

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 -

Deanne Nowitsky, d.b.a. dn & Company Hair Studio
("dn")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 1999/261

DATE OF **D**ECISION: June 29, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Deanne Nowitsky d.b.a. dn & Company Hair Studio (“dn”) of a Determination which was issued on April 12, 1999 by a delegate of the Director of Employment Standards (the “Director”). In that Determination, the Director concluded that dn had contravened Section 46 of the *Employment Standards Regulations* (the “Regulations”) by failing to comply with a Demand for Records, ordered dn to cease contravening the *Regulations*, to comply with the *Regulations* and imposed a \$500.00 penalty under Section 28(b) of the *Regulations*.

dn says the Determination is a nullity because the Demand for Records was not authorized by law. Although counsel for dn has asked for an oral hearing on this appeal, the Tribunal is satisfied that an oral hearing is not required.

ISSUE TO BE DECIDED

The issue is whether dn has met the burden of persuading the Tribunal that the Determination ought to be canceled because the Director was without jurisdiction to issue a Demand for Records.

FACTS

On July, 10 1998, the Director notified dn that a former employee, Theona Hunter (“Hunter”) had filed a complaint alleging she had been dismissed without notice and without compensation and invited dn to respond and to send payroll records, time sheets and other documents. There is nothing on file to indicate there was any response from dn and on July 29, 1998, the Director issued a Demand for Records pursuant to Section 85(1)(f) of the *Act*. On August 10, 1998, dn provided partial records and a response to the complaint stating Hunter had been terminated for cause and was not entitled to compensation. On September 28, 1998, the Director replied, advising dn, among other things, that the information provided did not comply with Section 28(1) and again requested the records. The Director also notified dn that the scope of the request was being limited to the six month period immediately preceding Hunter’s dismissal

On October 22, 1998, counsel for dn became directly involved and, by letter, requested:

copies of any and all document [sic] in you file pertaining to directly and/or indirectly in the alleged complain [sic] your office received in respect to the above . . .

The Director responded on December 14, 1998, and, it appears, provided counsel for dn with a copy of the complaint, noting also that dn had not complied with the Demand for Records and indicating that there was no basis to delay providing the information demanded. On January 4, 1999, counsel for dn wrote:

. . . I had requested that you send me full disclosure of all material directly and/or indirectly relating to the alleged complaint . . .

On February 4, 1999, the Director provided counsel for dn with all material on file and stated:

. . . I note that it has now been over six months since I first requested information regarding the dismissal of the above noted employee. The information I requested should in no way have been withheld because of pending disclosure of this file.

The Director also invited counsel for dn to provide support for their assertion that there was just cause to terminate Hunter and set a deadline of February 15, 1999 for filing the information. Counsel for dn responded on February 12, 1999 stating his opinion that the issue of whether the employer had just cause could only be resolved through a hearing. No records were provided. On February 17, 1999, the Director responded. In that correspondence, the Director notes again that dn was in non-compliance with the Demand, provided a "final opportunity for dn to comply" and scheduled a mediation session for February 24, 1999. Counsel for dn was also advised that dn's failure to attend would result in Determination being issued based on the information received to that date and that a penalty would be imposed for failure to deliver employment records. On February 21, 1999, counsel for dn notified the Director that neither he nor dn would attend the mediation session.

The records sought in the Demand have never been provided.

ANALYSIS

The position of dn in this appeal is captured in the following paragraph of their submission:

It is respectfully submitted that before a Demand for Records can be lawfully issued pursuant to Section 85(1)(f), the Director must first, as a precondition, make a finding whether the employee was fired for just cause. In this case, the question whether the employee was fired for just cause was very much a live issue and the failure of the Director to enter into a hearing and make a determination, renders the Demand unlawful.

This argument was dealt with and dismissed by the tribunal in *Jack Verburg operating Sicamous Bobcat and Excavating*, BC EST #D418/98. Although that decision did not arise in the context of a dismissal, the position of the appellant in the *Verburg* case was identical in all relevant aspects to that taken by counsel for dn, which was that no Demand for Records is legally valid unless and until the Director establishes the legitimacy of the complaint. In its reasons, the Tribunal stated:

The basic premise of the position taken by Verburg is that an employer is not required to respond to a Demand for Employer Records in the context of an investigation under the *Act* unless the Director provides proof, satisfactory to the employer, of the allegation giving rise to the demand. That premise is wrong. The authority of the Director to demand production of records is not dependent upon the existence of a complaint. Rather, it is part of the statutory mandate of the Director to ensure compliance with the *Act* and the *Regulation*. Subsection 85(1) of the *Act* authorizes the Director to require production of any records. The relevant portions of that subsection read:

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).

There are two matters of note in the above provision. First, the authority to inspect applies to *any* records that *may* be relevant. A determination of the relevance of records sought by the Director to be inspected does not have to be established before inspection is allowed. And most certainly, it does not depend on the perception of the person to whom the demand is made of the relevance of the records sought to be inspected. Second, the authority to require production is associated with “an investigation” under Part 10 of the *Act*. An investigation under the *Act* does not depend either on a complaint or proof of a contravention of the *Act*.

Subsection 76(1) requires the Director to investigate, subject to the discretion given the Director in subsection 76(2), if a complaint is made under Section 74. Subsection 76(3) authorizes the Director to conduct an investigation without a complaint:

76. (3) *Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.*

The role of the director under subsections 76(1) or 76(3) is investigative. There is no requirement on the Director to validate the legitimacy of a complaint at this stage of a proceeding. The entire purpose of an investigation is to determine whether a complaint is valid. The legislature has decided, for the purpose of facilitating one of the objectives of the *Act*, to efficiently resolve disputes arising under the *Act*, persons who have information that may be relevant to an investigation are required to produce and deliver it on demand. A demand must be *bona fide* and not arbitrary, but assuming it is validly issued, Section 46 of the *Regulation* imposes a statutory duty on a person to whom a demand has been issued:

46. *A person who is required under section 86(1)(f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required.*

On the facts of this case, the demand was proper and Verburg contravened the Section 46 of the *Regulation* by refusing to produce the employer records. The Director did not err in imposing the fine.

Similarly, on the facts of this case, the Demand was proper and dn was required to comply with it. There is no basis to conclude that the Demand had any purpose other than to efficiently resolve the complaint. While the fairness of the scope of the Demand in its original form was questionable, the Director later changed the Demand to a reasonable scope and notified dn of that change. The relevance, or potential relevance, of the records demanded is apparent. In addition to their obvious relevance to calculating compensation if dn failed to establish just cause, the Director, although not required to do so, also notified counsel for dn of the potential relevance of the records in the context of the just cause investigation, stating in her December 14, 1998 letter:

. . . the employer’s reason for terminating the employee is an accusation that the employee has taken business away from the shop. The employee is paid by commission, therefore the records could possible [sic] reflect a change in income from the shop.

The Demand was valid and never ceased to be valid. dn was not justified in ignoring it. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 12, 1999 be confirmed, together with whatever interest has accrued since the date of issuance pursuant to Section 88 of the *Act*

David Stevenson
Adjudicator
Employment Standards Tribunal