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 -

Superior Student Painters Ltd.
(" Superior ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No: 1999/786

DATE OF DECISION: March 13, 2000

DECISION

OVERVIEW

Superior Student Painters Ltd. ("Superior", also, "the employer"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), has appealed a Determination by a delegate of the Director of Employment Standards (the "Director"). The Determination is dated November 30, 1999 and it orders Superior to pay Kuen Wai Yim (mistakenly called "Yen Wai Kuen" at the outset of the Determination) $304.15 in wages and interest and Sesaiya Ramlu $392.05 in wages and interest.

The Determination is based on information provided by the two employees. The delegate contacted Superior for information in respect to rates of pay and hours worked but Superior did not provide such information.

In appealing the Determination, Superior claims that Yim is an independent contractor. It claims that he has been paid in full. It is said that the rate of pay was not $13 an hour but $10 an hour. The employer produces evidence to show that it paid Yim $704, not $561.

Superior also claims that Ramlu was its subcontractor and independent of it. The employer goes on to claim that Ramlu worked only 24 hours at a rate of pay of $8 an hour and that, as such, the man is owed only $192.

ISSUES TO BE DECIDED

The employer did not cooperate with the delegate and, on appeal, declares that Yim and Ramlu are not employees but independent contractors and that hours of work and rates of pay are not as set out in the Determination. It for the first time produces evidence of what it paid Yim. My task is to decide whether the Determination ought to be varied or cancelled for reason of an error in fact or in law.

FACTS

Yim and Ramlu worked as painters for Superior.

Superior told the delegate at the investigative stage that it does not keep a daily record of hours worked by its painters. It advised her that it was about to move operations to the United States and that it had no intention of paying Yim any more money. Superior said that it would check records with a view to determining whether Ramlu was owed money but, if it did, it did not then advise the delegate of its findings.

While Superior alleges that Yim and Ramlu are independent contractors, it does not produce evidence in support of its claim.

While Superior alleges that Yim agreed to work for $10 an hour and that Ramlu agreed to work for $8 an hour, it does not produce evidence which shows that.

Superior alleges that Yim has been paid in full but it does not provide evidence which shows how many hours were worked by him. It does provide evidence which indicates that it paid Yim $704. And, on appeal, Yim accepts that he was in fact paid $704. But Yim goes on to claim that the Determination fails to account for the 12 hours that he spent painting a house in Deep Cove for Superior on the 26th and 28th of July, 1999. He claims that in total he worked 72.5 hours, not 60.5.

Superior alleges that Ramlu worked 24 hours. It has not submitted evidence to show that Ramlu in fact worked that number of hours.

Yim advises the Tribunal that his last name is "Yim" and not "Kuen". The Determination at its outset refers to Mr. Yim as "Yen Wai Kuen" but after that the delegate goes on to use "Yim".

ANALYSIS

I am shown that Yim in fact received $704, not $561 as set out in the Determination. If it were not for that, I would simply be dismissing this appeal pursuant to section 114 (1)(c) of the *Act*. That section of the *Act* allows the Tribunal to dismiss an appeal which is frivolous, vexatious, trivial or not brought in good faith. In this case, I have found that while Superior claims that Yim and Ramlu are not employees but independent subcontractors, and claims that the Determination is wrong both in respect to pay rates and hours worked, it then fails to offer any support for what is alleged. Superior may hold strong views on those particular issues but, legally speaking, that part of the appeal is trivial and frivolous in that it fails to challenge the Determination in any important way.

The Tribunal has said, through decisions which include *Tri-West Tractor Ltd.* (BCEST No. D268/96) and *Kaiser Stables Ltd.* (BCEST No. D058/97), that it will not normally allow an employer to raise issues or present evidence which could have been raised or presented at the investigative stage. In *Tri-West*, the principle is stated as follows:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with 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."

In *Kaiser Stables*, the concerted efforts of a delegate to have an employer participate in the investigation of a Complaint were ignored by the employer. The employer then appealed the delegate's Determination and sought to introduce new evidence on appeal. That evidence was

ruled inadmissible. The Adjudicator in that decision states, "the Tribunal will not to allow an employer to completely ignore the Director's investigation and then appeal its conclusions".

Decisions like *Tri-West* and *Kaiser Stables* preserve the fairness and integrity of the *Act*'s decision-making process. If it were not for such decisions, the role of the Director would be seriously impaired and the appeal process would become unmanageable and eventually fall into disrepute.

Yet the Tribunal has not set an absolute bar to the production of new evidence on appeal. "There are many decisions of this Tribunal which follow the reasoning of *Tri-West Tractor Ltd.* but almost all qualify the rule to some degree using such words as 'generally' or 'normally' new evidence will not be allowed at the appeal stage" (*Re Poretsis*, BCEST No. D370/98). That is because there will in some cases be good reason to allow a party to raise a new issue or introduce new evidence on appeal. As another Adjudicator has said in *Speciality Motor Cars (1970) Ltd. and Russell David Reid* (BCEST No. D570/98),

> "… it should also be recognized that the Kaiser Stables principle relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigating officer. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer … ."

In this case, evidence of a second payment to Yim surfaces on appeal. I have decided to accept the evidence as that is consistent with administrative fairness. Not even an employer that is completely uncooperative should be forced to pay twice for work. The *Act* is remedial legislation.

So Yim was paid $704, not $561, the question remains, Is that reason to vary the Determination? As another Adjudicator has noted in *Mykonos Taverna operating as the Achillion Restaurant*, BCEST No. D576/98, the burden on the appellant is to show that there is no rational basis for the Determination or it is patently unfair.

> "After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving "efficient" resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged *on its facts*, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her

> authority under the *Act* (see *Shelley Fitzpatrick operating as Dockers's Pub and Grill*, BCEST No. D511/980." (pages 6-7)

In this case, it has been shown to me that the Determination takes into account only one of the two cheques that Superior issued Yim. But the Determination is consistent with the Complaint and it is by no means inconsistent with evidence produced by Superior. The second cheque was issued after the Complaint was filed and Superior did not provide the delegate with any payroll information. I am, moreover, shown that Yim is very likely owed another $156 for the 12 hours of work that he performed at Deep Cove (12 x $13/hr. = $156). On that basis, I find that there is a rational basis for the Determination and that it is not manifestly unfair.

Superior has failed to show me that the Determination should be varied or cancelled. The evidence before me shows that Yim is probably entitled to another $13. I may not award him those additional moneys, the reason being that he did not appeal the Determination.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated November 30, 1999 be confirmed. Superior is ordered to pay Kuen Wai Yim $304.15 and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*. Superior is ordered to pay Sesaiya Ramlu $392.05 and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal