

An appeal

- by -

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

- of Determinations 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:** Shafik Bhalloo

**FILE Nos.:** 2011A/153 & 2011A/154

**DATE OF DECISION:** December 1, 2011

## DECISION

### SUBMISSIONS

Gary Sumner	on his own behalf, carrying on business as Student First Chocolates
Jennifer R. Redekop	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Gary Sumner (“Mr. Sumner”) carrying on business as Student First Chocolates (“Student First”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against two (2) Determinations issued by the delegate of the Director of Employment Standards Branch (the “Director”) on April 21, 2011, and August 4, 2011, respectively. The first Determination imposed a penalty of \$500.00 on Student First for its failure to produce proper payroll records pursuant to section 46 of the *Employment Standards Regulation* (the “*Regulation*”). The demand was issued by the delegate pursuant to section 85(1)(f) of the *Act* and the \$500.00 penalty was levied pursuant to section 29(1)(a) of the *Regulation*. The second Determination imposed a penalty of \$2,500.00 on Student First pursuant to section 29(1)(b) of the *Regulation* for its second failure to produce payroll records as demanded pursuant to section 46 of the *Regulation*.
2. The deadline for Student First to appeal the first Determination was May 30, 2011, and the second Determination was September 12, 2011. Student First failed to file its appeals within the statutory appeal periods when it filed appeals of both Determinations on October 7, 2011.
3. On October 12, 2011, the Tribunal notified the parties that the issue of the timeliness of the appeals would be decided before the parties were asked to respond on the merits of the appeals.
4. Pursuant to section 103 of the *Act* and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In this case, neither party has requested an oral hearing and, in my view, the preliminary issue of the timeliness of Student First’s appeals may be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determinations.

### ISSUE

5. The sole issue to be addressed in this decision is whether the Tribunal should extend the deadline for requesting an appeal in accordance with the powers of the Tribunal under section 109(1)(b) of the *Act*.

### FACTS

6. By way of background to both Determinations, Mr. Brian Smyth filed a third party complaint under section 74 of the *Act* alleging that Mr. Sumner contravened the *Act* by employing children under the age of 12 without a permit (the “Complaint”).
7. On March 8, 2011, the delegate contacted Mr. Sumner at the phone number provided by Mr. Smyth and left a voicemail message indicating that a complaint had been filed with the Branch against Student First regarding

a possible employment by the latter of children under the age of 12. On March 9, 2011, the delegate again left a voicemail message for Mr. Sumner requesting he return the delegate's call.

8. Subsequently, on March 14, 2011, the delegate sent a letter to Mr. Sumner explaining the nature of the Complaint and issued a Demand for Employer Records, pursuant to section 85(1)(f) of the *Act*, requiring Mr. Sumner to deliver records requested to the Kelowna office of the Branch on or before March 30, 2011, in order to resolve this Complaint. This letter and Demand for Employer Records was sent via registered and regular mail to the address of 68 Kenyon Road, Vernon, BC, V1H 2E4, which Mr. Smyth provided to the delegate. According to the delegate's search of the BC Assessment registry, a Kathryn A Sumner and Gary Sumner were shown as the registered owners of the property at that address. In addition, according to the delegate, the phone number provided by Mr. Smyth, matched the 68 Kenyon Road address on the website whitepages.ca and was registered to the name 'Kathy Sumner'.
9. The delegate notes in the Reasons for both Determinations that on April 5, 2011, the registered mail sent on March 14, 2011, was returned to her marked 'unclaimed' but the regular mail of the same correspondence was not returned.
10. However, on March 21, 2011, the delegate received an email from Mr. Sumner attaching some documents for her to review. In that e-mail, he also provided a phone number where the delegate could reach him after reviewing those documents. The delegate states she responded to Mr. Sumner with an e-mail on the same date stating she could not open one of the attachments in the e-mail and asked Mr. Sumner to resend it. To this, the delegate notes she received an e-mail response from Mr. Sumner the same day setting out the attachment she could not open. The documents in question, as described by the delegate, were:
  - a) a 'Student Vendor Information Package' which set out details of selling the chocolates;
  - b) a blank 'Student Vendor Application and Agreement', which contains space for contact information and has a declaration regarding being self-employed that the student signs and a consent statement the legal guardian signs; and
  - c) an information sheet about the background of the business Mr. Sumner was operating.
11. In response to Mr. Sumner's e-mail above, on March 22, 2011, the delegate e-mailed him again requesting some further documents in addition to those requested earlier in the Demand for Employer Records. The delegate imposed a deadline of March 30, 2011, for Mr. Sumner to respond to her latter request but says he did not comply. She then successfully contacted him on April 5, 2011, at the phone number he had provided previously to her. In that phone conversation, the delegate states she asked Mr. Sumner if he had received her last e-mail of March 22 and he said he had not. However, he responded to her, stating that it was a waste of his time to be answering her questions as he was investigated by the Branch in 2004 and found to be in compliance with the *Act*. The delegate also notes that Mr. Sumner said the students were independent contractors and he does not have any employees. He also told the delegate that she had failed to talk to any of the students, to which the delegate states she responded that she did not know who any of them were and wanted that information from him. The delegate states Mr. Sumner replied he would not give her that information. The delegate then asked him if any of the students had completed the Student Vendor Application and Agreement forms and did he have any of the completed forms in his possession. Mr. Sumner, according to the delegate, replied that he did have some but he would not provide them to her. Instead, states the delegate, Mr. Sumner insisted that she look at the previous file where the Branch had investigated him. The delegate states that she advised Mr. Sumner that she was conducting a new investigation on a new complaint, but she would also look at the file number he provided and call him back.

12. Subsequently, on the same day, on April 5, 2010, when the delegate called Mr. Sumner back, he did not answer. She left him a voicemail message advising that she would be issuing a new Demand for Records as he was claiming he did not have the “employer records” requested in the first Demand.
13. On April 6, 2011, the delegate issued a second Demand for Records, pursuant to section 85(1)(f) of the *Act*, to Mr. Sumner. This Demand did not make reference to previous employer records but, instead, requested various specific documents, including documents Mr. Sumner admitted to having but refused to produce to the delegate. The delegate asked Mr. Sumner to comply with the request by delivering the records to the Kelowna office of the Branch on or before 1:00 p.m. on April 15, 2011. Like the first Demand, this Demand for Records was also sent by registered and regular mail to the Kenyon Road address. In addition, the delegate also e-mailed it to Mr. Sumner at the e-mail address at which she previously was successful in corresponding with him.
14. On April 14, 2011, the delegate received the regular mail returned to the Branch’s office with a handwritten note “not known at this address”. The delegate notes in her Reasons that the Canada Post website showed that a notification card was left at the Kenyon Road address, but the item was unclaimed.
15. Subsequently, on April 21, 2011, the delegate issued a Determination against Mr. Sumner finding the latter in contravention of Section 46 of the *Regulation* for his failure to produce the records the delegate requested. The delegate subsequently sent the Determination by registered and regular mail and both were returned to the Branch. The Determination was also sent via e-mail.
16. On June 13, 2011, the delegate sent a further Demand for Records to Mr. Sumner, essentially reiterating the terms of the earlier Demand sent to him on April 6, 2011. The Demand was sent to Mr. Sumner by registered mail at the Kenyon address and the Nerie Road address and also via e-mail. Mr. Sumner was required to deliver the records requested to the Kelowna office of the Branch on or before 1:00 p.m. on June 24, 2011. On this occasion, the delegate included a letter with the Demand advising Mr. Sumner that failure to comply would result in a penalty determination in the amount of \$2,500.00.
17. The delegate states the registered mail was unclaimed and the e-mail returned with a message that the e-mail address was not found and message undelivered. Subsequently, on June 15, 2011, because of the postal strike at the time, the delegate notes she sent the Demand to Mr. Sumner by Purolator courier. The tracking records on the Purolator website showed the package was refused on June 27, 2011, and returned to the Kelowna office of the Branch on June 28, 2011. The delegate then phoned the Purolator office in Vernon and spoke with the receptionist who advised that since Mr. Sumner lived in a more rural area, Purolator’s practice was to call the recipient to let them know a package is available for pickup at the Vernon depot. The receptionist also advised, according to the delegate, that the tracking information would not indicate “refused” and the package would not have been returned to the Branch as “refused” if Mr. Sumner had not contacted the depot to refuse it.
18. Subsequently, on August 4, 2011, the delegate issued a Determination against Mr. Sumner finding the latter in contravention of Section 46 of the *Regulation* for his failure to produce the records the delegate requested in the June 13, 2011, Demand and imposed a penalty of \$2,500.00 on Mr. Sumner, pursuant to section 29(1)(b) of the *Regulation*, as this was his second contravention of the same section of the *Regulation*.

### **SUBMISSIONS OF MR. SUMNER**

19. Mr. Sumner, in his late filed appeals, makes identical submissions. The gist of the submissions is that the delegate or the Director made a mistake, as he was never afforded the opportunity to represent himself or “be

informed of a court date”. He submits that in the documents left at his door on October 6, 2011, it is apparent to him that the delegate used an improper address for him and that is why the mail was returned to the Branch. He states he works in “a rural area outside of a city and did not receive” any of the documents that the delegate was sending him.

20. In the Appeal Form, Mr. Sumner uses the address at 08 Nerie Road, Vernon, BC, V1T 7Z3. I note that he attaches to his appeal submissions, the Certificates of Judgments the Director obtained for \$500.00 and \$2,500.00 respectively on August 30, 2011, showing the Kenyon Road address and that the Judgments were registered or charged against the interest of Mr. Sumner in the latter property. Mr. Sumner says he received the documents at his door on October 6, 2011. He does not explain whether it is the Nerie Road address or the Kenyon Road address at which the bailiff left the documents, which he received.
21. Mr. Sumner also attached a Contract of Purchase and Sale showing he and Kathryn Sumner, on April 1, 2004, entered into an agreement to purchase a property at Nerie Road. He also attaches a bill dated June 21, 2011, from Terasen Gas addressed to Kathryn Sumner at the Nerie Road address but at the bottom of the bill it also clearly shows Kathryn Sumner’s Kenyon Road address as well. Mr. Sumner does not explain what connection he had with the Kenyon Road address at any time in his submissions.
22. In his further reply submissions in both appeals, he complains that the delegate acquired his address and telephone number from Mr. Smyth, the complainant, but does not explain how he got this information as the information was incorrect as the registered mail to the address was returned to the Branch “unclaimed”.
23. He also submits that he did not receive the delegate’s email of March 22, 2011, but does recall making a change to his e-mail in spring 2011 “due to too many virus threats at the time”.
24. He also denies receiving any voicemail from the delegate on April 5, 2011, and denies receiving any mail from the delegate sent to the Kenyon Road address. He states the Nerie Road address is his correct address.
25. With respect to the Purolator delivery the delegate sent to Mr. Sumner, Mr. Sumner states that the delegate does not explain that Purolator’s “receptionist does not remember” the call to him or “anyone coming in” and refusing to accept the delivery. He argues that the delegate (or the receptionist) is speculating that the delivery was “refused” and argues that the delegate could have “come out to his place of business and discovered his correct address for delivery.”

## **SUBMISSIONS OF THE DIRECTOR**

26. The Director, with respect to the late appeals of both Determinations, reiterates the background of the Complaint and the history of her numerous efforts to contact Mr. Sumner and obtain employer records. I will not reiterate the details of those contacts here as they are virtually the same as those set out by the delegate in her Reasons for the second Determination, and I have already delineated those details under the heading Facts in this decision.
27. The Director also submits that Mr. Sumner only filed his appeals once the bailiff commenced collections proceedings against him with respect to the judgments obtained by the Director with respect to the two Determinations. Mr. Sumner did not show any intention to appeal the Determinations prior to this time nor convey his intention to appeal to the Director.
28. The delegate also notes that Mr. Sumner submitted a Contract of Purchase and Sale with his appeal submissions indicating the Nerie Road address as his current address. However, the legal description of the

property provided in the Contract, according to the BC Assessment search commissioned by the delegate, shows that the legal address relates to the property at the Kenyon Road address.

29. With respect to the Terasen Gas bill dated May 30, 2011, Mr. Sumner presented with his appeal submissions, the Director observes that while the bill was prepared for Kathryn Sumner of Nerie Road, the mailing address at the bottom of the bill shows the Kenyon Road address.

30. The Director argues that the Kenyon Road address “is in fact the Appellant’s correct mailing address” and Mr. Sumner “was clearly informed of the investigation and was given the opportunity to participate in the investigation process”, but chose not to participate and failed to pick up his registered mail or receive mail sent to his mailing address. He also refused mail sent to him by courier (Purolator). As a result of his own actions or doing, Mr. Sumner failed to meet the original appeal deadlines for the Determinations, argues the Director.

31. The Director also notes that while the delay in appealing the first Determination was several months after the expiry of the appeal deadline and the second Determination shorter, there is no harm to the respondent in extending the appeal deadline. However, this factor alone is not determinative in the decision-making on the issue. Instead, the Director looks to the purposes of the *Act* and particularly section 2(d) of the *Act*, which sets out two of several important purposes of the *Act*, namely, to provide fair and efficient procedures for resolving disputes. According to the Director, extending the appeal deadlines in the Determinations would not be “congruent with those purposes” because Mr. Sumner had the opportunity to participate in the process and chose not to do so.

32. The Director also submits that while Mr. Sumner has ticked off the “error of law” and “new evidence” grounds of appeal, no evidence is provided in support of the new evidence ground, nor is evidence adduced in support of the error of law ground. Therefore, argues the Director, Mr. Sumner’s appeals do not show a strong case that might succeed if he was granted an extension to file his appeals.

33. Finally, the Director argues:

The Determinations issued were with respect to the Appellant’s failure to provide records as was required by the Demand for Records that were issued [*sic*]. Pursuant to section 122 of the Act, a demand is deemed to have been served 8 days after the demand is deposited in the Canada Post office if sent by registered mail to the person’s last known address. The evidence clearly indicated the 68 Kenyon Road address was the correct address for the Appellant. I could not review the records relevant to the investigation of the third party complaint filed by Mr. Smyth because the records were not produced. There is no error in law in those Determinations as the facts support the findings made that the Appellant contravened section 46 of the Employment Standards Regulation.

## ANALYSIS

34. As indicated previously, Student First failed to file its appeals of the Determinations within the statutory appeal periods. The appeal deadlines for the first and second Determinations were May 30, 2011, and September 12, 2011, respectively. However, Student First filed its appeals on October 7, 2011, over four (4) months late in the case of the first Determination and over one (1) month late in the case of the second Determination.

35. While section 109(1)(b) of the *Act* gives the Tribunal the discretion or authority to extend the time period for requesting an appeal under section 112, the Tribunal has consistently stated that it will not exercise its discretion under section 109(1)(b) where the appellant does not show a compelling reason for the Tribunal to

exercise its discretion. The burden is on the appellant to show good reason why the Tribunal should extend the appeal period.

36. In numerous cases the Tribunal has set out a non-exhaustive criteria that it will consider in determining whether to exercise its power, under section 109(1)(b) of the *Act* to extend the time for appealing a determination. These factors include the following:

1. there is a reasonable and credible explanation for failing to request an appeal within the statutory limits;
2. there has been a genuine and ongoing *bona fide* intention to appeal the determination;
3. the respondent party and the Director have been made aware of this intention;
4. the respondent party will not be unduly prejudiced by the granting of an extension; and
5. there is a strong *prima facie* case in favour of the appellant.

37. Having said this, in the case at hand, I do not think there is any basis for exercising the Tribunal's discretion under section 109(1)(b) to extend the appeal periods in either Determination as Mr. Sumner, I find, has failed to discharge the onus upon him to satisfy the criteria or prerequisites delineated above to cause this Tribunal to exercise its discretion to extend the appeal periods.

38. More specifically, I do not find Mr. Sumner's explanations for filing his appeal after the expiry of the statutory period either reasonable or credible. From the evidence adduced by the delegate, it is clear to me that Mr. Sumner was privy to the Complaint lodged by the third party, Mr. Smyth, against him very early on before the first Determination was made. I note that after the delegate did not receive a response to her telephone calls of March 8 and 9, 2011, to Mr Sumner at the number for Mr. Sumner provided by Mr. Smyth, the delegate sent the first Demand for Employer Records to Mr. Sumner on March 14, 2011, by registered and regular mail to the Kenyon Road address of Mr. Sumner (provided to the delegate by Mr. Smyth). Although the registered mail was returned to the Branch unclaimed, the regular mail was not returned. Thereafter, on March 21, 2011, in advance of the March 30, 2011, deadline imposed by the delegate for compliance with the Demand for Employer Records, Mr. Sumner sent an email to the delegate attaching some documents for the delegate's review and his telephone number for contact. It stands to reason that Mr. Sumner received the delegate's Demand for Employer Records that was mailed by regular mail at the Kenyon Road address, as Mr. Sumner would not have otherwise responded to the delegate via email. I also note that the Kenyon Road address matched the phone number Mr. Smyth gave for Mr. Sumner and, according to the delegate's whitepages.ca search, it was registered to Kathy Sumner.

39. I also note that on April 15, 2011, when the delegate contacted Mr. Sumner at the phone number the latter provided to her in his previous email, Mr. Sumner indicated to her that he was not the students' employer and he was not interested in providing the delegate with the documentary information she was requesting, namely, the signed Student Vendor Application and Agreement forms which Mr. Sumner claimed to have with respect to some students. I note that the delegate then called Mr. Sumner back on the same day, but he did not answer her call and she left him a voicemail message advising that she was issuing him a new Demand for Records. Mr. Sumner indicates he never received her voicemail message, or any registered and regular mail at the Kenyon Road address with respect to the first and subsequent Demands for Records. I also note that the e-mail address at which Mr. Sumner previously corresponded with the delegate ceased to function, and Mr. Sumner explains that it was because of some virus problem that he experienced with that e-mail address. What I find curious is that Mr. Sumner had notice of the first Demand for Employer Records as early as March 21, 2011, and was aware of the delegate's investigation into Mr. Smyth's Complaint and spoke with the delegate on April 15, 2011, and thereafter seems to have ceased all contact with delegate despite knowledge of

an ongoing investigation by the delegate. I do not find Mr. Sumner's explanation that he did not receive any telephone calls or messages from the delegate credible. I also find it unreasonable that Mr. Sumner did not inform the delegate that he terminated the e-mail address that he previously used to communicate with her because of a virus problem. I would think that a reasonable or prudent person in Mr. Sumner's shoes with knowledge of an ongoing investigation would have either telephoned or emailed the delegate using another (functioning) email address to let her know alternative means to contact him.

40. I also note that in his written submissions, Mr. Sumner does not explain his association with the Kenyon Road address. One would think that Mr. Sumner would at least explain whether he lived at that address and for what period, as that address clearly shows up on the Terasen Gas bill he adduced in his appeal as well in the whitepages.ca search of telephone number for Mr. Sumner the delegate conducted and the BC Assessment search of the legal address provided in the Contract of Purchase and Sale Mr. Sumner attached to his appeal submissions. If Mr. Sumner lived at the Kenyon Road address for any period or if he moved from that address to the Nerie Road address at some point, one would think that he would explain this and provide relevant dates. Also, if he changed addresses from Kenyon Road to Nerie Road during the investigation of the Complaint, then he should have advised the delegate of such.
41. I also find the evidence adduced by the Director with respect to the delivery to Mr. Sumner of the second Demand for Records by the Purolator courier on June 15, 2011, very telling. That delivery failed, in my view, because Mr. Sumner was not going to participate in the delegate's investigation no matter what mode of contact the delegate employed. I find this to be a transparent case of the appellant making concerted efforts to avoid participating in the delegate's investigation. Only after the Determinations were issued and collections efforts initiated by the bailiff, Mr. Sumner was moved to file his appeals. In the result, I find Mr. Sumner's explanation for failing to file his appeals within the statutory limits unpersuasive and frankly, unreasonable.
42. I also find that Mr. Sumner has not adduced any evidence showing a genuine and ongoing *bona fide* intention on his part to appeal the Determinations. There is also no evidence that he communicated to the Director his intention to appeal before the expiry of the appeal deadlines.
43. I agree with the Director that it would be inconsistent and incongruent with the stated purpose of the *Act* in section 2(d), namely, to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*, if Mr. Sumner were to be granted an extension to file his appeals of the Determinations.
44. I also find that this is not a case where there is a strong *prima facie* case in favour of the appellant. I note that Mr. Sumner has checked off the "error of law" and "new evidence" grounds of appeal. While it is not the purpose of this Tribunal, in this decision, to go into the merits of Mr. Sumner's appeal, I note there is no *prima facie* evidence supporting either of these grounds of appeal Mr. Sumner invokes. In the case of the new evidence ground of appeal, I note that Mr. Sumner has adduced no evidence whatsoever. With respect to the error of law ground of appeal, I do not find any basis in Mr. Sumner's evidence to challenge the delegate's finding of contravention by Mr. Sumner of Section 46 of the *Regulation* in both Determinations. I also find the delegate correctly interpreted and applied section 122 of the *Act* governing service of determinations. In this case, both Determinations were served on Mr. Sumner by registered mail at his last known address at Kenyon Road. Pursuant to section 122(2) of the *Act*, the Determinations are deemed to be served 8 days after they were deposited in a Canada Post office.
45. Based on my reasons above, I reject Mr. Sumner's application for an extension of time for appealing both Determinations.



**ORDER**

- <sup>46.</sup> Pursuant to section 115(1)(a) of the *Act*, I order that the Determinations issued on April 21, 2011, and on August 4, 2011, be confirmed. Pursuant to section 114(1)(b) of the *Act*, the appeals are dismissed.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**