

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 -

Jack Verburg operating Sicamous Bobcat and Excavating
("Verburg")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/425

DATE OF DECISION: September 25, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Jack Verburg operating Sicamous Bobcat and Excavating (“Verburg”) of a Determination which was issued on June 9, 1998 by a delegate of the Director of Employment Standards (the “Director”). In that Determination the Director found Verburg had contravened Section 46 of the *Employment Standards Regulation* (the “Regulation”) by failing to produce proper payroll records and, pursuant to Section 28(b) of the *Regulation*, imposed a fine of \$500.00 on Verburg.

ISSUE TO BE DECIDED

There are two issues that arise in this case. The first issue is whether the Director has adequately stated the reasons for imposing the fine in the Determination. The second issue is whether Verburg has demonstrated the Demand for Records issued by the Director was improper. The representative for Verburg argues that if the demand was improper, Verburg cannot be faulted for refusing to comply and the fine for non-compliance with that demand cannot stand.

FACTS

On November 26, 1997, the Director received a complaint from Rupert G. Davy (“Davy”), a former employee of Verburg, alleging he did not receive daily and/or weekly overtime as required by Part 4 of the *Act*. Verburg was advised of the complaint by letter date February 7, 1998 and was asked to reply. Mr. Peter Jovan (“Jovan”), who had been authorized by Verburg to represent him in the matter, responded by telephone to the letter on February 24, 1998 and followed his verbal response with a written response dated March 5, 1998 which asserted the basic position of Verburg that the complaint and claim was “unfounded and vindictive”. On the same day, in telephone conversation, Jovan advised the investigating officer that Davy had not worked overtime and had been paid all wages that were owed to him.

On March 5, 1998, a Demand for Employer Records was issued to Verburg. It was received by him on March 11, 1998. Jovan responded to the demand in a letter dated March 13, 1998. The essence of the response is found in the following paragraph:

I have requested that you submit proof of your allegation against my client and I will then comply with all requests that the Ministry wishes. At this time, I understand that you wish all records pertaining to Jack Verburg’s payroll and I understand you are classifying this as an investigation. If this

is an investigation, you will have to comply with the rules of court and are warned not to further ignore Mr. Verburg's legal rights.

Needless to say, no records were produced. On March 24, 1998, the Director wrote another letter to Verburg, indicating, among other things, that Verburg had until April 8, 1998 to comply with the demand, and in the event no response was received, would assess the matter on the basis of the material on file. On April 8, 1998, Jovan replied, restating Verburg's refusal to comply with the demand in the absence of "a foundation in law". A further letter followed to Verburg, as I read it, for the purpose of seeking confirmation of Jovan's authority to act for Verburg in the matter. On April 29, 1998, Jovan replied, stating, in part:

As of the first contact with you, I had forwarded a copy of Jack Verburg's letter of authorization (enclosed). I guess that was either not good enough for you or you are trying my client's patience. In any case, I have enclosed a different letter for your approval. As I have stated numerous times and at this point I am starting to believe that there is a comprehension problem with you or whoever is determined to carry on this fairly obvious abuse of process. I am **not** in a position to make a move on this demand until I see proof of this allegation, because without proof there is no lawful enforceable order.

ANALYSIS

On the first issue, I have no difficulty concluding the Director has adequately stated the reasons for imposing the fine. Unless Verburg is correct in its position that the demand was improper and, as a result, not requiring compliance, this appeal will fail. Improper, in the sense it is being used in this case, means without legal justification or foundation.

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.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 9, 1998 be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal