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-

Fuji Catering and Foods Supply Ltd.

("Fuji Catering" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	98/776
DATE OF DECISION:	February 11th, 1999

DECISION

OVERVIEW

This is an appeal brought by Fuji Catering and Foods Supply Ltd. ("Fuji Catering" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on November 13th, 1998 under file number ER090-765 (the "Determination").

The Director determined that Fuji Catering owed its former employee, Robert Magana ("Magana"), the sum of $1,236.68 on account of unpaid regular wages, statutory holiday pay, vacation pay and interest accrued to November 13th, 1998.

FACTS

According to the information set out in the Determination, Magana was employed as a driver and kitchen worker from March 1st to April 24th, 1998 when he was laid off. Magana claimed unpaid wages for the period April 7th to 24th.

In the face of the employer's refusal to participate in any way in the delegate's investigation--refusing to respond to telephone messages, three letters and a "Demand for Employer Records"--the delegate accepted Magana's apparently credible evidence and issued a determination in Magana's favour based on an $8 per hour wage rate.

ISSUE TO BE DECIDED

In a letter addressed to the Tribunal, dated December 4th, 1998 (appended to its notice of appeal), Fuji Catering claimed, by way of defence to Magana's claim, that he was not employed by Fuji Catering during the period April 7th-24th, 1998; Fuji Catering asserts that Magana voluntarily terminated his employment on March 31st, 1998.

ANALYSIS

The employer's position is vigorously disputed by Magana. In a letter submitted to the Tribunal on January 4th, 1999, Magana characterized the employer's assertion that he (Magana) quit on March 31st, 1998 as a "flat out lie".

The uncontradicted evidence before me is that the employer did not issue Magana a Record of Employment shortly after March 31st, or indeed, as of January 4th, 1999. Further, it is not clear why the employer did not respond to delegate's various inquiries during the investigation of Magana's complaint.

In *Kaiser Stables Ltd.* (B.C.E.S.T. No. D058/97), the Tribunal affirmed the evidentiary principle discussed in *Tri-West Tractor Ltd.* (B.C.E.S.T. No. D268/96), namely, that:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it...The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

It is abundantly clear that the employer in this case willfully refused to participate in the delegate's investigation and now is attempting to place before the Tribunal evidence that ought to have been provided to the delegate. The uncontradicted evidence before me is that the delegate:

> • initially wrote to the employer on August 11th, 1998 advising it about Magana's claim and specifically noted that the claim was for unpaid wages for the period April 7th-24th, 1998. I should add that the August 11th letter was mailed to the very same address that appears on Fuji Catering's notice of appeal and that, further, the letter requests that the employer provide payroll records (by August 24th) if its disputes the claim or to telephone the delegate if the employer wished to "discuss the matter further". The employer ignored this letter.
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> • sent a follow-up letter, by certified mail (proof of receipt in contained in the Tribunal's file), on September 2nd, 1998 enclosing a "Demand for Employer Records" pursuant to section 85 of the *Act*--this letter and the enclosed Demand were ignored by the employer although the delegate, yet again, stated that the employer could contact the delegate by telephone if it had "any questions". The employer ignored this letter.
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> • wrote the employer yet again on October 27th, 1998 stating that if the employer continues to ignore the matter, "the Branch will make a decision based on the information available". In fact, with the employer still refusing to cooperate in the delegate's investigation, that is precisely what happened; the Determination being issued on November 13th, 1998.

In addition to the above-noted correspondence, there is evidence before me that the employer's principal, during the course of the investigation, repeatedly refused to return the delegate's various telephone calls.

In light of the foregoing, I cannot think of a clearer case to apply the *Kaiser Stables* rule and thus exclude all "evidence"--which, in any event, largely consists of unsubstantiated allegations--submitted by the employer to the Tribunal.

Accordingly, this appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$1,236.68** 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