



Failing to Comply with the *Employment Standards Act, 2000*

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Many individuals and employers appreciate the consequences for failing to comply with the *Employment Standards Act, 2000* (the “ESA” or “the Act”), and as a result, ensure compliance within the prescribed time period. However, occasionally an order or direction is disregarded resulting in increased monetary liability and, in extreme cases, imprisonment.

Failure to comply with an order, direction or requirement under the *ESA* is an offence under the *Act*. Much like a prosecution under the *Occupational Health and Safety Act*, a prosecution under the *ESA* may be initiated under Part I or Part III of the *Provincial Offences Act* (the “POA”).¹ Although there are technical differences between a Part I and Part III prosecution, the most significant is the potential liability:

Part I:

- Set fines as established by the Chief Justice of the Ontario Court of Justice for specific offences (currently \$295.00 per conviction); or,
- Should a set fine for the offence in question not have been established by the Chief Justice of the Ontario Court of Justice, \$1,000.00 per conviction as set out in the *POA*.

Part III:

- For an individual, a maximum of \$50,000 or 12 months imprisonment per conviction;
- For a corporation (first conviction), a maximum of \$100,000 per conviction;
- For a corporation (second conviction), a maximum of \$250,000 per conviction; or
- For a corporation (third or subsequent conviction), a maximum of \$500,000 per conviction.

According to the Ministry of Labour’s Prosecution and Conviction Statistics, between September 2011 and August 2012, there were 639 Part I and 10 Part III convictions.²

¹ NOTE: Part II of the *Provincial Offences Act* is set aside for traffic offences.

² <http://www.labour.gov.on.ca/english/es/pubs/enforcement/convictions.php>

In nearly all Part III convictions, an employer had failed to comply with an order to pay wages. Examples of fines include \$2,600.00 for a director who authorized, permitted or acquiesced in the failure to pay wages; \$6,250.00 for a corporation's failure to pay wages; and \$125,000.00 for six counts of a corporation's failure to pay wages.

When Money Isn't Enough

Although rare, imprisonment may be considered appropriate when one or more of the following factors exists:

- The conduct was wilful as opposed to negligent; and/or
- The defendant was convicted of a similar offence in the past; and/or
- The defendant shows a lack of remorse.

Other considerations include but are not limited to the gravity of the offence, the general attitude of the defendant, mitigation factors and the protection of public.

The Case of Steven Blondin

In November 2012, Steven Blondin, a director of six Ontario companies, was convicted of failing to comply with some 113 orders, totalling \$125,000 and representing wages to 61 employees with complaints dating back to 2007.

Unrepresented at trial, Mr. Blondin pled guilty, resulting in jail time as well as nearly \$500,000 in fines. Specifically, the court ordered:

- Total fines of \$280,000;
- An additional 25% victim fine surcharge, as required by the *POA* (\$70,000);
- Payment of all previously unpaid orders (\$125,000); and
- 90 days imprisonment.

As the trial transcript is not yet public we are not yet able to analyze why Mr. Blondin disregarded the initial orders or the evidence he may have offered the court in the course of pleading guilty and addressing penalty. In the absence of the transcripts, it seems fair to assume the court found Mr. Blondin's conduct to have been wilful and without remorse.

Practice Tips

While imprisonment for an *ESA* violation is the rare exception, Mr. Blondin's case reminds us it can happen. And even if we ultimately learn the facts in *Blondin* were extreme, and highly unusual, they reiterate the following best practice for employers:

- Every order or direction must be address and cannot be ignored.
- An order under the *ESA* may be appealed within 30 days to the Ontario Labour Relations Board. In an appropriate case, this is a route to consider.

- In almost every case, a negotiated settlement will be on the table at various stages in the process. Discussing settlement with a Ministry of Labour representative (whether or not settlement is the end result) is not a sign of weakness, but rather of good business. It may be worth more than the risk of trial.
- An order must be complied with and/or paid into trust during the appeal process. Ignoring the order pending it's resolution is not an option.

About the Author

Carissa is a lawyer with Sherrard Kuzz LLP in Toronto. She represents management in the full range of employment and labour law issues with particular expertise in workplace safety and insurance, occupational health and safety, the hiring and termination process, human rights, Ontario Labour Relations Board matters and employee relations and management training.

Carissa is currently serving as a Vice-Chair for the Labour and Employment Law Section of the Ontario Bar Association Executive. She is a frequent speaker at conferences and conducts workshops and seminars relating to employment and labour issues.