**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-

Y.M. Inc. operating as Stitches and Sirens

(the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

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| **ADJUDICATOR:** | Kenneth Wm. Thornicroft |
| **FILE No.:** | 98/412 |
| **DATE OF DECISION:** | September 1st, 1998 |

# DECISION

## OVERVIEW

This is an appeal brought by Y.M. Inc. operating as "Stitches and Sirens" (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 June 2nd, 1998 under file number 065495 (the "Determination").

The Director's delegate determined that the employer owed its former employees, Amardeep Bhandal ("Bhandal") and Coralee Spier ("Spier), the total sum of $3,266.42 (including interest) because the employer "required [the employees] to purchase clothing from their stores to wear for work and the employer did not provide it without cost" contrary to sections 25 and 21(2) of the *Act.*

## FACTS

According to the information set out in the Determination, the two former employees--both of whom formerly managed retail clothing stores operated by the employer--were required by the employer's dress code (set out in an "Employee Handbook") to wear appropriate seasonal fashions purchased from the employer's stores while on duty. A breach of the dress code policy would result in the employee being sent home. The employees both purchased clothes as directed by the dress code policy but the employer refused to reimburse them for these expenditures.

The employer's position during the investigation was that the dress code policy was merely a "request" and not a mandatory work rule. The employer now acknowledges that there was a "dress code" in place as described in the Determination. However, legal counsel for the employer submits that the employer's dress code did not direct the employees to wear a "uniform or specified brand of clothing" and that the statutory definition of "special clothing" does not encompass the employer's dress code policy.

## ISSUES TO BE DECIDED

The employer appeals the Determination on two principal grounds:

- the delegate failed to comply with section 77 of the *Act;* and
- the delegate erred in finding that the clothes in question constituted "special clothing" as defined in section 1 of the *Act;*

**ANALYSIS**

*Opportunity to Respond*

A demand for employer records relating to Bhandal was issued on December 10th, 1997. Counsel for the employer submits that subsequently, on March 1998, the same delegate who issued the demand then made a "determination" in favour of Bhandal and Spier. Counsel submits:

> "This March 4, 1998 Determination was made without giving the Employer an opportunity to be heard. While the March 4, 1998 Determination did provide an opportunity to dispute the allegations of the Employees by written response with supporting documents by March 20, 1998, the Employment Standards Officer had already made a determination and had prejudged the issue. (underlining in original)

The delegate's March 4th, 1998 letter to the employer's solicitors is not, in my opinion, a "determination" as that term is defined in sections 1 and 79 of the *Act.* The delegate's letter sets out her preliminary findings, based on the evidence submitted to her (much of which consisted of the employer's own documents and which were enclosed in the delegate's letter) and asks the employer to either admit or dispute its liability. In the latter regard, the letter specifically states: "If you dispute the allegations, please send a written response with supporting documents by March 20, 1998" and continues "If you have further questions, please do not hesitate to contact me".

In my opinion, these latter statements contained in the March 4th letter, clearly distinguishes the present appeal from *Robinson v. Tale'awtxw Aboriginal Capital Corporation* [1996] 96 CLLC 141,387 (cited by employer's counsel) where the delegate's letter in question was found to be an order to pay. In *Robinson,* the delegate's letter essentially offered the employer the following choice--"pay $X or a determination will be issued for $X". The delegate's March 4th letter was not so rigid; the employer was not offered the Hobson's choice of either pay or be ordered to pay. Rather, the delegate was actively seeking the employer's response to Bhandal and Spier's monetary claims.

Far from evidencing prejudgment on the part of the delegate, the March 4th letter, in effect says, "based on the evidence before me, it appears as though the employees have a claim for $X; what do you have to say in reply?"--the very essence of what I understand the delegate was obliged to do under section 77.

I might add that this letter was but one of a long series of communications between the Director and the employer dating from July 1997. The uncontradicted evidence before me discloses that representatives of the Director communicated with the employer's representatives by telephone, in person and by letter on numerous occasions prior to issuing the Determination. Frankly, reviewing the extensive history of communications, I can only conclude that not only did the Director comply with section 77; even if there had been substantially fewer communications, the Director's statutory obligation would nevertheless have been amply satisfied. From at least as early as August 1997, the employer knew that an investigation was underway and by no later than mid-December 1997, the employer's position had crystallized--it wasn't prepared to admit any liability

in the matter--and it would appear that the employer has steadfastly held to that position since that time.

Certainly, the employer was entitled to deny liability and thereby require the Director to formally adjudicate the matter by way of a determination. However, I cannot accept that the employer was in any way denied an opportunity to respond to the employees' complaints.

*"Special Clothing"*

As noted above, the employer now concedes that it had a dress code in place but argues that its dress code does not fall within the ambit of section 25. The employer's dress code states, in part:

> "As an employee in the Fashion Industry, it is necessary to represent the Company's image in the most fashionable and up to date manner. The dress code dictates that *all employees are required to wear the current seasons merchandise at all times.*
>
> After one month, *employees must only wear merchandise that has been purchased in one of our locations...*
>
> An employee may be sent home for neglecting to abide by the dress code." (*italics* added)

The documents in evidence before me clearly show that the employer rigorously enforced its dress code and that store managers, particularly, were to be both the primary role models for, and the enforcement officers of, the dress code. For example, the minutes of a January 13th, 1997 managers' meeting state that "all managers...must be in dress code at all times" and that offending employees were to "be sent home immediately"--a subsequent April 11th memo goes even further, stating that employees are to be sent home "without pay (if the schedule allows), No exceptions!".

Section 25(1) of the *Act* provides as follows:

> **Special clothing**
>
> 25 (1) An employer who requires an employee to wear special clothing must, without charge to the employee,
>
> > (a) provide the special clothing, and
> >
> > (b) clean and maintain it in a good state of repair, unless the employee is bound by an agreement made under subsection (2).

"Special clothing is, in turn, defined, in section 1 as follows:

> "special clothing" includes a uniform and a specified brand of clothing;

It should be noted that the above definition is not an exhaustive or exclusive definition. While the employer's dress code may or may not define a "uniform" as that term is generally understood--such as the "uniform" worn by police officers or the front-end clerks at a fast-food restaurant where employees all wear clothing that is identical or very substantially similar--the employer nonetheless did dictate the *type* of clothing that was required to be worn at work.

While the employees had some choice as to what clothes they might wear to work, they were required to wear the "current seasons merchandise" and only if such merchandise was purchased from one of the employer's stores. Undoubtedly, the employer sold any number of "brands" of clothing, but the employees could only wear those brands sold by the employer--*i.e.,* "specified brands". The *Oxford Dictionary* defines a "brand", *inter alia,* "goods of a particular make or trade mark". In my view, particularly given that "special clothing" is not restrictively defined, the employer's dress code could certainly be said to fall within the general ambit of section 25.

Even if the employer's dress code does not implicate section 25, I am nonetheless satisfied that by requiring employees to wear only "current season merchandise" purchased from one of the employer's stores, the employer, in effect, was passing on its business costs to its employees contrary to section 21(2) of the *Act:*

> **Deductions**
>
> 21 (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

The employer's dress code is very obviously a component of its overall marketing program--the reference in the dress code to the company's "image" and its desire to project that image in a "fashionable and up to date" manner bespeaks of the employer's underlying motivation in mandating its particular dress code.

In effect, the employer's management and staff are on-site "models" and, even though the employees are able to purchase clothing at a very substantial discount (50%, I understand), the fact remains that they have no *choice* in the matter. If the management and staff wish to work for the employer, they are compelled to purchase their "work clothes" from the employer. No doubt some employees view the 50% discount as an employment benefit--and in some sense it is--but that benefit would still be in place if the employees were not obliged to purchase their work wardrobe from their employer. In my opinion, it is this element of *compulsion* that brings the policy within both sections sections 25 and 21(2) of the *Act.*

The employer also submits that, even if the employees were obliged to purchase "special clothing" contrary to section 25, the actual expenses allowed by the delegate were unreasonable not not legitimate. It should be recalled that the employees' obligation to purchase clothing was an ongoing obligation--the employees could only wear "current seasons merchandise". The employer's policy does not envision a "one-time purchase". Bearing this fact in mind, I am not prepared to say that the Determination, which reflects recovery by each employee of a little over

$100 per month for each month of employment, is--as asserted by employer's counsel--unreasonable or excessive.

## ORDER

Pursuant to section 115 of the *Act,* I order that Determination be confirmed as issued in the amount of **$3,266.42** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

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**Kenneth Wm. Thornicroft,** ***Adjudicator***
**Employment Standards Tribunal**