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-

Meratel Management Inc.

("Meratel" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	99/73
DATE OF DECISION:	April 7th, 1999

DECISION

OVERVIEW

This is an appeal filed by Steven Lee Cramer, on behalf of Meratel Management Inc. ("Meratel" or 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 January 18th, 1999 under file number 39-814 (the "Determination").

The Director's delegate determined that the employer owed its former employee, Sherry L. Gorzynski ("Gorzynski"), the sum of $6,020.21 on account of unpaid wages (including overtime) and interest. In addition, by way of the Determination a $0 penalty was levied pursuant to section 98 of the Act and section 29 of the *Employment Standards Regulation.*

I should note that the employer has not appealed an earlier determination, issued January 11th, 1999 also under file number 39-814, by which the Director levied a $500 monetary penalty for failure to produce employment records. The appeal period governing such an appeal has now expired (the appeal period expired on February 3rd, 1999 approximately one week prior to the instant appeal being filed). Thus, the issue as to whether or not the employer complied with the Director's Demand for production of employment records--an issue raised by the employer in this appeal--is now *res judicata.*

FACTS

Gorzynski was hired by the employer as a telemarketer in late April 1996 and continued her employment until she resigned on or about May 15th, 1998. At the point of her resignation (although Gorzynski characterizes her resignation as, in effect, a constructive dismissal), Gorzynski was paid by way of a commission based on sales performance. Gorzynski filed a complaint with the Employment Standards Branch, claiming unpaid wages, on June 5th, 1998.

On October 15th, 1998, the Director's delegate issued a "Demand for Employer Records" regarding Gorzynski and another employee; their payroll records were to be produced by no later than 1:00 P.M. on October 29th, 1998. In October 1998 the delegate also spoke with Mr. Steven Cramer, representing the employer. Mr. Cramer apparently indicated to the delegate that the employer did not maintain records relating to employees' working hours and that, in any event, since Ms. Gorzynski was paid by way of commission earnings, she was not entitled to any further pay regardless of the number of hours worked (needless to say, this understanding on Mr. Cramer's part is completely erroneous). In any event, Mr. Cramer undertook to deliver some records and did, in fact, subsequently deliver records showing wages paid, but not hours worked (as per the Demand), by the two employees in question.

Accordingly, a second essentially identical Demand was issued on November 12th, 1998--pursuant to this latter Demand, the requisite records were to be produced by no later than 1:00

P.M. on November 26th, 1998. As with the first Demand, the employer was advised that it risked a $500 monetary penalty if it refused to comply with the Demand; the relevant statutory and regulatory provisions were appended to the Demand.

On December 2nd, 1998 the delegate sent, by registered mail (received on December 3rd), a letter to the employer summarizing the above facts and requesting, in the penultimate paragraph of the letter:

> "When you failed to provide these records [records of hours worked], I contacted you to discuss the matter. You stated that you would provide them, but also indicated that these records were not maintained. If you have these records, would you please provide them to me at your earliest convenience and no later than **December 16, 1998**. If you have not provided the records by that date, the appropriate penalties will be applied, and the wages owed, if any, will be calculated on the basis of the records that have been provided to date." (**emphasis** in original)

The employer did not provide any further records to the delegate although the employer did submit a large number of additional records--some showing hours purportedly worked by the employer's employees--to the Tribunal along with its notice of appeal. There is absolutely no evidence before me to indicate that these latter records were ever provided to the delegate during the course of her investigation.

ISSUE TO BE DECIDED

The Director's delegate says that the present appeal ought to be dismissed because the only evidence submitted by the employer to the Tribunal is inadmissible. In support of this submission, the delegate relies on the Tribunal's decisions in *Tri-West Tractor Ltd.* (B.C.E.S.T. No. D268/96) and *Kaiser Stables Ltd.* (B.C.E.S.T. No. D058/97).

ANALYSIS

In *Tri-West Tractor* the Tribunal held that:

> "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."

In *Kaiser Stables,* as in the present case, the employer based its appeal on evidence not previously provided to the investigating officer. At the appeal hearing, an objection was raised as to whether

or not the employer could submit certain evidence. In the face of 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--the evidentiary objection was upheld.

Subsequent decisions of the Tribunal have adopted 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 present appeal ought to be dismissed on the basis of the *Kaiser Stables* principle to be well-founded. The evidence before me discloses a persistent refusal to participate in the delegate's investigation. The documents filed with the Tribunal should have been provided to the delegate 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.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$6,020.21** together with whatever further interest that may have accrued, pursuant to 88 of the *Act*, since the date of issuance.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal