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-

Marbella Restaurants Ltd.

("Marbella" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 1999/308

DATE OF DECISION: July 13th, 1999

DECISION

OVERVIEW

This appeal, filed by Marbella Restaurants Ltd. ("Marbella" or the "employer"), concerns two separate determinations issued by delegates of the Director of Employment Standards (the "Director").

On May 4th, 1999 a delegate of the Director issued a determination under file number ER 087704 with respect to an unpaid wage claim filed by Tyson Pappas ("Pappas") against Marbella. The delegate determined that, in fact, Pappas had been overpaid by his former employer--Pappas earned $994.50 during the relevant period (the latter half of July 1998) but was actually paid $1,025.

Notwithstanding the foregoing, and as part of the same determination, another delegate issued a $0 penalty, pursuant to sections 98 of the *Act* and 29 of the *Employment Standards Regulation*, by reason of the employer's alleged contravention of sections 40 (payment of overtime wages) and 58 (payment of vacation pay) of the *Act.*

I must say that it is a mystery to me how an employer can be penalized for *failure to pay* a particular employee overtime wages and vacation pay, while at the same time be found to have overpaid that very same employee. It would appear that the delegate's real concern was the employer's failure to properly document Pappas' overtime and vacation pay entitlements, but that is a failure to comply with one or both of sections 27 and 28, rather than a contravention of sections 40 and 58. It follows that the $0 penalty must be cancelled.

Another determination was also issued against Marbella on May 4th, 1999, under the same file number ER087704. Pursuant to this determination, a $500 monetary penalty was levied against Marbella because:

> "Marbella Restaurants Ltd. operating as Marbella Spanish Restaurant-Tapas Bar has contravened Section 46 of the ***Employment Standards Regulations*** [sic] by failing to produce proper payroll records. The penalty for this contravention is $500.00. It is imposed under Section 28(b) of the ***Employment Standards Regulation.***"

ISSUE TO BE DECIDED

Marbella appeals the $500 penalty arguing that it did not fail to comply with the delegate's demand for production of payroll records relating to Pappas.

FACTS AND ANALYSIS

The following facts are reproduced from the $500 penalty determination:

> "On April 9, 1999, [a delegate] issued a Demand for Records pursuant to section 85(1)(f) of the [*Act*] to [Marbella]...On April 22, 1999, Marbella provided employer records specified in the demand. The timesheet (Attachment 3) provided by Marbella now showed dates worked and hours worked on each day...
>
> *[The delegate] reviewed the records and determined that the records failed to meet the requirements of Section 28(1) of the Act, because they did not contain the hours worked by the employee on each day."* (my *italics*)

The delegate justified the issuance of the $500 penalty as follows:

> "*Failure to keep records,* at the very least, delays investigation. It may deny an employee a minimum standard. The records demanded were relevant to an investigation, the employer was aware of the demand for production of records. *No reasonable explanation for the failure to keep these records was given.* If a reasonable explanation had been given, the Director would have exercised discretion and a penalty would not have been issued...
>
> The Director issues a penalty in order to create a disincentive against employers who frustrate investigation through *failure to keep records...*
>
> I order [Marbella] to cease contravening *Section 28(1)* of the [*Act*]."
>
> (my *italics*)

As noted above, the delegate issued a "Demand for Employer Records" on April 9th, 1999 pursuant to which the employer was to "produce and deliver" employment records relating to Pappas spanning the period July 17 to 31st, 1999. While it might be argued that the records produced by the employer were inadequate in some fashion, the employer did produce whatever records it had in its possession relating to Pappas.

It must be remembered that the $500 penalty was issued for failure to produce records, however, it appears to me that the central thrust of the reasoning behind the issuance of the $500 penalty determination was the employer's failure to *keep* proper payroll records.

An employer's obligation to *keep* payroll records is crystallized in section 28 of the *Act.* Pursuant to section 28(a) of the *Regulation* a $500 penalty may be imposed for a contravention of section 28 of the *Act.* However, this particular $500 penalty was issued, as noted above, pursuant to section 28(b) of the *Regulation* for an alleged contravention of section 46 of the *Regulation* which

in turn simply states that a person who is issued a demand for records pursuant to section 85(1)(f) of the *Act* must comply with that demand.

While the determination appears, on its face, to have been issued for failure to comply with a demand to produce records, the reasoning set out in the determination appears to relate to an alleged failure to keep proper payroll records. The obligation to keep records and the obligation to comply with a demand for production of records are separate and distinct obligations. It is entirely possible that proper records may be kept but not produced on demand. In such case, the appropriate penalty provision is section 28(b) of the *Regulation*. Where proper records are not kept, the appropriate penalty provision is section 28(a) of the *Regulation*.

In essence, the facts of this case are the mirror image of those in *Mega Tire Inc.* (B.C.E.S.T. Decision No. 406/97) where I observed that these two contraventions, namely, failing to *keep* records and failing to *produce* records, were separate and independent matters:

> "Whether a party has violated the record-keeping requirement set out in section 28 of the *Act*, or has failed to "produce or deliver" records in violation of section 46 of the *Employment Standards Regulation*, the penalty prescribed by sections 28(a) and (b) of the *Employment Standards Regulation* is the same--$500 for each contravention. However, it must be remembered that the penalty provisions set out in the *Act* and accompanying *Regulation* are in the nature of quasi-criminal regulatory offence provisions and, as such, a party against whom a penalty has been imposed has the right to know what specific statutory provision they are alleged to have breached, and such alleged breach must be strictly proved. In my view, this is the minimum that is called for by sections 7 and 11 of the *Canadian Charter of Rights and Freedoms.*"

As I noted in *Westminster Chevrolet Geo Oldsmobile*, B.C.E.S.T. Decision No. 210/97:

> "In my view, a penalty determination, being in the nature of a quasi-criminal proceeding, ought to clearly indicate, *on its face*, the precise reason why the determination is being issued so that a party who receives the penalty determination will have no doubt about the nature of the allegation that has been made against them."

On the face of the $500 penalty determination, it was issued for failing to produce records, yet the evidence before me shows that whatever records the employer had in hand relating to Pappas were, in fact, disclosed. The reasoning behind the issuance of the determination appears to be that the records that were produced were deficient insofar as section 28 of the *Act* is concerned. Nevertheless, the determination was issued for failure to *produce* records, not for failure to *keep* records.

In her written submission to the Tribunal dated June 10th, 1999 the delegate states that "while the appellant produced payroll records for the investigation, the appellant failed to keep the proper

payroll records that were relevant to the investigation...The Determination was issued against the appellant for failing to keep proper payroll records." In my view, this latter assertion is simply not tenable--I need only refer once again to the "Conclusion" set out at page 2 of the determination:

> "Marbella Restaurants Ltd. operating as Marbella Spanish Restaurant-Tapas Bar has contravened Section 46 of the ***Employment Standards Regulations*** [sic] by failing to produce proper payroll records. The penalty for this contravention is $500.00. It is imposed under Section 28(b) of the ***Employment Standards Regulation.***" (my underlining)

The fact that the delegate, in the determination, referred to the employer's record-keeping obligation mandated by section 28(1) of the *Act* does not in any material way change the critical fact that the $500 penalty was imposed for failure to *produce*, not for failure to *keep*, certain payroll records. Given that the only evidence before me is that all of the employer's records relating to Pappas *were* produced, the $500 penalty must be set aside.

ORDER

Pursuant to section 115 of the *Act*, I order that both the $0 and the $500 penalties levied by the Director against Marbella on May 4th, 1999 be cancelled.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal