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-

Sean Sullivan and Clint Margetish
doing business as the "Wild Side Cafe"

(the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/784

DATE OF DECISION: March 10th, 1999

DECISION

OVERVIEW

This is an appeal brought by Sean Sullivan and Clint Margetish, doing business as the Wild Side Cafe (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 18th, 1998 under file number 089129 (the "Determination").

The Director's delegate determined that Sean Sullivan and Clint Margetish, along with a third person, Ken Swanson, owed their former employee, Lionel Donovan ("Donovan"), $3,152.95 on account of unpaid wages and interest. I should note that the appeal before me was brought by Sean Sullivan and Clint Margetish--these two gentlemen have apparently had a falling out with their former partner in the Wild Side Cafe, Ken Swanson. Swanson has not appealed the Determination.

FACTS

The delegate found, and there does not appear to be any dispute, that at the material time, Sullivan, Margetish and Swanson operated the Wild Side Cafe as a partnership. This restaurant is located in Port Renfrew, B.C. This partnership has now been dissolved with some apparent acrimony as between Sullivan and Margetish on the one hand, and Swanson, on the other.

The Delegate's Investigation

In his original complaint filed on March 9th, 1998, Donovan claimed that he had been employed as a waiter at the Wild Side Cafe, earning $8 per hour, from October 1st, 1997 to January 20th, 1998 when his employment was terminated. As noted in the Determination, Donovan claimed to have worked 160 regular hours in October, November and December 1997 and 80 overtime hours in October 1997 bringing his total earnings to $4,800 plus 4% vacation pay ($192); Donovan acknowledged having received $2,000 in wages and thus the Determination was issued for the balance plus interest--*i.e.*, $3,152.95.

The delegate accepted Donovan's submission in the absence of any substantive response from the employer regarding Donovan's unpaid wage complaint. As noted in the Determination, the delegate sent, by certified mail, a letter and "Demand for Employer Records" to Sullivan and Margetish on September 22nd, 1998. This Demand, requesting all employment records relating to Donovan, was received on September 28th by Lisa Margetish. The delegate's September 22nd letter indicated that Donovan had filed a complaint, described the nature of that complaint, and asked that the employer's response to the complaint be forwarded, in writing, by no later than October 14th, 1998. The delegate's letter continued in boldface type: "**Failure to participate fully in this investigation may result in a determination based solely on the information**

provided by the complainant, and further may adversely affect your ability to appeal a Determination to the Employment Standards Tribunal." The delegate asked the employer to contact him at a designated telephone number "if you have any questions".

On September 29th, 1998 the delegate spoke with Clint Margetish by telephone; during that conversation Margetish explained that Ken Swanson had actually hired Donovan and that the partnership had dissolved shortly after Donovan's employment ended. Nevertheless, Margetish agreed to provide a full written summary of the employer's position by October 14th, 1998. No response having been received by October 14th, the delegate wrote, yet again, on October 20th to the employer requesting employment records and a summary of their position by no later than November 4th, 1998. The October 20th letter continued: "You are again advised that failure to provide this reply may result in a Determination based solely on the information provided by the complainant, and a $500 penalty pursuant to the Act for failure to provide records." The November 4th deadline came and went without any response whatsoever from the employer; the Determination was issued on November 18th, 1998.

A copy of the delegate's October 20th letter was also sent to Ken Swanson at his new business address in Port Renfrew. Ken Swanson never provided any information to the delegate, did not participate in any way in the delegate's investigation and, as noted above, has not appealed his liability under the Determination.

The Kaiser Stables principle

Appended to Sullivan and Margetish's notice of appeal is an undated letter addressed to the delegate which purports to respond the delegate's previously noted requests for a written submission. This letter was not provided to the delegate during the investigation; rather, as noted, it was simply appended to the notice of appeal filed with Tribunal on December 11th, 1998.

The delegate submits, in a written submission dated December 22nd, 1998, that the appeal ought to be dismissed in accordance with the Tribunal's decisions in *Tri-West Tractor Ltd.* (B.C.E.S.T. Decision No. 268/96) and *Kaiser Stables Ltd.* (B.C.E.S.T. Decision No. 58/97). In *Tri-West* the adjudicator held that certain evidence was inadmissible on appeal because:

> "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."

This decision was followed in *Kaiser* where the facts disclosed a consistent and willful refusal by the employer to participate in the delegate's investigation--the employer repeatedly ignored letters, telephone calls and faxes from the delegate. Subsequent decisions of the Tribunal have affirmed the approach taken in *Kaiser Stables,* namely, in the face of a concerted refusal to participate in an investigation, the employer will not be permitted to rely on evidence that was available and that

could have been presented to the investigating officer. In my view, the principle espoused in *Kaiser Stables* is a sound one and entirely consistent with two of the *Act's* stated purposes--the encouragement of open communication between employers and employees and the fair and efficient resolution of disputes arising under the *Act* [see subsections 2(c) and (d)].

I find the delegate's submission that the appeal ought to be dismissed, on the basis of the *Kaiser* principle, to be well-founded. The evidence before me discloses a persistent refusal to participate in the investigation; the only substantive response filed by the employer was the letter it filed with the Tribunal--a response that should have been filed prior to, rather than after, the Determination was issued. Certainly, the employer had more than fair warning that its refusal to cooperate would redound to its detriment.

I might add, for the sake of completeness, that the employer's December 11th submission does not, in any event, effectively meet the employer's burden of showing that the Determination is erroneous. It is clear that the arrangements regarding Donovan's employment and compensation were made between Donovan and Ken Swanson. However, as partners, both Sullivan and Margetish were bound by Swanson's actions so long as they related--as they did in this case--to the business of the partnership. Sullivan and Margetish admit that Donovan was employed (they only dispute his entitlements) by the Wild Side Cafe but say that "no agreements verbal or otherwise were made regarding payment for his services with either [Sullivan] or [Margetish]". Nevertheless, such an agreement was apparently made between Swanson (acting on behalf of the partnership) and Donovan and in light of the principles set out in the *Partnership Act*, and in particular, sections 7 and 11, that agreement also binds both Sullivan and Margetish. Sections 7 and 11 provide that:

> 7. (1) A partner is an agent of the firm and the other partners for the purpose of the business of the partnership.
>
> (2) The acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member bind the firm and his or her partners, unless
>
> > (a) the partner so acting has in fact no authority to act for the firm in the particular matter, and
> >
> > (b) the person with whom he or she is dealing either knows that the partner has no authority, or does not know or believe him or her to be a partner.
>
> • • • •
>
> 11. A partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he or she is a partner, and after his or her death his or her estate is also severally liable in a due course of administration for those debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of his or her separate debts.

ORDER

It appears that Clint Margetish's last name is misspelled in the Determination; the Determination is varied to show the correct spelling. Otherwise, and pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$3,152.95** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

_____

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal