

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 -

MONCHELSEA INVESTMENTS LIMITED
("Monchelsea")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: ALFRED C. KEMPF

FILE NO.: 97/365

DATE OF DECISION: July 15, 1997

DECISION

OVERVIEW

This is an appeal by Monchelsea Investments Limited ("Monchelsea"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against Determination of the Director of Employment Standards (the "Director") issued on April 25, 1997. The Determination found that Monchelsea had failed to produce or deliver records described in a demand for records under Section 85 of the *Act*. The Determination required Monchelsea to pay a fine in the amount of \$500.00. Monchelsea has appealed the Determination indicating that it had no information and therefore cannot comply with the Order. Monchelsea also objects to the Determination being issued prior to the date for the demand having expired.

The matter proceeded on the basis of materials on file, without the need for an oral hearing.

ISSUE TO BE DECIDED

Can a penalty be imposed under Sections 28 and 46 of the *Regulation* for a violation of Section 85 of the *Act* in the circumstances set out herein.

FACTS

On February 25, 1997 the Director's delegate wrote to Monchelsea saying in part as follows:

"Some time ago this Branch issued Certificates naming Vancouver School of Animation & Multimedia Ltd. and Julie Ferguson (its sole director) as owing wages to a number of ex-employees. These Certificates have not been satisfied. Julie Ferguson is now operating a business named Animagic from premises at 425 Carrall Street Vancouver.

On February 18, 1997 I spoke to Brian Bronk and confirmed to him by fax regarding my requests to garner certain information regarding Ferguson. He indicated that he would pass on my requests to Mr., Roughton. While I expect that he did, to date I have received no response."

In the letter the Director's delegate makes the following request for information pursuant to Section 85 of the *Employment Standards Act*:

"all documents relating to the rental of space by Julie Ferguson and/or Animagic at 425 Carrall Street, Vancouver BC including information as to the means by which rent is paid."

On April 16, 1997, a "Demand for Employer Records" was completed and presumably served upon Monchelsea requiring that the demanded records be delivered on or before 4:00 p.m. on April 30, 1997.

On April 17, 1997 Monchelsea responded to the Director as follows:

1. Monchelsea I.L. is not an employer of Julie Ferguson or Animagic.
2. Julie Ferguson is not a tenant @ 425 Carrall St.
3. Animagic is not a tenant @ 425 Carrall St.
4. Monchelsea I.L. has no connection with Julie Ferguson or Animagic.

Monchelsea also wrote a letter to the Ministry of Labour to this effect on April 28, 1997.

The Determination was issued on April 25, 1997.

In none of the correspondence to Monchelsea did the Director indicate why he believed that Monchelsea was in possession of the requested information. While it may be inferred that Monchelsea was the owner of the premises in which another employer was believed to operate, that is not at all clear from the initial request for records, the Demand for Employer Records, or from the Determination itself.

ANALYSIS and DECISION

The Determination potentially raises interesting issues as to the limits of the Director's power pursuant to Section 85 of the *Act* to demand information from third parties for the purposes of an investigation. For the reasons indicated below it will not be necessary to explore those issues.

Section 85 of the *Act* provides the Director with broad powers of entry and inspection. A combination of Sections 28 and 46 of the *Regulation* provide for a penalty if a third party does not "produce or deliver records to the Director ... as and when required" (Section 46 of the *Regulation*).

These are onerous provisions. In my view in order to rely on these provision the Director must have reasonable grounds to issue a Demand and he must act within established procedure.

The Demand issued on April 16, 1997 was entitled "Demand for Employer Records". There is no information before me substantiating that Monchelsea was an employer nor is there any indication that the Director wished Monchelsea to divulge records concerning its employees. The Demand was of a third party and therefore the form of the Demand is fatally flawed.

If I am wrong in this I would set aside the Determination in any event since Monchelsea had until April 30, 1997 to produce records. It had indicated its position to the Director and had made a further representation to the Ministry of Labour objecting to the Determination. The mere fact that Monchelsea responded in this fashion does not take away from the fact that it had until 4:00 p.m. on April 30, 1997 to produce the requested records. In the circumstances the Determination could not be made prior to the date given for compliance with the Order.

I further note that the Demand for Employer Records and the Determination do not give any indication for the justification for the Demand and subsequent Determination. In order to expect compliance with a Demand under Section 85(c) and (f) some reason or rationale for the Demand ought to be provided, the Determination should say how the information requested relates to an investigation under Section 85 of the *Act*, and some reasons should be given if the Director feels the response or records provided are inadequate.

On the evidence before me, notwithstanding the procedural flaws, Monchelsea provided a full and adequate response to the Demand. I have great difficulty in seeing how Monchelsea could provide records which it says do not exist. There is no evidence before me that such records do, or are likely to, exist.

ORDER

In summary, I order under Section 115 of the *Act*, that the Determination dated April 25, 1997 be cancelled.

ALFRED C. KEMPF
Adjudicator
Employment Standards Tribunal

/cef