



An appeal

- by -

Luma Interior and Landscape Lighting Design Ltd.  
("Luma")

- of a Determination 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

**ADJUDICATOR:** M. Gwendolynne Taylor

**FILE No.:** 2001/466

**DATE OF DECISION:** September 17, 2001

## DECISION

### OVERVIEW

This is an appeal pursuant to section 112 of the *Employment Standards Act* by Luma Interior and Landscape Lighting Design Ltd. (“Luma”), from a Determination by the Director dated May 28, 2001, file ER#: 094-831. The Director found that Luma had contravened Section 46 of the *Act*, by failing to produce proper payroll records, for two cases. The Director imposed a penalty of \$500.00 for each contravention, pursuant to section 98 of *Act* and section 28(b) of the *Employment Standards Regulation*.

On June 19, 2001, Luma filed an appeal claiming the Demands for Records had not been received and claiming that the Director’s delegate Harvey was biased against Luma.

The Determination was issued by delegate Superle. Delegate Harvey had been investigating complaints and had issued the Demands for Records.

### ISSUE

1. Does the evidence support the Director’s Determination that Luma contravened section 46 of the *Employment Standards Act*?
2. Does the evidence support the allegation that delegate Harvey was biased and that this Determination was affected by the bias?

### ARGUMENT

Bill Peters, on behalf of Luma, claimed that he had not received the Director’s Demands for Records at the address noted because of his physical injuries. He also alleged that he and his accountant had attempted on a number of occasions to provide the requested records. The complainants failed to meet with the accountant and Mr. Peters telephoned the Employment Standards Branch to convey that information. Mr. Peters alleged that the Director’s delegate Harvey was biased on a previous case and should not continue with this case. He stated that a full investigation would corroborate his position.

In his reply to the Director’s submissions, Mr. Peters provided information that he had submitted on another case, the Malkin case, which was not related to these complainants. This may have been in error, or it may be that he was intending those submissions to address his allegation of bias.

The Director’s delegate Superle submitted that Demands dated March 26, 2001 were sent by registered mail to the last known address for the employer. Luma failed to provide the records.

Between March and May 28 when the Determination was issued, Luma did not provide an address change or advise delegate Harvey of new mailing instructions. Section 122 of the *Act* deems service by sending to the last known address.

The delegated noted that it appeared from the appeal that Mr. Peters might be confusing this case with another.

By a separate submission, dated June 27, 2001, Dave Ages, Regional Manager, addressed Mr. Peters' allegation of bias against the delegate. Mr. Ages reviewed case law on bias and noted that timing of an allegation is an important consideration. He drew attention to the fact that Luma did not raise the issue of bias during the investigation, but only after the Determination had been issued. Mr. Ages submitted that Luma had presented no evidence that would support a conclusion that the delegate had pre-determined the issue or was otherwise biased.

## **DECISION**

Section 98 of the *Act* permits the Director to impose a penalty, in accordance with the prescribed schedule, if the Director is satisfied that the person has contravened the *Act* or the Regulations. Section 28 of the Regulations establishes a penalty of \$500 for each contravention of section 28 of the *Act*. Luma bears the onus of proving that the Director's determination was incorrect.

It may be that Mr. Peters confused two cases. This possibility was brought to his attention in the Director's submission. After it was brought to his attention, he made identical submissions for three cases before the Tribunal, but it was this file number that was noted. Therefore, I assume he has not confused the cases and that I have all his submissions for this case.

Luma has not presented any evidence to support the suggestion that they tried to provide the records. In fact, that is contradictory to their submission that they did not receive the Demands.

I find that Luma has not presented any clear evidence to support the allegation of bias and, accordingly, has not substantiated the allegation of bias.

I find that Luma has not demonstrated that the Director's determination was incorrect.

I find that the Director had the discretion under Section 98 of the *Act* to impose a penalty. I reject Luma's suggestion that the Director exercised the discretion improperly due to bias.

I find that Luma must pay the \$1,000.00 penalty.

**ORDER**

Pursuant to section 115 of the *Act*, I confirm the Determination issued May 28, 2001.

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**M. Gwendolynne Taylor**  
**Adjudicator**  
**Employment Standards Tribunal**