

BC EST #D392//99

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-

Competition Towing Ltd.
(the Employer)

-of a Determination issued by-

The Director of Employment Standards
(the Director)

ADJUDICATOR: Hugh R. Jamieson

FILE NO: 1999/442

DATE OF DECISION: September 14, 1999

DECISION**OVERVIEW**

This decision deals with an appeal brought by the Employer against a Determination issued by the Director on July 7, 1999, wherein a penalty of \$500.00 was assessed against the Employer for failing to produce payroll records on demand. The Employer is no longer a functioning entity, the business having been sold early in 1998. The principle issue raised in the appeal is the concern of Ms. Paula Mueller, nee Lezetc, hereinafter referred to as Ms. Mueller, President/Secretary of the Employer, that the \$500.00 penalty will become her personal liability pursuant to Section 98 (2) of the *Employment Standards Act* (the "Act"), and that these monies will be garnisheed from her wages. In this regard, a Determination assigning liability to Ms. Mueller for the amount of the penalty was issued by the Director on July 14, 1999. The appeal also affects this Determination.

In her appeal and in the submissions that followed, Ms. Mueller also took issue with allegations made by three employees claiming non payment of vacation pay. These complaints are presently under investigation by the Director. Ms. Mueller also challenges some findings of the Director in previous determinations regarding wages owing and deductions taken from an employee's wages. On that previous occasion the Employer also failed to produce payroll records on demand. The ensuing penalty of \$500.00 was later determined to be a liability of Ms. Mueller as a Director or Officer of the Employer and was collected by the Director via garnishment proceedings against her wages.

ISSUES TO BE DECIDED

The issues that arise here are whether the Director properly exercised the statutory authority under Section 98 of the *Act* to impose a monetary penalty on the Employer and also, whether this penalty was properly determined to be a personal liability for Ms. Mueller as a Director or Officer of the Employer pursuant to Section 98 (2) of the *Act*.

FACTS

To put this whole matter in perspective it is necessary to refer briefly to the previous occasion where a \$500.00 penalty was assessed against the Employer and collected from Ms. Mueller personally as an Officer. This arose from the investigation into a complaint by a Mr. Ryan Hyland that caused the Director to issue a "Demand for Employer Records" on July 14, 1997. Non compliance with this demand resulted in Penalty Determination being issued against the Employer on April 3, 1998. On June 24, 1998, a letter was sent to the Employer concerning the non payment of this penalty. The only response to this letter was a telephone call from Ms. Mueller indicating that the Employer (Competition Towing Ltd.) had been sold. A follow up letter seeking details of the sale of the business went unanswered.

On February 24, 1999, a determination was issued by the Director finding Ms. Mueller personally liable for the \$500.00 penalty as a Director or Officer of the Employer. Following another unanswered demand letter to Ms. Mueller dated June 4, 1999, action was taken by the Director to recover the \$500.00 from Ms. Mueller's wages.

In the meantime, more relevant to the instant appeal, on March 25, 1999, in response to complaints from three other employees, Messrs., James Bowen, William Smith and Wayne Young, the Director served another "Demand for Employer Records" on the Employer. There was no response. A follow up letter was sent on May 11, 1999, to Ms. Mueller asking for reasons for the non compliance. A copy of this letter was also sent to the Employer's Registered and Records Office. A law firm that indicated that it was no longer acting for the Employer responded by letter dated May 12, 1999, and provided the information that a Notice of Dissolution had been received from the corporate registry indicating that the Employer (Competition Towing Ltd.) would be dissolved as of June 1, 1999.

On May 18, 1999, yet another "Demand for Employer Records" was sent to the Employer with a deadline to produce by 10.00 a.m. on June 11, 1999. The records were not produced.

On July 7, 1999, the first of the Determinations that is under appeal here was issued by the Director imposing a penalty of \$500.00 on the Employer for failing to produce the payroll records. This penalty being payable by July 30, 1999. The deadline for appealing this Determination was also July 30, 1999. Then, on July 14, 1999, the Director issued the other Determination finding that Ms. Mueller is personally liable to pay the \$500.00 penalty in her capacity as a Director or Officer of the Employer. She was given twenty-three (23) days to submit the money. The deadline for appealing this Determination was August 11, 1999.

THE APPEAL

Before describing the basis for the appeal I should mention that I fully appreciate that the content of this appeal is on the extreme borderline of acceptance under the Tribunal's Rules of Procedure and in particular as it relates to the issue of specifically what determinations are being appealed. One has to read all of the submissions accompanying the appeal to draw the inference that both the July 7, 1999, and the July 14, 1999, Determinations are being appealed.

I am nevertheless accepting the appeal as being properly before me. I also find that it affects both Determinations. In arriving at this conclusion, I adopted the approach taken in D.Hall & Associates Ltd., BC EST# 354/99 where the Tribunal exercised its discretion to allow certain aspects of an appeal to proceed notwithstanding some deficiencies in the presentation. There, the Tribunal observed, correctly in my view:

“ It is obvious that there is a sensitive balance to be struck between the interest

of ensuring that the process of adjudication moves quickly and with finality and the interest of ensuring that appellants are not effectively denied access to the process by an overly technical application of the rules.”
(page 10)

The appeal consists of a completed Form 1 dated July 14, 1999, a submission of the same date and, further submissions dated July 15, 1999 and August 4, 1999. In effect the appeal is really a dual presentation, with Ms. Mueller speaking at times for the Employer and at times for herself as a Director or Officer of the Employer. For simplicity, I will not attempt to differentiate between the two.

To begin with, Ms. Mueller disputes that Messrs. Bowen, Smith and Young were not paid all of the wages to which they were entitled. I need not recite the details of these submissions as those matters are still under investigation. There has been no determination issued as yet by the Director in this regard so it follows that there can be no appeal. I therefore have no jurisdiction to deal with the issues raised.

Ms. Mueller also makes reference to the previous determinations and the penalty arising from the complaint of Mr. Hyland. In effect, she is now attempting to challenge the Director’s findings that the Employer owed Mr. Hyland wages and also raises issues going to the garnishment of her wages. None of those matters were appealed at the time and the appeal periods for so doing have long since expired. Again, I have no jurisdiction to deal with the issues raised so there is no need to go into the details of these submissions.

Insofar as the two Penalty Determinations over which I do have jurisdiction, Ms. Mueller starts by pleading that she had no knowledge of the complaints by Messrs. Bowen, Smith and Young or the Demands for Employer Records until July 9, 1999, which was the same day her wages were garnished. She claims that she did not receive the Demands for Employer Records until they were couriered to her shortly after July 9, 1999 at her request. In this same vein, Ms. Mueller goes to some lengths describing her difficulties picking mail up from the Post Office which is apparently located about three (3) miles from her residence.

Insofar as the penalty being her personal liability, Ms. Mueller characterizes this as harassment and pleads for understanding and compassion. She also submits that another \$500.00 deduction from her pay may well force her into bankruptcy.

Lastly, Ms. Mueller claims that there were health reasons contributing to the failure to produce the payroll records in response to the Director’s demands. She also submits that this whole ordeal has her close to a total breakdown. In this regard, a medical certificate dated February 26, 1999, is presented.

In response to all of this, the Director basically denies harassing Ms. Mueller and sets out at length the full history of the attempts to gain access to the Employer’s payroll records to enable the Director to complete the investigation into the outstanding complaints.

ANALYSIS

Section 98 of the *Act* provides:

- “ 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.”
- 98(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. ...”

Section 28 of the Employment Standards Regulations provides in part:

- “28 The penalty for contravening any of the following provisions is \$500.00 for each contravention:
- (a) sections 25(2) (c), 27, 28, 29, 37(5) or 48(3) of the Act;
 - (b) section 3, 13 or 46 of this regulation.”

Section 46 of the Employment Standards Regulations provide:

- “46 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.

Referring to the service of determinations or demands, Section 122 of the Act provides, in part:

- 122 (1) A determination or demand that is required to be served on a person under this Act is deemed to have been served if
- (a) served on the person, or
 - (b) sent by registered mail to the person’s last known address.
- (2) If service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.

Dealing first with the impact of Section 122 of the *Act* on Ms. Mueller’s claims that the Employer

did not receive the Director's Demands for Employer Records, this is a prime example of why these provisions were enacted. Without the deeming provisions of Section 122, recalcitrant employers could defeat or at least unduly delay the mandatory production of records aspect of the *Act* by simply not picking up their mail. Section 122 (2) preempts this sort of conduct by deeming that such Demands are served eight (8) days from the date they are sent by registered mail. When the Tribunal has been called upon to interpret and apply Section 122 of the *Act* in the past, it has adopted a strict approach to ensure that these deeming provisions prevail and that the purposes of the *Act* are achieved. For example, see - *A-Mil Financial Corp.*, BC EST # D193/98; *ScottLynn Contracting Ltd.*, BC EST # D012/97; and, *Zedl*, BC EST # D308/ 96.

In the situation here, there can be no doubt that the documents in question were properly served on the Employer at its last known address. The evidence in the material before me shows that they were sent on the dates shown as the Director alleges, by certified mail, which is synonymous with registered mail for the purposes of Section 122 of the *Act*. The fact that the mail containing these documents was not picked up in response to the notices left by the Post Office makes no difference. Once the Director deposited the Demands with Canada Post, they are deemed to have been served eight (8) days thereafter. In the circumstances, I find that the Employer was properly served with the Demands for Employer Records dated March 25, 1999 and May 18, 1999.

Dealing with the appeal going to the Determination of July 7, 1999, and the imposition of the penalty of \$500.00 on the Employer for failing to produce the records, the evidence that the records were not produced as required cannot be refuted. In fact, according to the Director's submissions of August 25, 1999, the records still had not been produced.

It follows then that the Director was quite correct in the Determination of July 7, 1999, when it was stated that the Employer had failed, on two occasions, to produce payroll records and that the Employer had therefore violated Section 46 of the Employment Standards Regulations. Given the circumstances and the lack of any reasonable explanation why the records were not produced, the Director exercised the discretion under Section 98 (1) of the *Act* to impose a monetary penalty on the Employer. In these situations where violations of Section 46 of the Regulations are involved, the penalty stipulated in Section 28 of the Regulations is \$500.00.

For this portion of the appeal to be successful, the Employer has to convince the Tribunal that the Director's discretion to impose a penalty under Section 98 (1) of the *Act* has been exercised improperly in that the Director acted in bad faith or in an arbitrary or discriminatory fashion. However, there is nothing in the appeal that even comes close to discharging that onus.

What is in the appeal are explanations as to why there was difficulty producing the records considering that it is almost two years since the business was sold and the records are apparently not all in one place. Also, we have Ms. Mueller's health problems which she claims was a contributing factor, as well as her pleas for compassion. These are of course not grounds for an appeal and they certainly do not justify the Tribunal disturbing the Determination. These are matters that should have been raised with the Director before the Penalty Determination was issued. If they had, this may well have persuaded the Director that a penalty was not deserving in

the circumstances.

Turning now to the Determination that was issued on July 14, 1999, and the issue of Ms. Mueller's personal liability as a Director or Officer of the Employer for the amount of the penalty under Section 98 (2) of the *Act*, there appears to be very little written by the Tribunal on this topic. It is therefore necessary in the given circumstances to briefly differentiate between these provisions and those in Section 96 of the *Act* where the Tribunal's policies regarding directors or officers of corporations being held liable for unpaid wages are well established.

The starting point is Professor Mark Thompson's Report of February 3, 1994, *Rights & Responsibilities in a Changing Workplace, a Review of the Employment Standards in British Columbia*, which contained the recommendations that formed the base for the restructuring of the *Act* in 1995. There, Professor Thompson rejected overtures from the business community to include some form of due diligence as a defence for directors or officers of corporations found liable for unpaid wages under Section 96 of the *Act* - (see pages 155 & 156 of the Report for the full discussion). As it stands under Section 96 (1), directors or officers of corporations become liable for unpaid wages by simply being a director or officer at the time the wages were earned.

However, looking at the construction of Section 98 (2) of the *Act* and, ignoring the reference to employees or agents of the corporation for the time being, it is only those directors or officers who have *authorized, permitted or acquiesced* to the violations of the *Act* that can be held liable for penalties imposed on corporations. Simply being a director or officer when a violation of the *Act* or of the Regulations occurs is not in itself sufficient to attract liability for penalties. In short, there is a defence for directors or officers under Section 98(2) of the *Act* which is not there under Section 96.

There is therefore a higher standard of proof that the Director must meet under Section 98(2) of the *Act* when assigning personal liability for penalties to directors or officers of corporations as opposed to assigning liability to directors or officers for unpaid wages. Consequently, before the Tribunal confirms a determination assigning personal liability for a penalty under Section 98 (2) of the *Act*, it must ensure that the Director has taken those extra steps to determine if the persons named in the determination have in fact *authorized, permitted or acquiesced* in the contravention.

At the very least, in the interests of natural justice, the Tribunal should be satisfied that such persons have been given a meaningful opportunity to respond to any assertion by the Director that they had in fact *authorized, permitted or acquiesced* in the contravention. The Determination must also be clear as to the reasons why those named are being held liable.

In the situation here, the Director appears to have treated the assignment of liability for the penalty to Ms. Mueller as though it was a liability under Section 96 of the *Act*. At pages 2 & 3 of the Determination in question, the Director states:

“ Information obtained from the Registrar of Companies indicated that, from December 12, 1995 until June 28, 1999, Paula Lezetc was shown as a Director or Officer of Competition Towing. That information is attached hereto as

Appendix II. Accordingly, at the times Competition contravened Section 46 of the Regulations, (viz. April 22, 1999 and June 11, 1999), Paula Leztec was a Director or Officer of Competition Towing.

Conclusion

Accordingly, pursuant to the provisions of Section 98 (1) (sic) of the *Act*, Paula Leztec is liable to pay the aforementioned \$500.00 penalty. A copy of section 98 of the *Act* is attached hereto as Appendix III.

Paul Leztec apparently now uses the name Paula Mueller. She acknowledged that fact when she spoke (by telephone on June 8, 1999) with Industrial Relations Officer David Oliver. Accordingly, it is appropriate to also show Paula Mueller (also known as Paula Leztec) as being liable to pay the aforementioned \$500.00 penalty. ”

Obviously, the Determination is flawed in that there is no specific finding going to the only grounds upon which Ms. Mueller could possibly inherit liability for the penalty imposed on the Employer, i.e., that she had somehow *authorized, permitted or acquiesced* in the contravention.

Moreover, I see nothing in the Director’s submissions in response to the appeal showing that Ms. Mueller was ever notified prior to the Determination being issued as to how, why, where and when she, as a Director or Officer of the Employer had *authorized, permitted or acquiesced* in the Employer’s failure to produce its payroll records. While in the circumstances here, the how, why, where and when Ms. Mueller was personally responsible for the contravention may seem obvious to the Director, that is not the point. Natural justice requires that when any individual is to be held personally liable under Section 98 (2) of the *Act* for penalties assessed against corporations, be they employees, directors or officers or agents, they must be notified of the specific allegations against them and be given a meaningful opportunity to respond.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated July 7, 1999, imposing a penalty of \$500.00 on the Employer for contravening Section 46 of the Regulations is hereby confirmed. The Determination dated July 14, 1999, assigning liability for the aforesaid penalty to Ms. Mueller as a Director or Officer of the Employer is hereby cancelled.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal