

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-

Cretan Enterprises Ltd.
operating as “Golphis Steak & Lobster”

(“Cretan”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	1999/430
DATE OF HEARING:	October 15th, 1999

BC EST #D487/99

DATE OF DECISION:

November 15th, 1999

DECISION

APPEARANCES

Athanashe Karamanoli, Officer & Director
& Golphis Caramanoli for Cretan Enterprises Ltd.

Diane H. MacLean, I.R.O. for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Cretan Enterprises Ltd. operating as “Golphis Steak & Lobster” (“Cretan”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 16th, 1999 under file number ER 011-277 (the “Determination”). By way of this Determination, the Director’s delegate levied a \$500 monetary penalty for failure to produce certain payroll records.

THE DETERMINATION

The relevant portions of the Determination are reproduced below:

“On January 28, 1998, [a delegate] issued a Demand for Records pursuant to section 85(1)(f) of the [Act] to [Cretan]. This Demand was necessary because a complaint had been received from a former employee...

[The delegate] reviewed the records and determined that the records failed to meet the requirement of Section 28(1) of the Act, because they did not contain the following information:

Payroll information for the period December 12, 1994 to May 31, 1996,

Hours of work records for the period October 16, 1996 to December 1, 1996,

Pay stubs showing payment of final vacation pay.

Conclusion

[Cretan] 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*.”

FACTS AND ANALYSIS

Athanashe Karamanoli, on behalf of Cretan, testified that he received a Demand for production of certain payroll records relating to a former employee, Ms. Nicole Panteluk (Ms. Panteluk had been employed by Cretan from 1993 until December 1996). He says that upon receipt of the Demand he forwarded to the delegate all of the payroll records that he had in hand but acknowledged that the records were incomplete. In particular, Mr. Karamanoli did not have *any* records relating to Ms. Panteluk prior to June 1st, 1996.

As I understand the situation, Mr. Karamanoli became the principal shareholder of Cretan by way of a sale purchase agreement that closed on or about September 22nd, 1996. Apparently, the former principal shareholder either lost or destroyed, or in fact never maintained, proper payroll records relating to Ms. Panteluk--this was never made clear in the evidence. Mr. Karamanoli requested all relevant records from the former principal shareholder but no records were forthcoming. In effect, Mr. Karamanoli, on behalf of Cretan, produced what records he had in his possession but nevertheless did not produce the records as set out in the Demand.

I might note that, so far as I can gather, some records (but not nearly all of the records demanded) were produced in response to an earlier demand for production that was issued on September 11th, 1997. The Director did not levy a penalty by reason of Cretan's failure to comply with that demand although certainly the Director could have done so. It would appear that upon receipt of the Demand now before me, Cretan produced a few more documents (relating to vacation pay) but the bulk of the documents demanded were, once again, simply not produced.

Although there was a share transfer in late September 1996, Ms. Panteluk's *employer* throughout her tenure from 1993 to December 1996 never changed--she was employed by Cretan throughout this entire period. The Demand was issued, not to any particular shareholder, but rather to the *employer*, namely, Cretan. The Canada Post records before me show that this Demand was delivered by certified mail and received by Cretan on January 30th, 1998. As per the Demand, the records were to be produced by no later than 10:00 A.M. on February 19th, 1998.

The Demand, issued on January 28th, 1998, very clearly sets out the records that were to be produced and, equally clearly, the bulk of the records demanded were not produced even though, by reason of section 28 of the *Act*, Cretan was under a statutory obligation to maintain certain payroll information and to retain such records for a period of 5 years after the employee's employment terminated. I might add that at the bottom of the Demand, in boldface type, is a notice which states that a failure to produce the required records may result in a \$500 penalty.

The Demand was issued in accordance with the provisions of section 85(1)(f) of the *Act* which states that the Director may "require a person to produce, or to deliver to a place specified by the director, any records for inspection" that relate to an ongoing investigation. Section 46 of the *Employment Standards Regulation* states that upon receipt of a demand a person "must produce or deliver the records as and when required". As noted, the employer produced some, but certainly

not all, of the relevant records that were the subject of the Demand even though all of the relevant records ought to have been available for production. Finally, section 28(b) of the *Regulation* mandates a \$500 penalty for breach of section 46 of the *Regulation--i.e.*, the very provision pursuant to which the instant \$500 Determination was issued.

I see no basis for setting aside the \$500 penalty levied by the Director in this case. If a failure to produce records could be characterized as an “absolute liability” offence [see *R. v. City of Sault Ste. Marie* (1978), 85 D.L.R. (3d) 161 (S.C.C.)], then, *by its own admission*, Cretan did not produce the records in question and thus failed to comply with the Demand. Even if one was to characterize a failure to produce records as a “strict liability” offence, I am not satisfied that the Cretan has shown the appropriate “due diligence” in terms of maintaining necessary payroll records so that those records could be produced if demanded. I have absolutely *no evidence* before me as to why the employer does not have in its possession the very records that it is obliged, by law, to maintain. The only explanation advanced is that the former principal shareholder did not, despite being asked to do so, provide the requisite records to Cretan’s new principal shareholder. Apparently, either the former shareholder did not ensure that proper payroll records were maintained, or, alternatively, the records were lost or destroyed. Either way, I have no evidence before me to explain *why* the records were not available to be produced and thus I cannot conclude that the *employer* (the party to whom the Demand was issued) exercised any “due diligence” regarding the maintenance and production of records.

As noted above, I see no basis for setting aside the Determination and, accordingly, the appeal must be dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$500**.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal