’s reasons (at page 2): “On January 7, 2014, the [Employment Standards] Branch notified Mr. Sumner that it was conducting an investigation pursuant to section 76 of the Act to investigate whether he has employees working for him selling chocolates and if he was employing people, whether he was in compliance with the minimum requirements of the Act.” It should be noted that under subsection 76(2) the Director can conduct an investigation “whether or not the director has received a complaint”.
10. The record before me shows that on January 7, 2014, the delegate forwarded a letter, both by registered and regular mail, to Mr. Sumner advising him of the investigation and enclosing a “Demand for Records” (the “Demand”) under subsection 85(1)(f) of the *Act*. The Demand required Mr. Sumner to produce the following records to the delegate by no later than 1 PM, January 21, 2014:
  1. A list of the names and phone numbers of all people who, within the last 6 months, have sold chocolates and/or worked for or in association with Gary Sumner carrying on business as Student First Chocolates and/or Student 1<sup>st</sup> Enterprises,
  2. For the period of July 8, 2013 – January 7, 2014, timesheets showing daily hours worked by each person, records of the number of boxes of chocolates sold by each person and records of the amount of monies earned by each person who has sold chocolates and/or worked for or in association with Gary Sumner carrying on business as Student First Chocolates and/or Student 1<sup>st</sup> Enterprises, and
  3. Any and all documents you wish to rely on regarding the issue of whether students working for or in association with Gary Sumner carrying on business as Student First Chocolates and/or Student 1<sup>st</sup> Enterprises are employees under the Act or are self-employed.
11. The delegate’s January 7 letter cautioned Mr. Sumner as follows: “Failure to deliver these records as required will result in a Determination being issued. As you have previously received two penalties with respect to non production of records, another penalty would be in the amount of \$10,000.00.”
12. Although the delegate’s January 7 letter sent by registered mail was returned as “unclaimed”, the delegate, on January 21, 2014, received an undated letter from Mr. Sumner on “Student 1st Enterprises” letterhead in which he stated:

As requested I have sent you here 4 Distributors that have been selling Student 1<sup>st</sup> Chocolates from the period of July 8, 2013 – January 7, 2014.

[3 names omitted] are distributors. You have in front of you a copy of the Franchise contract that they have purchased Student 1<sup>st</sup> Chocolates in this period. [sic]

Also is a copy of the Student Vendor and Agreement for a student named [omitted].

13. Mr. Sumner's letter clearly was not responsive to the Demand – among other deficiencies, he failed to provide the names and telephone numbers of persons who were selling chocolates; he failed to provide timesheets (and under section 28 of the *Act*, an employer must keep certain payroll records); and he failed to provide the requisite sales information and earnings. On January 29, 2014, the delegate sent another letter to Mr. Sumner, again by both registered and regular mail, outlining the information that had not been submitted as required by the Demand and demanding that the documents be provided by 4 PM on February 4, 2014.
14. On February 4, 2014, the delegate received another undated letter from Mr. Sumner in which he refused to provide the demanded information relating to persons who were selling chocolates and told the delegate “to contact the Franchisee’s for this” [sic]. The delegate contacted two of the “franchisees” (who had responded to advertisements place by Mr. Sumner for positions as “youth leaders”) and they told the delegate that they purchased chocolates from Mr. Sumner that, in turn, were sold by school children. “Mr. Sumner required them to submit records to him on a daily basis of how many chocolates were sold and how many students were working” (delegate’s reasons, page 3).
15. On March 7, 2014, the delegate was contacted by an RCMP school liaison officer who was concerned that Mr. Sumner was employing children without proper parental consent (see section 9). The delegate then spoke with a number of children who advised her that “Mr. Sumner was personally driving them for several days a week for the purposes of selling chocolates” (delegate’s reasons, page 4).
16. The delegate concluded: “...I find Mr. Sumner would have had the records pertaining to the children [the “franchisees”] drove. ...I find Mr. Sumner was driving children to sell chocolates during the period of July 8, 2013 – January 7, 2014. ...and therefore would have had the records pertaining to those children (delegate’s reasons, pages 4-5). Since Mr. Sumner had records in his possession but failed to produce them in accordance with the Demand, a third penalty in the amount of \$10,000 was issued by way of the Determination.

