

An appeal

- by -

Karen Terrilon operating as ABC Coast Independent Flagging
("Terrilon" or "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2001/310

DATE OF DECISION: September 19, 2001

DECISION

OVERVIEW

This is an appeal by an employer, Karen Terrilon operating as ABC Coast Independent Flagging, from a Determination dated March 9, 2001 issued by a Delegate of the Director of Employment Standards, pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”). The Delegate imposed a penalty of \$500.00 because the employer failed to comply with a demand for records. The employer appealed on the basis that it required further particulars from the Delegate in order to comply with the demand. In a review of the facts of this case, it was apparent that the Delegate notified the Employer of the nature of the claims made, and the time period in which the claims arose, and provided sufficient particulars for the Employer to respond to the request for information. I, therefore, dismissed the appeal.

ISSUE:

Was the Delegate entitled to make a demand for information, and did the Employer neglect or refuse to comply?

FACTS

A Delegate of the Director of Employment Standards commenced an investigation of the Employer, as a result of a complaint received from Patricia L. Dyke and Scott Mudry (the “Employees”). The Employees complained that they had not received wages from the employer after working for a week as flaggers on a highway project in the Sechelt area. Further, the Employees alleged that the Employer refused to pay the wages because the employees were being trained. On February 20, 2001 a Delegate issued a Demand for records pursuant to s. 85(1)(f) of the *Act* to the Employer. The Employer did not produce the records. The demand was to produce the employment records for all employees for the period of July 2000. The records were to include:

- (a) names, addresses and home telephone numbers of all employees;
- (b) records of all contractors that ABC Coast Independent Contracting performed work for in the month of July 2000;
- (c) the names, addresses and telephone numbers of Ministry of Highways officials responsible for any work performed on Sechelt highways where ABC Coast Independent Flagging performed flagging services in the month of July 2000
- (d) the address of the physical location of the office of the employer.

The envelope containing the demand letter was sent by registered mail to the employer, and was returned to the Employment Standards Branch and marked “refused”.

Prior to the making the demand by letter, the Delegate advised that Patricia L. Dyke and Scott Mudry alleged that they performed work for Karen Terillion operating as ABC Coast Independent Flagging between July 17, 2000 and July 27, 2000 on the Francis Peninsula. The Delegate had a box number for the employer in Sechelt.

Prior to making the Demand the Delegate informed Terrillon by letter dated October 16, 2000 that the employees alleged that they worked for one week without wages, and alleged that Terrillon advised them that they would have to have one week of training without payment of wages.

By letter dated November 8, 2000 the Delegate supplied the Employer invoices submitted by the employees which set out the dates and locations worked, and the hours worked.

By letter dated February 20, 2001 the Delegate wrote as follows:

You have been provided with all the details of the complaints that have been filed. Your continued refusal to provide me with the information that I requested in my letter of November 8, 2000 is impeding the investigation that I am required to conduct. Since you have declined to provide me with the names addresses and telephone numbers of persons working for you on Francis Peninsula, the name of the contractor for whom the work was performed or the name of the Ministry of Highways contact for that site for July 2000, the purpose of my visit is to examine your records to obtain that information.

Please contact me immediately on receipt of this letter and no later than **March 1, 2001**. If I do not hear from you by that date, I will issue a Determination based on the information that has been provided to date. Please be aware that your refusal to provide information to the Delegate of the Director, during the course of the investigation may seriously compromise any appeal rights if a Determination is not favourable to you. Please also note that failure to produce records may lead to penalties.

By letter dated March 8, 2001, the Delegate gave particulars:

You have been provided with information regarding the allegations. As I have advised, you, by way of my letter and copies of the letter from Ms. Dyke, the employees allege that they performed work for you Francis Peninsula (which they mistakenly referred to as Francois Penn), between July 17, 2000 and July 27, 2000.

The Employer wrote letters to the Delegate (November 8, 21, 2000, February 12, 2001, March 12, 2001), refusing to provide information, until the Delegate provided further information or particulars concerning the investigation including the dates that the employees alleged they worked, the number of hours alleged, and the street address of the work. The March 8th letter was returned to the Delegate marked “refused”.

A different Delegate, than the Delegate conducting the investigation, made an order that the Employer cease violating s. 46 of the *Regulation* imposed a penalty of \$500.00 for a breach of s. 46 of the *Regulation* by the employer.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case the employer, to show that there was an error in the Determination such that I should vary or cancel the Determination.

The Delegate commenced an investigation. The Employer denied that the complainants were employees. Pursuant to s. 85(1) (f) the Delegate has the power to make a demand for records “for the purpose of ensuring compliance with the Act”. The only limitation is that the records sought be relevant to an investigation under this Part.

The investigation in this case related to the claims of two persons that they had worked as employees on certain roads as flag persons in the Sechelt area on certain dates during 2000. The Delegate advised the employer with regard to the names of the employees, the location of the work, and the time frame. In making the request the Delegate was seeking to identify witnesses to corroborate information provided by the employees. The information sought from the Employer was relevant to the investigation before the Delegate.

There is no doubt that the employer was aware that the Delegate was investigating a complaint made by Patricia Dyke and Scott Mudry for work as traffic flag persons on the Francis Peninsula (Sunshine Coast area around Sechelt). The Employer declined to produce information because it did not feel that the Employees provided sufficient details for the Employer to respond, that the requests of the Delegate were in the nature of a fishing expedition, and that it would be costly to comply with the request (letter of October 25, 2000). The employer considered the request “groundless”.

There is no doubt that the Employer refused to provide the information, and in the end refused to accept registered mail sent by the Delegate. The *Act* provides for service of demands by registered mail to the last known address of a person (s. 122).

The Employer mistakenly relied on the following premise in her dealings with the Delegate:

Under the Employment Standards Act and Canadian Common Law, the Branch is only allowed to request records relevant to investigating a specific complaint and

the employer is entitled to be informed of the specifics of the complaint before being required to produce records.

Under the *Act*, it is not necessary for the Delegate to have a filed complaint, before proceeding to a demand for information. It is only necessary that the demand be for the “purpose of ensuring compliance with the Act.” The Delegate is empowered to conduct an investigation, without a complaint, in order to ensure compliance with the *Act*, and the Delegate has a duty to investigate a matter when a complaint is filed. When a demand is vague, an employer may be able to show due diligence in failing to produce the information. In this case, however, the demand made was clear, and the records sought were relevant to the investigation.

There is no requirement that the employer be informed of the “specifics of the complaint” before the employer is required to produce records: *Verburg BCEST #D417/98*. In this case, however, the employer was well aware of the nature of the complaints under investigation. An employer must be given a reasonable opportunity to participate in an investigation, however, the employer was afforded an opportunity to participate, and declined to do so.

I note that the request for records was framed, perhaps more broadly, than was necessary in order to satisfy the purposes of the Delegate. The information sought, was however, relevant to the investigation, and the Employer had a duty to comply with the demand of the Delegate. One of the purposes of the *Act* is to ensure that employment disputes are resolved on a timely, and cost effective basis. The Delegate’s investigation was delayed and frustrated by the lack of record production by the Employer.

For all the above reasons I find that the Employer has not shown any error in the Determination.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated March 26, 2001 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal