

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-

A.B. Lumber Co. Ltd.
("A.B. Lumber" or the "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE NO.: 98/105

DATE OF DECISION: May 13th, 1998

DECISION

OVERVIEW

This is an appeal brought by A.B. Lumber Co. Ltd. (“A.B. Lumber” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on January 28th, 1998 under file number 060-429 (the “Determination”).

The Director determined that A.B. Lumber failed to comply with a demand for production of employer records and, accordingly, issued a penalty in the amount of \$500.

ISSUE TO BE DECIDED

The employer’s appeal is predicated on the assertion that the Director’s delegate failed to respond to a request for “particulars” prior to issuing the Determination.

FACTS

A “Demand for Employer Records” (the “Demand”) was issued on December 8th, 1997. I should add that a further, essentially identical, “Demand for Employer Records” was issued on February 2nd, 1998. The employer has similarly refused to comply with that demand (and the time for compliance expired on February 11th, 1998), however, this latter demand is not before me and is not, so far as I am aware, the present subject of a determination.

Pursuant to the Demand, A.B. Lumber was directed to “disclose, produce and deliver employment records for...all current employees (as of November 30th, 1997)” spanning the period from the later of December 1st, 1995, or the date of hire, to November 30th, 1997. The employment records demanded included all payroll and other records the employer was obliged to keep and maintain pursuant to Part 3 of the *Act* and Part 8 of the *Employment Standards Regulation*. The records were to be produced at the Employment Standards Branch office situated in Surrey, B.C. on or before 3:30 P.M. on January 5th, 1998.

Upon receipt of the Demand, A.B. Lumber’s office manager faxed a letter to the Director’s delegate on December 19th, 1997 requesting an extension of the deadline for production of the records from January 5th to January 24th, 1998 by reason of his imminent departure for vacation. This extension request was granted by the Director’s delegate.

Subsequently, the employer, in turn, retained an independent consultant and then legal counsel both of whom spoke with the Director’s delegate regarding the production of employment records. The Director’s delegate maintained a consistent position that the records would have to be produced by the extended deadline, namely, January 24th, 1998.

On January 22nd, 1998, the Director's delegate received, by fax, a letter from yet another solicitor who advised that he had been retained by A.B. Lumber. This solicitor's letter continued:

“Needless to say, your request for the complete payroll records for all current employees is not reasonable as it does not set forth what employees have made such a complaint so as to enable my client to produce those particular payroll records. In addition, I am made to understand that a number of employees have indicated that they do not wish to have their payroll records disclosed and as such I can only assume that those individuals have not filed a complaint.

That being so, I would request the necessary particularization and will instruct my client accordingly.”

This latter letter from A.B. Lumber's solicitor constitutes the employer's demand for particulars that was allegedly improperly ignored by the Director's delegate. I note that this particular letter is not a request for a further extension of the deadline for the production of the demanded records; it is, in effect, written notice that the employer intends to refuse to comply with the Demand as issued. The employer's solicitor acknowledges in his appeal form that the Director's delegate spoke with the solicitor's office on January 22nd and reiterated her position that the relevant employment records must be produced on or before the January 24th, 1998 deadline.

ANALYSIS

Section 76 of the *Act* authorizes the Director to conduct an investigation upon receipt of a complaint or even in the absence of a complaint. Once an investigation is underway, the Director may utilize her statutory powers under section 85 of the *Act* to, *inter alia*, require the production of employment records [see section 85(1)(f)].

Section 28 of the *Act* sets out the particular payroll records that an employer is required to keep for each employee. Such payroll records must be maintained for a period of 7 years after each employee's employment ends. These payroll records may be the proper subject of a demand for production under section 85.

Section 46 of the *Employment Standards Regulation* provides that once a demand for employment records has been issued under section 85(1)(f) of the *Act*, the person to whom the demand is directed “must produce or deliver the records as and when required”. If the records are not produced as demanded, section 28(b) of the *Employment Standards Regulation* provides for a \$500 penalty. Section 98 of the *Act* provides that the Director may issue a monetary penalty by way of a determination.

In the instant case, a proper demand for employment records was issued to, and received by, the employer. The Demand clearly indicates *what* particular records were to be produced, *where* and *when* the records were to be produced and the *monetary penalty* should the records not be produced as demanded. I note that the Director granted one time extension for the production of

records to the very date originally requested by the employer in its December 19th, 1997 letter. The Demand clearly set out that all current employees' employment records spanning the period from December 1st, 1995 to November 30th, 1997 were to be produced. There is absolutely nothing vague or ambiguous about this Demand.

The employer had in excess of one month to comply with the Demand--not a particularly complicated matter--and yet failed to do so. All the employer had to do in order to comply with the Demand was photocopy and deliver to the Director the very records that it was obliged, under the *Act*, to keep and maintain.

I do not find the employer's solicitor's assertion that the Demand was in some respect "unreasonable", because it did not specifically name individual complainants, to be a meritorious ground of appeal. The Director has the statutory right to review all of the employer's employment records to ensure that the employer is complying with the *Act*. It may be that the Director took the quite reasonable position that if some employees were not paid the wages to which they were entitled under the *Act*, there might be a systemic problem affecting the entire workforce. Perhaps the complainants sought and received assurances of confidentiality--assurances that would be rendered meaningless if the Director limited her request to only the complainants' employment records (see section 75).

As I final comment I might add that I am troubled by the employer's solicitor's assertion that the employer was approaching individual employees to ascertain if they wished to have their records disclosed. First, such consent is irrelevant. Second, this sort of behaviour on the part of the employer raises the spectre of trying to "flesh-out" the identity of the complainants so that they might be "persuaded" to abandon or otherwise compromise their complaints. Section 77 of the *Act* ensures that, in due course, the employer will be given a fair opportunity to respond to the complaint(s).

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**