## **FINDINGS AND ANALYSIS**

17. As previously noted, although Mr. Sumner's Appeal Form refers to a single ground of appeal, namely, that the delegate failed to observe the principles of natural justice in making the Determination, he added the two remaining statutory grounds of appeal in his September 30, 2014, submission. I have endeavoured to extract the central thrust of each of his grounds of appeal from his submissions and will now address each ground in turn.

### ***Natural Justice***

18. Mr. Sumner says: “I was not allowed a fair opportunity to answer any allegations and findings against me”. He claims that there was “no reason” for issuing the Demand. He submits: “I was not informed from the start of any written formal complaint against Student first chocolates [sic] to restart any investigation pursuant to section 76 of the Act” and “I had asked for an oral meeting between the two parties...Where is the justice when a man can't be herd?” [sic]. Finally, he suggests that the delegate does not “sound like a rational lady”.
19. In my view, Mr. Sumner's “natural justice” grounds are wholly lacking merit. I shall briefly dispose of each of the allegations he has made that arguably fall within the ambit of a breach of the principles of natural justice.

First, and most fundamentally, the record before me clearly shows that Mr. Sumner was given a full and fair opportunity to comply with the Demand. Indeed, and as noted above, when he did not provide a proper response to the Demand, the delegate identified the specific deficiencies in his response and unilaterally extended the deadline for production – and yet Mr. Sumner still failed to comply with the Demand. The original Demand was accompanied by a letter from the delegate that explained why the Demand was being issued and the consequences of noncompliance. The delegate was not obliged to conduct an oral hearing regarding the Demand – the delegate issued a Demand and reasonably expected that Mr. Sumner would provide the records sought. There was no ambiguity about the records being sought and, in any event, if Mr. Sumner was unsure about what he was supposed to do, the delegate specifically invited him “not to hesitate to contact me [at a specified e-mail address and telephone number] if you have any questions regarding the above”. As noted earlier in these reasons, the Director can institute an investigation in the absence of a complaint; the delegate’s original letter accompanying the Demand clearly indicated why the Demand was being issued (see para. 9, above). Mr. Sumner’s suggestion that the delegate does “not sound like a rational lady” is a wholly unnecessary and uncorroborated *ad hominem* attack on the delegate’s character that does nothing to advance his cause.

### ***Error of Law & New Evidence***

20. Mr. Sumner did not specifically identify the errors of law allegedly made by the delegate. I have reviewed Mr. Sumner’s submissions and the closest thing I can find to an alleged error of law is the following statement: “I am concerned that The Director has confidential documents under The Confidential and protection of privacy act that I cannot have a fair appeal to answer any allegations against myself in a determination” [*sic*]. I am not quite sure what to make of this assertion. First, there is no such statute. Second, the Determination is a penalty determination relating to Mr. Sumner’s failure to provide records as demanded. This appeal does not concern a question of “confidential documents” (whatever they might be – Mr. Sumner did not provide any further particulars) that may or may not be in the Director’s possession. Rather, this is a simple case of whether Mr. Sumner properly responded to a lawful Demand for records issued under subsection 85(1)(f).
21. As for the “new evidence” ground of appeal, this has not been particularized in Mr. Sumner’s submissions. He did append several documents to his submissions but all of these documents were either in the record before the delegate or otherwise pre-date the Determination in which case they were available to be disclosed had Mr. Sumner wished to provide them to the delegate. Further, I am not sure what relevance these documents may have to the central issue of whether Mr. Sumner complied with the Demand.
22. Mr. Sumner is understandably upset about having been assessed a \$10,000 monetary penalty. However, this appeal, on its face, is wholly without merit and must be summarily dismissed.

**ORDER**

23. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed on the basis that there is no reasonable prospect that it will succeed. In accordance with subsection 115(1)(a) of the *Act*, the Determination is confirmed.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**