

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1996, C.113

- by -

Dusty Investments Inc. d.b.a. Honda North
("Honda North")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Hans Suhr

File No.: 97/873

Date of Hearing: February 24, 1998

Date of Decision: March 11, 1998

DECISION

APPEARANCES

John K. Dungate	Counsel for Dusty Investments Inc. d.b.a. Honda North
Dave Fanshaw	on behalf of Dusty Investments Inc. d.b.a. Honda North
Ms. Ross	on behalf of Dusty Investments Inc. d.b.a. Honda North
Christopher Downey	on his own behalf
Blake Cassie	on behalf of Christopher Downey
Rick Devore	on behalf of Christopher Downey

OVERVIEW

This is an appeal by Dusty Investments Inc. d.b.a. Honda North (“Honda North”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated November 24, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Honda North alleges that the delegate of the Director erred in the Determination by concluding that Christopher Downey (“Downey”) was an employee and further erred by concluding that Downey was owed wages in the amount of \$12,520.81 plus interest for a total of \$12,991.71. The Director’s delegate concluded that although Downey was a manager, he was nevertheless entitled to be paid at straight time rates for all hours worked.

PRELIMINARY ISSUE

The delegate of the Director, in his submission to the Tribunal dated December 18, 1997, submits that this appeal by Honda North should be dismissed as Honda North did not participate during the investigation by the Director and, consistent with the Tribunal’s previous decisions in *Tri-West Tractor Ltd.* BC EST No. D268/96, *Kaiser Stables Ltd.* BC EST No. D058/97 and *Intrepid Security Ltd.* BC EST No. D378/97, should not now be permitted to appeal the merits of the Determination.

Counsel for Honda North submits that the facts in this appeal are such that the Tribunal should display some compassion for the circumstances and allow the appeal on the merits of the Determination. Counsel for Honda North further stated that he was not familiar with the cases cited by the delegate of the Director as he had not been able to obtain copies of those cases.

FACTS

The following facts are not in dispute:

- Downey commenced employment with Honda North July 15, 1991
- Downey became Parts Manager on June 1, 1993 at a salary of \$2900 per month
- On May 1, 1995, Downey's salary was increased to \$3200 per month
- On September 1, 1996 Downey's salary was increased to \$3286.66 per month
- Downey resigned from employment effective May 15, 1997

The delegate of the Director submits that:

- August 20, 1997 a Demand for Employer Records was sent via Certified Mail to Honda North requiring that the records requested be provided on or before September 19, 1997
- August 26, 1997, an Acknowledgment of Receipt from Canada Post confirmed that the Demand had been received by Honda North on August 22, 1997
- September 23, 1997, the delegate of the Director telephoned Honda North and spoke to the bookkeeper who advised that she had just returned from holidays and the owner of the business was away until the week of September 29, 1997. The bookkeeper requested and was granted an extension until September 30, 1997
- October 3, 1997, the delegate of the Director again spoke to the bookkeeper who indicated that she had just finished the year end and that the records requested would be provided later that morning
- October 6, 1997, the delegate of the Director again spoke to the bookkeeper to inquire when the records would be dropped off and was advised that the records would be provided in the afternoon of the following day
- October 15, 1997, the delegate of the Director sent a letter to Honda North again requesting the records and requiring that they be provided by October 24, 1997. This letter advised Honda North in part as follows *“Under Section 46 of the Employment Standards Act Regulation I can impose a Penalty of \$500.00 for a failure to produce the records requested in the Demand for Records. Further, it may be in the interest of the employer to produce the records requested because without them, I will use the best available evidence - in this case the records provided by the complainant.”*
- October 22, 1997, the delegate of the Director spoke with another employee of Honda North who advised him that the bookkeeper had gone to England because her father was ill. Upon being advised by the delegate of the Director that the records were still required, this employee stated that she “could not produce them because that was not her area of responsibility”.
- November 24, 1997, the delegate of the Director issued the Determination and delivered it by hand to the employer's place of business, the employer's registered and records office, to the residences of both of the directors

- November 24, 1997, a Penalty Determination was issued in the amount of \$500.00 for not producing the requested records as required

The delegate of Director investigated the records and information provided by Downey. He was unable to compare Honda North's records to Downey's records and information. On the basis of the investigation he determined that Honda North had not paid Downey for all hours worked and that the complaint should succeed.

With respect to the failure of Honda North to provide the records requested, counsel for Honda North submits in their appeal that "Honda North was unable to provide the information in the time period requested as the Employer, Honda North's bookkeeper/accountant was:

- a) firstly, was sick;
- b) secondly, had to prepare accounting updates to finalize year end;
- c) thirdly, had to travel to England where her father was severely ill immediately after preparing (b);
- d) only returned from England on November 10, 1997"

Counsel for Honda North further submits in their appeal that "The Employer, Honda North, realizes it should have responded in writing setting out its problem, however, the key person to provide the information was just not available"

Counsel for Honda North concedes that the records which were provided to the delegate of the Director *prior* to the issuance of the Determination "were limited and not what were requested".

The bookkeeper/accountant for Honda North, Ms. Ross, advised the Tribunal that she chose not to deliver any records to the delegate of the Director until she had the opportunity to ensure that she had collected all the records necessary.

Counsel for Honda North finally submits that the Determination dated November 24, 1997 is without jurisdiction and this hearing before the Tribunal is without jurisdiction as Downey was a manager and not an employee and the Employment Standards Act does not apply to managers.

ISSUE TO BE DECIDED

Honda North failed to participate in the Director's investigation except to provide some records which were conceded to be "*limited and not what were requested*" by the delegate of the Director.. Is Honda North entitled to introduce evidence in appeal that it refused to provide to the Director during the investigation ?

ANALYSIS

With respect to the submission by counsel for Honda North in regard to jurisdiction, the purpose of the *Act* as set forth in Section 2 (a) “*ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment*” and the scope of the *Act* as set forth in Section 3 “*This Act applies to all employees, other than those excluded by regulation, regardless of the number of hours worked*”. clearly outline the jurisdiction of the *Act*.

The definition of employee contained in Section 1 of the *Act* provides “

“employee” includes

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,*
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,*
- (c) a person being trained by an employer for the employer's business,*
- (d) a person on leave from an employer, and*
- (e) a person who has a right of recall;*

When the statutory definition of “employee” is considered, it is clear that Downey was an “employee” of Honda North at all times material to his complaint.

There is no dispute that Downey was a manager, however, he nevertheless continued to be an **employee** of Honda North.

Managers are however, excluded from certain portions of the *Act* such as Parts 4 and 5 but, except for those exclusions the remaining portions of the *Act* do apply to managers.

I therefore conclude that the *Act* does have jurisdiction with regard to both the Determination issued by the delegate of the Director and to this hearing.

With respect to the issue of whether Honda North is entitled to introduce evidence in appeal that it refused to provide to the Director during the investigation, the Tribunal found in *BWI Business World Incorporated* BC EST No. D050/96 that the investigation and determination by the Director to be of a quasi-judicial nature.

The decision making process was quasi-judicial in the case at hand. Honda North was given an opportunity to make a submission to the delegate of the Director. The delegate of the Director made numerous attempts to obtain the records from Honda North. Honda North ignored the delegate’s concerted efforts to give them the opportunity to participate. That was their decision.

Honda North did not participate not did it cooperate in virtually all aspects of the delegate of the Director's investigation. It now seeks to challenge the delegate of the Director's Determination with evidence it acknowledged it did not provide to the delegate of the Director as requested. The Tribunal will not allow that to occur. In previous decisions of the Tribunal, *Tri-West Tractor Ltd.* BC EST No. D268/96 and *Kaiser Stables Ltd.* BC EST No. D058/97, the Tribunal has stated it will not allow an employer to completely ignore the determination's investigation and then appeal its conclusions. I concur with those previous decisions.

Honda North's failure to participate is significant. I am not persuaded that the delegate of the Director should have to make numerous unsuccessful attempts to obtain information from an employer prior to issuing a Determination. The Director is required, pursuant to Section 77 of the *Act*, to "..... make reasonable efforts to give a person under investigation an opportunity to respond." In the case at hand, the efforts expended by the delegate of the Director to provide an opportunity for Honda North to respond were, in my view, more than reasonable and Honda North, by their own choice and for their own reasons, refused to participate.

The Determination, however, must still explain the basis of its conclusions. I am satisfied that it does that. The Determination sets out the uncontested hours worked by Downey during his period of employment with Honda North. The delegate of the Director's finding of hours worked and not paid for is established in those documents.

For all of the above reasons, I conclude that Honda North is not entitled to introduce evidence in appeal that it refused to provide to the Director during the investigation.

The appeal by Honda North is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated November 24, 1997 be confirmed in the amount of \$12,991.71 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of the issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal

HS/bls