

An appeal

- by -

John Goedhart

- 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:** M. Gwendolynne Taylor

**FILE No.:** 2000/812

**DATE OF DECISION:** February 14, 2001

## DECISION

### APPEARANCES:

Written submissions by:

John Goedhart	employee on his own behalf
Heather Mills, employer	on behalf of Wings Housing Society
Sharon Cott,	on behalf of the Director of Employment Standards

### OVERVIEW

This is an appeal by John Goedhart (“Goedhart”) pursuant to section 112 of the *Employment Standards Act* (“the Act”) from a determination dated November 2, 2000 (#ER 098021) by the Director of Employment Standards (“the Director”).

Goedhart’s complaint alleged that he was owed overtime and statutory holiday pay by the employer, Wings Housing Society (“Wings”). Additionally, he alleged that Wings had not posted the hours of work (section 31), had not allowed 8 hours off between shifts or 32 hours off each week (section 36), and had permitted or demanded excessive hours of work in detriment to Goedhart’s health and safety (section 39).

The Director found there was insufficient evidence to support the allegations, ceased the investigation and closed the file.

Goedhart’s appeal does not challenge any of the Director’s findings. His appeal asks that the case be further investigated because

- he has new evidence by a member of the Board of Directors of Wings,
- the employer purposefully withheld evidence, and
- members of the society are willing to testify on his behalf.

### ISSUE

Should the Tribunal refer this case back to the Director for reconsideration of new evidence.

## ARGUMENT

The Director submitted that Goedhart's issues were addressed in the Analysis section of the determination and that Goedhart had been given an opportunity to provide additional evidence prior to the Determination.

The Director said that Goedhart told the Director, in a letter dated October 11, 2000, tenants were willing to come forward but he did not provide their names because of a concern over confidentiality. Therefore, the Director's determination was made without the evidence from the tenants.

The Director also advised that she was not aware of evidence pertinent to the claim being withheld by the employer.

Wings objected to the appeal noting that the appeal was incomplete because Goedhart did not state why the Determination was wrong, give clear reasons why he is appealing, or clearly state what facts are in dispute.

## THE FACTS AND ANALYSIS

Goedhart filed his complaint with the Director on February 17, 2000. He alleged he was owed overtime from January 1, 1999 until October 31, 1999. He also alleged he was owed statutory holiday pay for various dates from January 1, 1999 until October 11, 1999.

The Director noted that no daily record of hours had been kept. However, there was a 1999 calendar submitted which included some notations on statutory holidays and weekends. From February 1, 2000 through June 8, 2000, Goedhart completed timesheets, which the Director examined and referred to.

The Director considered the evidence from the standpoint of Goedhart being an employee, and being a resident caretaker. Either way, the Director found the evidence supported a finding that Wings paid Goedhart for the hours of work performed, according to the *Act*. The Director was unable to find evidence to support the allegations of excessive hours, overtime hours and statutory holidays being worked without compensation. The Director also found there was insufficient evidence to support the allegation of not having 32 hours free from work each work.

Two leading decisions by the Tribunal on admissibility of new evidence, are *Tri-West Tractor Ltd.* (BCEST No. D268/96) and *Kaiser Stables Ltd.* (BCEST No. D058/97). The Tribunal set forth the principle that a party will not normally be allowed to raise issues or present evidence which could have been raised or presented at the investigative stage. I agree that this should be a threshold test for admissibility of new evidence. I would add that the evidence must be relevant and material to an issue that was before the Director such that it could have resulted in a different determination.

One of the purposes of the *Act*, section 2 (d), is “to provide fair and efficient procedures for resolving disputes”. “Fair and efficient procedures” includes the element of ensuring that disputes are resolved in a timely fashion. This consideration protects against protracted disputes, helps to ensure that evidence is fresh so it can be fairly investigated, and helps to ensure that witnesses are available. In any weighing of “fair and efficient procedures”, the Tribunal must be cognisant of balancing the interests of all parties to ensure that procedures do not assist one party to the undue prejudice of another.

In his appeal to the Tribunal, Goedhart has said that 9 members of the society are willing to testify to support his claim for overtime and he gives their names and unit numbers. I find that he could have presented this type of evidence during the investigation before the Director but chose not to. Therefore, I find that this does not support his request for further investigation.

It is apparent that the evidence from the Board Member is new evidence and that the allegation of withholding evidence is new. Goedhart says the member of the Board of Directors “gives new evidence to my claim”, and “proves collusion and deceit ... to deny me this claim for overtime/holiday pay.” In his second point, he says the employer purposefully withheld information and is still in possession of evidence pertinent to the claim.

Unfortunately, these statements do not say what the evidence is and do not suggest how the investigation and Determination might have been affected by this new evidence. I am unable to weigh the impact of the new evidence to determine whether it is relevant and material and, therefore, whether it would warrant a referral back.

I considered giving Goedhart an opportunity to elaborate on the reasons for his appeal. However, I note that the appeal form directed him to “give clear reasons why you are making this appeal” and “state clearly what facts are in dispute.” This he did not do.

In order for the evidence to be material and relevant, it would have been in existence between January 1 and October 31, 1999. Goedhart’s complaint to the Branch was filed in February 2000. The Director’s Determination is dated November 2, 2000. I find there was ample time for Goedhart to discover evidence pertinent to his case during the Director’s investigation. I also find that it would be unduly prejudicial to Wings to allow Goedhart more time to introduce new evidence at this stage.

I find it would be contrary to the stated purposes of “fair and efficient procedures” to allow the introduction of new evidence this long after the alleged contraventions and the filing of the complaint.

**ORDER**

Pursuant to section 115, I dismiss the appeal and confirm the Director's Determination.

**M. Gwendolynne Taylor**

**M. Gwendolynne Taylor**

**Adjudicator**

**Employment Standards Tribunal**