

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 -

Fernando Villagren
("Villagren")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Hans Suhr

File No.: 98/047

Date of Decision: April 2, 1998

DECISION

OVERVIEW

This is an appeal by Fernando Villagren (“Villagren”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated January 5, 1998 issued by a delegate of the Director of Employment Standards (the “Director”). Villagren alleges that the delegate of the Director erred in the Determination by concluding that Saul Esparza (“Esparza”) was owed wages in the amount of \$4,129.68. The Director’s delegate concluded that Villagren had contravened Section 17 of the *Act*.

PRELIMINARY ISSUE

The delegate of the Director, in her submission to the Tribunal dated February 2, 1998, submits that this appeal by Villagren contains information which was not submitted to the delegate during the investigation. The delegate further submits that Villagren chose not to provide this information earlier despite being given ample opportunity to do so.

The appeal by Villagren includes information not previously submitted to the delegate of the Director.

FACTS

There is no dispute that:

- Esparza worked for Villagren installing carpet;
- Villagren kept no payroll records with respect to Esparza

Esparza states that he worked for Villagren from February 17, 1997 to May 2, 1997. Esparza provided records indicating the dates worked and the rate of pay. Esparza further states that he only received a total of \$860.00 for his work from Villagren.

Villagren states that Esparza “offered” to work for free to gain experience as a carpet installer. Villagren further states that the rate he paid for helpers was \$7.00 per hour and not \$10.00 per hour.

The delegate of Director investigated the records and information provided by Esparza. She was unable to compare Villagren’s records to Esparza’s records and information as Villagren conceded that he kept no records with respect to Esparza. On the basis of the investigation she determined that Villagren owed wages to Esparza and that the complaint should succeed.

ISSUE TO BE DECIDED

Villagren did not provide any corroborating evidence to the delegate of the Director with respect to the rate of pay for Esparza during the investigation by the delegate of the Director. Is Villagren entitled to introduce evidence in appeal that it failed or refused to provide to the delegate of the Director during the investigation ?

ANALYSIS

With respect to the issue of whether Villagren is entitled to introduce evidence in appeal that he failed or 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. Villagren was given an opportunity to make a submission to the delegate of the Director. Villagren chose to ignore the delegate's concerted efforts to give him the opportunity to submit any further evidence. That was his decision.

Villagren did not provide any records to the delegate of the Director during the investigation. In fact, Villagren admits that he had no records with respect to Esparza's employment. He now seeks to challenge the delegate of the Director's Determination with evidence he did not provide to the delegate of the Director prior to the Determination being made. 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.

Villagren's failure to provide records, or as is the case, keep records 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 Villagren to respond were, in my view, more than reasonable and Villagren, by his own choice and for his own reasons, refused to participate.

For all of the above reasons, I conclude that Villagren is not entitled to introduce evidence in appeal that he failed or refused to provide to the delegate of the Director during the investigation.

The Determination, however, must still explain the basis of its conclusions. Upon review of the Determination and the material relied upon by the delegate of the Director in making the Determination , I have noticed several inconsistencies.

The Determination does not take into account the statement by Esparza, *on his complaint form*, that he had received a total of \$860.00 from Villagren. The Determination further does not take into account the records provided by Esparza in which Esparza indicates that his rate of pay for the period February 17 - 28 was \$7.00 per hour, his rate of pay for the period March 1 - 20 was \$8.00 per hour and only from March 24 onwards does Esparza indicate that his wage rate was \$10.00 per hour.

I have recalculated the wages earned by Esparza to reflect the different wage rates as follows:

Earnings	= \$3,391.00
+ 4% Vac Pay	= \$ 135.64
Total	= \$3,526.64
Less wages paid	= \$ 860.00
Wages Owing	= \$2,666.64

Based on the evidence provided and on the balance of probabilities, I conclude that Villagren owes wages to Esparza in the amount of **\$2,666.64**.

Villagren has also requested that the Tribunal issue an order “granting time to pay such revised entitlement without interest, namely payments in the sum of \$200.00 payable on the 15th day of each month commencing February 15, 1998 until paid in full”.

The Tribunal does not have the jurisdiction to grant such an order as requested by Villagren. Section 115 of the *Act* sets forth the avenues available to the Tribunal in deciding an appeal and provides:

“115.(1) After considering the appeal, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or*
- (b) refer the matter back to the director.*

(2) The tribunal must make a written copy of its order with reasons available to

- (a) the person who requested the appeal, and*
- (b) the persons who under the tribunal's rules were notified of the appeal.”*

The matter of establishing a payment plan is a matter to be raised with the delegate of the Director.

With respect to the matter of interest, Section 88 (1) of the *Act* provides:

“88. (1) *If an employer fails to pay wages or another amount to an employee, the employer **must** pay interest at the prescribed rate on the wages or other amount from the earlier of*

(a) the date the employment terminates, and

(b) the date a complaint about the wages or other amount is delivered to the director to the date of payment.” (emphasis added)

There is no provision in the *Act* which gives the Tribunal the right to exercise discretion to waive the payment of interest.

The appeal by Villagren is therefore allowed to the extent as outlined above.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated January 5, 1998 be varied to be in the amount of **\$2,666.64** together with whatever interest has accrued pursuant to Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal