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 -

Five B Produce Inc.
("Five B")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE NO.: 97/745

DATE OF DECISION: February 19, 1998

DECISION

OVERVIEW

This is an appeal by Five B Produce Inc. ("Five B") pursuant to s. 112 of the *Act*. The appeal is from a Determination issued by E.K. Rooney, a delegate of the Director of Employment Standards on September 16, 1997. The Determination imposed a penalty of $500.00 against Five B for failure to comply with a Demand for Employer Records issued by the Director on August 15, 1997.

Five B filed an appeal on October 9, 1997. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

The Director received complaints from some employees of Five B regarding unpaid statutory holiday pay, and commenced an investigation which resulted in Determinations being issued against Five B regarding five employees. In March, 1997, the Director requested that Five B conduct a self-audit and pay statutory holiday pay to "other employees who may be owed" the same pay. In April, 1997, Five B appealed the Determinations regarding the five employees. On the appeal, two of the five Determinations were cancelled and the remainder were confirmed. That appeal decision was rendered on August 12, 1997.

Ms. Pat Douglas, a delegate of the Director, telephoned Five B on August 15, 1997 to discuss the request for a self-audit. Ms. Veena Banga, a representative of Five B, advised Ms. Douglas that Five B's legal counsel would be dealing with that matter. In the Determination under appeal, it is stated that "[t]here was no response from her legal counsel." On the same date, August 15, 1997, a Demand for Employer Records was issued. The Demand requested records for two named employees and also for "all current employees" from November 1, 1995 to August 15, 1997. The Director now alleges there was no response to this Demand, and the Determination under appeal was issued on September 16, 1997. Five B submits, however, that it responded adequately to the Demand in a letter sent to the Director by its counsel on September 12, 1997.

ISSUE TO BE DECIDED

This appeal requires me to decide whether Five B failed to comply with the s. 85 Demand for Employer Records.

ANALYSIS

Section 85 of the *Act* reads in part as follows:

> **85.** (1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:
>
> ...
>
> (c) inspect any records that may be relevant to an investigation under this Part;

...

(f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).

Counsel for Five B, in comprehensive written submissions, suggests that a Demand for Employer Records under this section can only be used for "relevant" investigations, and cannot be used as a "fishing exercise" by the Director. Section 85(1) is indeed designed to allow broad powers of assistance to investigations by the Director that some might feel can result in a fishing expedition to determine whether the *Act* has been complied with. All that is required for the purpose of a section 85 Demand, however, is that the requested records be relevant to a particular investigation. This Tribunal has held, in ***Sandher v. Director of Employment Standards*** (BC EST #D311/97) that a section 85 Demand must relate to records "relevant" to a particular investigation. In the ***Sandher*** case, the Director sought production of payroll records from the employer when the investigation related to just cause for dismissal and there were no severance or other money issues to investigate. Payroll records were not relevant to the just cause issue, and so the Determination imposing a penalty for failure to comply with the section 85 Demand was cancelled. In the present case, the Director launched an investigation into whether Five B had paid statutory holiday pay to five employees. This investigation resulted in five Determinations, three of which were upheld on appeal. I am satisfied that the Director is entitled, under section 85, to seek production of records relating to "all other current employees" of Five B to investigate whether these employees were similarly denied statutory holiday pay. The Director was conducting an investigation into the holiday pay issue, and the requested records are relevant to that issue.

Five B also submits that if it complied with the Demand and released the requested records for all current employees, it would thereby face possible liability under the *Privacy Act*, R.S.B.C. 1996. c. 373. Section 1 of that Act reads as follows:

1. (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interest of others.

(3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

(4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

Section 2(2) of the *Privacy Act*, however, contains the following paragraph:

2. (2) An act or conduct is not a violation of privacy if any of the following applies:

...

(c) the act or conduct was authorized or required by or under a law in force in British Columbia, by a court or by any process of a court...

The release of Five B's employee records to a third party without each employee's consent could be a violation of privacy within the meaning of section 1(1) of the *Privacy Act*. However, when such disclosure occurs in response to a Demand under section 85 of the *Employment Standards Act*, I find that the employer's conduct would not be a violation of privacy on account of the exception set out in section 2(2)(c) of the *Privacy Act*. I reject the suggestion by counsel for Five B that this employee information might be disclosed by the Director to "union organizers or special interest groups with a result that the employer is prejudiced and disadvantaged in its day to day operations." I also reject the suggestion that "there is no legal safeguard under the Employment Standards Act or regulations for the use or confidentiality of information," as clearly the Director is bound by the provisions of the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C. 1996, c. 165.

Five B also submits that the Director's request for records of all current employees infers bias on the part of Ms. Douglas and the Director. Counsel for Five B makes the following submission:

> The demand was made within days of an unfavorable result. That is; the tribunal decisions that cancelled and varied the claims and orders initially made by Ms. Douglas. In effect, the decision to demand identity of "all current employees" amounts to a reasonable apprehension of bias in these circumstances.

In support of this submission I was referred to two recent decisions of the Supreme Court of Canada: ***Newfoundland Telephone Company Limited v. The Board of Commissioners of Public Utilities***, [1992] 1 S.C.R. 623; and ***R.D.S. v. Her Majesty the Queen*** (1997, not yet reported).

A convenient statement of the Supreme Court of Canada's approach to the issue of bias is found in the following passage, which I quote from the headnote to ***R.D.S. v. Her Majesty the Queen***:

> Impartiality can be described as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues. Whether a decision-maker is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias. Actual bias need not be established because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.
>
> The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold

> for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. The test applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic.

The speed with which the Demand was issued after the appeal decisions and the telephone call with Ms. Banga does indicate a degree of zeal in conducting the investigation, but this by itself could not support a finding of bias. An informed person, viewing this matter realistically and practically -- and having thought the matter through -- would not likely conclude there is an apprehension of bias if the Director's delegate issues a demand for "all employees" when it was found (and approved by this Tribunal) that three employees had not been paid statutory holiday pay. Further, in issuing this Demand, the Director is not acting in an adjudicative capacity, but rather in an investigative capacity. In my view, the bias issue can only arise in the context of adjudicative decision-making. True, the Director does exercise a quasi-adjudicative role in making Determinations as there is a duty to hear from each party before issuing a Determination and the rights of parties are affected thereby. The bias issue is therefore relevant only at the Determination stage, and by then we would know the results of the investigation and the facts on which the Determination is based. Five B's allegation of an apprehension of bias at the investigative stage is premature. It is therefore not necessary for me to decide whether the bias test should apply to the Director to the same extent as it applies to judges who, as the Supreme Court of Canada notes, must be held to the highest standard among all adjudicators.

Finally, Five B alleges that it did respond to the section 85 Demand, through a letter from its counsel dated September 12, 1997. I do not have the advantage of a response from the Director on this point, and so I do not know whether the Director is alleging Five B's letter was not received before issuance of the Determination, although I note the letter is addressed to the Director "VIA FAX 576-1443." In any event, I do not view Five B's letter as in any way a satisfactory response to the Demand. The text of the letter is as follows:

> I am very concerned about your Demand for Records "of all current employees" and the Privacy Act, as it relates to the Employment Standards Act.
>
> I would suggest that instead of making a demand which could legally jeopardize my client, that you exercise your powers under the Act and seek a warrant for attendance at the business for the purposes of search. Of course, any such search or attendance would have to be reasonable, in compliance with the Charter of Rights and Freedoms, Section 8.
>
> I want to make it very clear that I am not obstructing your right to investigate or search. My concern is the legal position you place my client in by releasing personal information without written authority of that person.
>
> If you do intend to attend or search the premises, please advise me so that we can arrange a convenient time.

I have already dealt with the objection based on the privacy issue. In any event, the raising of an issue in response to the Demand for Employer Records is not, in my view, a satisfactory response to the Demand. While the Act does not specify a period of time in which such a Demand must be complied with, in this case the Director allowed one month for the records to be produced. The eleventh-hour objection raised in counsel's letter is not compliance with the Demand. Further, Five B may not dictate to the Director how the investigation should be conducted. Section 46 of the *Employment Standards Regulation* states: "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." There is no merit to the submission that the Determination should be set aside because the above letter was sent to the Director four days before the Determination was made.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by E.K. Rooney on September 16, 1997 is correct and the appeal should be dismissed. Pursuant to s. 115 of the *Act*, I order that the Determination is confirmed.

Ian Lawson
Adjudicator
Employment Standards Tribunal