

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act S.B.C. 1995, C. 38*

- by -

Kaiser Stables Ltd.  
(The “Employer ”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Richard S. Longpre

**FILE NO.:** 96/577

**DATE OF DECISION:** February 6, 1997

**DATE OF HEARING:** January 20, 1997

## DECISION

### APPEARANCES

Marlen Kaiser	for the Employer
Frances Paterson	for herself
Sharlene Paterson	for herself
Laurie Blancard	for herself
Toby Kliem	for himself
Pat Douglas	for the Director

### OVERVIEW

The Employer seeks appeal of Determination CDET No. 3912 pursuant to Section 112 of the *Employment Standards Act*. This Determination is set out in four separate determinations, all dealing with claims by former employees of the Employer. The delegate of the Director (the "Director") found that outstanding wages and interest were owed the four former employees: Frances Paterson - \$137.11; Sharlene Paterson - \$3,036.59; Laurie Blancard - \$1,558.77; and Toby Kliem - \$213.08 ( the " Complainants " )

The Employer argues that the evidence he had at the appeal hearing demonstrated that each of the Complainants had falsified the records of their employment to the Director.

A preliminary matter arises in this case. The complaints were filed with Employment Standards on August 15 and 16, 1996. The Employer's appeal of the Determination is based on evidence he did not provide the Director prior to the Determination being made on September 10, 1996. I must first decide whether the Employer is entitled to put such evidence before the appeal Panel.

### FACTS

The Complainants sought payment for hours worked. At the hearing, the Director informed the Panel that following the complaints being filed with Employment Standards she attempted to contact the Employer by mail, by telephone and by fax. Registered mail was returned as "unclaimed.". Other notices, dealing with these and other complaints, were ignored. The Director's attempts to contact the Employer by telephone were also unsuccessful. On August 19, 1996 the Director wrote to the Employer. The letter reads, in part:

Many telephone messages were left for you, asking for payroll records. In addition, Demands for Employer Records were sent via certified mail, and by fax, with no response except a brief note from you that 2 complainants didn't work there, and stating how much you paid to 1 other complainant. As this brief information did not comply with the provisions of Section 28 of the Employment Standards Act, phone messages were left for you, asking for further information. There was no response

The letter went on to explain that other determinations, setting out wages and penalties owing by his business, were made and issued notwithstanding his failure to cooperate with the investigations.

The Director investigated the records and information provided to her by each Complainant. She was unable to compare the Employer's records to the Complainants' records and information. On the basis of the investigation she determined that the Employer had improperly applied the Act and that the complaints should succeed.

The records and information provided by Blancard and Sharlene Paterson also showed that both were owed for overtime hours worked. The Director tried but was unable to obtain records from the Employer that addressed these overtime hours. Again, the Employer refused to cooperate.

During the hearing, the Employer did not dispute any of the Director's statements. He acknowledged that he did not comply with her requests to provide her with all necessary information during the investigation.

On September 10, 1996 the Determination was issued covering each of the four employees. Shortly after the Determination was issued, the Employer contacted the Director to seek instructions on appeal of the Determination. The Director assisted him in that matter. In the course of those discussions, the Director and the Employer discussed the information she had assembled in making her decisions. The Employer discussed further information he would put before the Panel.

### **ISSUE TO BE DECIDED**

The Employer refused to participate in the Director's investigation. Is the Employer entitled to introduce evidence in appeal that it refused to provide to the Director?

## ANALYSIS

I begin with a review of the adjudicative process arising from the filing of a complaint. *BWI Business World Incorporated* BC EST No. D050/96 discusses the basis on which the Tribunal finds the Director's investigation and determination to be quasi-judicial:

Once a complaint has been filed, the Director has both an investigative and an adjudicative role. When investigating a complaint, the Director is specifically directed to give the "person under investigation" (in virtually every case, the employer) "an opportunity to respond." (section 77). At the investigative stage, the Director must, subject to section 76(2), enquire into the complaint, receive submissions from the parties, and ultimately make a decision that effects the rights and interests of both the employer and the employee. In my view the Director is acting in a quasi-judicial capacity when conducting investigations and making determinations under the *Act*. [Cf. *Re Downing and Graydon* 21 O.R. (2d) 292 (Ont.C.A.)].

The decision making process was quasi-judicial in the case before me. The Employer was given an opportunity to make a submission to the Director. The Director made numerous attempts to discuss the records and information submitted by the Complainants. The Director's August 19, 1996 letter clearly explained the consequence of his refusal to cooperate with the investigation. He ignored the Director's concerted efforts to give him the opportunity to participate. That was his decision.

The Tribunal addressed a situation similar to the case at hand in *Tri-West Tractor Ltd.* BC EST No. D268/96. The employer did not submit certain information to the Director during the Director's inquiry. On appeal, it sought to rely upon that information. It argued that the information had been given to its lawyer on the understanding that the information would be passed on to the Director. Its lawyer had not passed the information on to the Director.

The Tribunal refused to see a distinction between the lawyer and the client in these circumstances. Most relevant to this case, however, the Tribunal would not allow an appellant who refused to participate in the Director's investigation, to file an appeal on the merits of the determination. To grant standing on appeal would be entirely at odds with the quasi-judicial nature of the investigation and determination.

The Employer did not participate nor did it cooperate in virtually all aspects of the Director's inquiry. It now seeks to challenge the Director's Determination with evidence it acknowledged it did not give to the Director as requested. The Tribunal will not allow that to occur. As reviewed *BWI Business World Incorporated supra* and *Tri-West Tractor Ltd. BC supra*, the Tribunal will not allow an employer to completely ignore the determination's investigation and then appeal its conclusions.

One issue remains. Sharlene Paterson and Blancard filed complaints that sought only past unpaid wages. In reviewing their terms of employment, the Director found that both Sharlene Paterson and Blancard were also owed for overtime hours worked. The Director has such authority. In this case, the issue is whether the Employer received proper notice of these additional hours that were found owing. The Employer was entitled to know the complaint before it.

In the hearing, the Director explained the efforts made to discuss with the Employer both the straight time and the overtime hours worked by the Complainants. The Director told the Panel that she asked for documents that went specifically to the total hours worked by each employee. Had the Employer participated in the investigation the issue of total hours worked by Sharlene Paterson and Blancard, including overtime hours worked, would have been discussed. The Employer voluntarily choose not to participate.

The Employer's failure to participate is significant. The Determination, however, must still explain the basis of its conclusions. I am satisfied that it does that. The Determination sets out Sharlene Paterson's uncontested hours worked from May 16, 1996 to August 3, 1996. It also sets out Blancard's uncontested hour of work from June 18, 1996 to August 6, 1996. The Director's finding of overtime hours worked are established in those documents.

In the above circumstances the Employer's application to appeal is dismissed.

**ORDER**

Pursuant to Section 115 of the *Act* I will not cancel nor vary Determination No. CDET 003912.

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**Richard S. Longpre**  
**Adjudicator**  
**Employment Standards Tribunal**