

**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 -

Colleen Gunther operating European Day Spa  
(“Gunther”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NO.:** 98/268

**DATE OF DECISION:** July 15, 1998

## DECISION

### OVERVIEW

Colleen Gunther operating European Day Spa, pursuant to section 112 of the *Employment Standards Act* (the “Act”), appeals a Determination of the Director of Employment Standards, dated April 7, 1998. The Determination is that Gunther contravened section 46 of the *Employment Standards Regulation* (the “Regulation”) in failing to produce and deliver employment records and it imposes a penalty of \$500 pursuant to section 28 of the *Regulation*.

### ISSUE TO BE DECIDED

The only issue is the matter of whether or not the Determination is in order.

### FACTS

Colleen Gunther was issued a Demand for Employer Records on the 25<sup>th</sup> of February, 1998. Gunther was ordered to disclose, produce and deliver employment records, by March 14, 1998, for Merrin McLachlan, covering the period May 6, 1996 to November 11, 1997. The records ordered are the following:

1. all records relating to wages, hours of work, and conditions of employment.
2. all records an employer is required to keep pursuant to Part 3 of the *Employment Standards Act* and Part 8, section 46 and 47 of the *Employment Standards Act Regulation*.

Gunther, through the manager of her salon, responded by saying that McLachlan was not employed by her but was an independent contractor. She provided the investigating officer with a copy of an agreement, the “Independent Contractor’s Agreement”, signed by McLachlan. And according to Gunther, the investigating officer led her to believe that he would review that agreement and get back to her but she heard nothing further from him before receiving the Determination. The Determination is as follows:

You contravened section 46 of the *Employment Standards Regulation* by failing to produce or deliver the records as and when required. The penalty for this contravention is \$500.00 which is imposed under section 28 of the *Employment Standards Regulation*.

There is no further explanation for the decision to impose the penalty.

## ANALYSIS

Section 85 of the *Act* provides that the Director or her delegate may order a person to produce or to deliver, to a place specified by the Director, any records that may be relevant to an investigation of the *Act*. Section 46 of the *Regulation* provides that the records be produced or delivered “*as and when required*”.

Under sections 98 (1) and (2) of the *Act*, the Director may impose a penalty where the Director is satisfied that a person or corporation has contravened a requirement of the *Act* or the regulations. Section 98 is as follows:

98 (1) *If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director **may** impose a penalty on the person in accordance with the prescribed schedule of penalties.*

(2) *If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.* (my emphasis)

Section 28 of the *Regulation* provides for a penalty of \$500.00 for each contravention of section 46 of the *Regulation*.

Section 81(1)(a) of the *Act* requires that a person receive a Determination that includes the reasons for the determination. That section of the *Act* is as follows:

81 (1) *On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:*

(a) *the reasons for the determination;*

The *Act* clearly requires statement of the reason(s) for a Determination which imposes a penalty. Moreover, as is found in *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BCEST No. D374/97, the need for fairness also demands a clear statement of reasons for the penalty given that the power to impose penalties is discretionary. In the absence of that, the person or corporation, against which the penalty is imposed, simply has no way of knowing the case against it [*Williams Security Services Ltd.*, BCEST No. D467/97].

The Determination against Gunther, dated April 7, 1998, imposes a penalty but fails to explain why that is done. It is simply not adequate to state that the person has contravened a specific provision of the *Act* or *Regulation* [*Fairfax Enterprises Limited*, BCEST No. D048/98]. There must be an explanation of why the discretion to impose a penalty is being exercised.

I am further troubled by the mechanics of this case. The Determination imposes a penalty against Gunther, for failing to keep employment records, without it being decided that, contrary to what she may believe, she is the employer of McLachlan. The Determination gets the cart before the horse. Only the employer is under the obligation to keep and provide employment records, and only the employer can be fined for a failure to produce employment records.

**ORDER**

I order, pursuant to section 115 of the *Act*, that the PDET Determination, dated April 7, 1998 be cancelled.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**