

An appeal

- by -

Cakes by Mary-Ann Ventures Ltd.

- 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: John M. Orr

FILE No.: 2002/594

DATE OF DECISION: February 6, 2003

DECISION

OVERVIEW

This is an appeal by Cakes by Mary-Ann Ventures Ltd. ("Mary-Ann") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination dated November 7, 2002 by the Director of Employment Standards (the "Director").

In the exercise of its authority under section 107 of the *Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

The Director determined that Mary-Ann employed Karen Smith ("Smith") as a server/baker in her coffee shop from February 6, 2002 to May 15th 2002. Smith complained to the Director that there were irregularities in her wages and following an investigation the Director determined that Smith was owed \$1,170.65.

Mary-Ann appeals from the determination on the basis that the hours submitted by Smith were not accurate and she has submitted some time cards to establish that the hours claimed are inaccurate. These records were not produced to the Director's delegate during the investigation.

ISSUES

The issue in this case is whether the employer should be allowed to elicit evidence on this appeal that was not given to the delegate during the investigation and whether such evidence satisfies the Tribunal that the determination is wrong.

FACTS AND ANALYSIS

Mary-Ann submits that certain payments were made to Smith that have not been included in the wage calculation and that the hours of work claimed by Smith are not accurate. Mary-Ann has produced certain time cards that confirm some of these inaccuracies.

The Director submits that these records should not be admitted at this stage in the proceedings and that Mary-Ann had ample opportunity to provide the information during the course of the investigation but failed to do so.

The Director provides the following chronology. The first contact with Mary-Ann was on August 21, 2002. At that time Mary-Ann was adamant that the complainant's records were inaccurate and promised to fax the employer's records and payroll information by August 27th. On August 27th Mary-Ann said that she needed more time and promised the records by September 3rd.

On September 5th the delegate sent a Demand for Employer Records requiring that the records be received by September 20th. The demand was sent by registered mail but the delegate received no response. On September 25th the delegate telephoned Mary-Ann. The employer said that she had only just received the Demand and the records needed to be extracted from a computer. The delegate granted a further

extension of time until October 2nd but received no response by that date. The delegate again telephoned the employer and was told that there were still some difficulties extracting the records from the computer.

On October 17th the delegate sent Mary-Ann a letter outlining the preliminary findings of the investigation to give the employer a final opportunity to respond to the allegations. The delegate notes that this was the sixth opportunity given to the employer to provide records. There was no response and the determination was written on November 7th.

In the appeal submissions there is no explanation given for the failure of the employer to respond to the delegate during the course of the investigation. It is significant to note that in one of the telephone conversations Mary-Ann told that the delegate she had requested that Smith fill out daily time cards but that Smith had refused to do so. Mary-Ann has now produced a series of cards that she alleges were completed by Smith as daily time cards.

In the absence of a reasonable explanation for the failure to provide the records during the course of the investigation such records will not normally be admissible on the appeal. While the evidence submitted is important its credibility is in question given that the employer claimed that such records did not exist. While there is no absolute bar to the presentation of new evidence (*Geluk* BCEST #D488/00) it is clear that this evidence would have been available during the investigation. The employer simply failed to cooperate with the investigation and this Tribunal has held in previous decisions that an appeal will not be allowed in those circumstances: *Tri-West Tractor Ltd* BCEST #D268/96; *Kaiser Stables Ltd*. BCEST #D058/97.

In the absence of these records there is no substance to the appeal and I am not satisfied that the determination is in error. The appeal is dismissed and the determination is confirmed.

ORDER

I order, under section 115 of the *Act*, that the determination dated November 7, 2002 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal