

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Albert Fisher Canada Limited
Operating Pacific Produce (Victoria)
("AFCL")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Jim Wolfgang

FILE NO.: 96/386

DATE OF DECISION: September 10, 1996

DECISION

OVERVIEW

This is an appeal by Albert Fisher Canada Limited Operating Pacific Produce (Victoria) (“AFCL”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 002633 issued by a delegate of the Director of Employment Standards (the “Director”) on June 19, 1996. In this appeal AFCL claims that they should not have been assessed \$500.00 for failing to provide employment records.

ISSUE TO BE DECIDED

Did AFCL contravene Section 46 of the Regulations, and if so is the imposition of the assessment appropriate ?

FACTS

Bimla Toora (“Toora”) was employed by Pacific Produce as a Sales Representative until January 12, 1996. She was laid off due to lack of work without payment for length of service.

On May 9, 1996 the Director wrote to AFCL requesting any “documentation and/or information” relating to Toora.

On May 27, 1996 the Director sent a Demand for Employer Records to AFCL indicating the records were to be delivered by 4:00 p.m. June 10, 1996.

On May 30, 1996 AFCL responded to the Directors letter of May 9, 1996 but did not provide any employment records.

On June 19, 1996 the Director issued Determination No. CDET 002633 finding AFCL had contravened Section 46 of the *Employment Standards Regulations* (“Regulations”) and assessed them \$500.00 pursuant to Section 98 of the *Act* and Section 28 of the *Regulations*.

In a letter dated June 28, 1996 AFCL appealed the Director’s Determination

ARGUMENTS

AFCL claims there was “no willful intention” to not supply the employer records requested. They claim the company did respond to the May 9, 1996 letter however, it was late as the Assistant Branch Manager was away on holidays.

AFCL states the May 27,1996 letter from the Branch was misplaced in their office for a week which added to the confusion. As a result, their manger was not aware of the May 27, 1996 letter when he wrote the AFCL letter of May 30, 1996.

AFCL claims they did not send the payroll records as they were waiting for a reply to their May 30, 1996 letter.

AFCL claims there was minimal verbal communication between the parties and there was no second request notices or calls from the Employment Standards Branch advising that they were overdue in their response.

It is their opinion this was all due to an innocent misunderstanding and no penalty should be assessed.

The Branch contends AFCL had ample opportunity to respond and had been warned of the possible consequences of the failure to comply to the Demand for Employer Records. In addition AFCL were provided with copies of Sections 28, 85 and 98 of the *Act* and Sections 28, 29 and 46 of the *Regulations*.

The Branch waited nine days after the deadline for the Demand for Employer Records before issuing the Determination June 19, 1996 and as of July 16, 1996 AFCL had not produced the requested records.

ANALYSIS

AFCL was first contacted by telephone on April 29, 1996 by a delegate of the Director indicating a complaint had been filed by Bimla Toora. During the telephone conversation the company claimed no severance pay was due to Toora. This was followed by a letter from the Branch dated May 9, 1996. AFCL did not respond until May 30 ,1996, stating the cause for their delay was their Assistant Branch Manager was on vacation. In a company of this size one would expect staff would be assigned to handle routine mail during the absence of an officer.

The Branch's second letter of May 27, 1996 with a Demand for Employer Records indicated a delivery date no later than June 10, 1996. The document has a bold print notice at the bottom indicating failure to comply may result in a \$500.00 penalty. To further identify the seriousness of the Branch's demand copies of the various related Sections of the *Act* and *Regulations* were enclosed.

The AFCL letter of May 30, 1996 did not respond to the Branch's May 27, 1996 letter as the company claims it was lost in their office for a week. To my knowledge, no response has yet been received from AFCL to that letter.

AFCL appealed the Determination claiming they have not yet complied with the demand as they were waiting for a response to their May 30, 1996 letter. That letter states on January 12, 1996 Mr. Andres met with Toora to advise her that the company had to lay her off due to a slowdown in business. It further states "I asked her if she believed it was worthwhile for her remain with the company for another week. Ms. Toora stated that it would not be beneficial for her to remain as she believed that she was not suited for sales".

To delay action waiting for a reply to a letter that warrants no response as it merely states AFCL's position is hardly a solution. Their correspondence seems to suggest, as the company felt it did not owe Toora any money, it need not supply the employment records.

A request for employment records does not presume guilt, but is a necessary part of the process and should not be disregarded. This lack of initiative to supply the requested information prevented the prompt investigation of the matter, particularly as Toora denied she was offered opportunity to work the additional week.

In the AFCL letter to the Tribunal dated July 25, 1996 they say in part "we should bear in mind the real issue is the employee's original complaint which is a fairly simple matter..." I agree, and to further quote "The employee's interest would have been better served if we had instead devoted our time and resources to dealing with the employment issue at hand rather than this administrative issue". The whole purpose of the May 27, 1996 letter was to deal specifically with the employment issue and the failure of AFCL to comply with that request created this administrative issue.

The company has argued that a lack of communication created the problem. While there may have been some confusion caused by the different dates used in reference to the letters, the bottom line is clear. The onus was on AFCL to produce the records or to contact the Branch if there was any question as to their obligation. AFCL failed to meet the requirement of Section 46 and was assessed.

Section 46 states:

A person who is required under Section 85(1)(f) of the Act to produce or deliver records to the director as and when required.

The letter of May 27, 1996 the Demand for Employer Records that was attached clearly states the obligation of the Employer and further, the possible penalty for failure to comply. If there was an “innocent misunderstanding” as claimed by AFCL they could have easily remedied that by contacting the Branch.

For the above reasons I am not persuaded there is any reason to change the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 002633 be confirmed.

Jim Wolfgang
Adjudicator
Employment Standards Tribunal

JW:sr