

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 -

Jannex Enterprises (1980) Limited
(" Jannex ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/42 and 2000/44

**DATE OF PREHEARING
TELECONFERENCE:** May 8, 2000

DATE OF DECISION: May 10, 2000

DECISION

SUBMISSIONS

Mr. Robert Samuels on behalf of the Employer

Mr. Peter Kerr on behalf of himself

Ms. Heidi Hughes on behalf of the Director

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against two Determinations of the Director of Employment Standards (the “Director”) issued on January 13 and 14, 2000 which determined that:

- 1) Peter Kerr (“Kerr”) was owed \$15,808.20 on account of wages, vacation pay, statutory holiday pay and unauthorized deductions; and
- 2) the payroll records disclosed by Jannex failed to meet the requirements of Section 28 of the Act and imposed a penalty under Section 46 of the Regulation in the amount of \$500.

The Employer appeals the Determination.

PRELIMINARY ISSUES

A pre-hearing conference was held on May 8, 2000 in respect of three matters:

- 1) An application by Jannex that the matter be adjourned.
- 2) An application by Jannex that the Director disclose certain documents, principally notes or correspondence between the delegate and the complaint Kerr.
- 3) An application by the Director that the issues on appeal be decided on the basis of the submissions.

Turning to the last issue first, the counsel for the Director argues that the issues in dispute on appeal are legal in nature and not factual. Counsel for Jannex disagrees. In view of the fact that the Tribunal had issued a hearing notice, and my view that at least some of the issues may require a resolution of factual issues, I indicated to the parties that I was not inclined to allow the Director’s application.

With respect to the adjournment application, based on the likely potential unavailability of counsel for Jannex due to a Supreme Court trial, and not opposed by Kerr and the Director, I ordered that the hearing be adjourned to a later date to be set by the Tribunal.

The main issue in this pre-hearing conference was production and disclosure of documents.

Jannex requests that the Director produce certain documents, principally notes or correspondence between the delegate and Kerr. Counsel for Jannex takes the position that it is entitled to disclosure of this material in order to properly represent its position. He says that he is entitled to “full disclosure”. As I understand his position, he is of the view that there may--or may not--be statements inconsistent with the findings in the Determination(s) in the notes or correspondence.

Counsel for the Director opposes with the request. She is of the view that the application is a “fishing expedition” and that the onus is upon Jannex to show that the documents requested are relevant and, Jannex having failed to do so, I should not allow Jannex application. Counsel also argues that the duty to disclose should be seen in the context of Section 77 of the *Act* which provides that “the director must make reasonable efforts to give a person under investigation an opportunity to respond.” She says that Jannex was provided with notice of the allegations and an opportunity to respond. She argues that Jannex is seeking to import a criminal law standard of “full disclosure” which is inconsistent with the purposes of the *Act*.

The Tribunal does have the authority to order disclosure and production of documents. As noted in *Brar et al.*, BCEST #D072/00, at 5-6:

“The Tribunal’s powers set out in Section 109 of the *Act* “are in addition to its powers under Section 108” and include, *inter alia*, the authority:

- to inspect records that may be relevant <109(1)(e)>;
- to “require a person to disclose, either orally or in writing, a matter under this Act and require the disclosure to be made under oath or affirmation” <109(1)(g)>; and
- to “order a person to produce, or deliver to a place specified by the tribunal, any records for inspection under paragraph (e) <109(1)(h)>.

....

Although, the tribunal can issue pre-hearing document production orders, the Tribunal can only, in my view, order the production of documents that “may be relevant to an appeal, reconsideration or recommendation” <Section 109(1)(e)>....

In my view, an assessment of what documents “may be relevant” for the purposes of a production order must be driven by the Determination itself and by the stated reasons for appealing the Determination.”

I agree with counsel for the Director that the onus is on the party seeking disclosure and production to show why the documents “may be relevant”. I do not agree with counsel for the Director that disclosure and production of documents is limited by Section 77 of the *Act*. Section 77 applies to the process before the Director and provides that a person under investigation must be informed of the allegations against him and must be provided a reasonable opportunity to respond to those allegations. However, it does not mean, in my view, that the Director is required to provide a person under investigation with every bit of evidence. As argued by the Director, the delegate found that Jannex had contravened the *Act* in the following respects: failure to pay vacation pay, statutory holiday pay, minimum wages and unauthorized

deductions. The Director argues that it was afforded a reasonable opportunity, and, as far as I understand Jannex' position, it takes the position that it was not. In part, that appears to be based on settlement discussions between counsel for Jannex and the delegate. At this stage of the proceedings, I do need to decide whether Jannex was--or was not--afforded a reasonable opportunity to respond to the allegations, and I do not. Upon hearing the evidence, I will be in a better position to decide this issue. In any event, once a determination has been issued and appealed, a party may avail itself of the powers under Section 108 and 109 and apply for disclosure and production of documents subject to relevancy, *i.e.*, whether they "may be relevant".

It follows that I do not agree with Jannex that it is entitled to "full disclosure" as asserted. As well, I do not agree that the onus is upon the party opposing production to explain why the documents should not be produced. The onus is upon the applicant to satisfy me that the documents sought to be produced "may be relevant." The thrust of Jannex' argument for production is that "there may be something in the file which may assist it." Except as noted below with respect to hours of work, I agree with the counsel for the Director that Jannex is on "a fishing expedition."

The Determination is based on the finding that Kerr worked a minimum of 7.5 hours per day:

"The records of the employer do not contain a daily record of hours worked by Kerr. The payroll records simply show the total commissions paid per month. Kerr stated he worked a minimum of 8 hours per day, more during the busy spring ordering period, however he did not keep a daily record of hours worked. To determine the average hours worked by Kerr, I have referred to the Record of Employment issued by the employer issued on August 13, 1998. The ROE indicated Kerr had 2080.00 insurable hours in a 13 month period. This is the equivalent of 7.6 hours per day. The minimum wage calculations will be based on 7.5 hours per day."

In its appeal submission, Jannex argues that the number of hours worked by Kerr varied dramatically from month to month and that the delegate erred when she made the conclusion set out above. It appears to me, therefore, that there is a factual issue between the parties to be determined and that, insofar as the delegate has notes or correspondence, not yet disclosed, which pertain to hours worked by Kerr during the material time, these are relevant and should be disclosed. Moreover, it is more convenient from the standpoint of an efficient hearing process that the documents be produced now rather than dealing with them in an ad hoc fashion at the hearing.

ORDER

I order that the Director disclose and produce documents, including notes and correspondence, related to the issue of hours of work and not yet produced.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal