

An appeal

- by -

Richard D. Melnychuk Operating as Acer Plants & Gardens
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/835 & 2000/836

DATE OF DECISION: March 23, 2001

3 and December 12. The ROE for 1999 appears to indicate that the first and last day worked in that year was February 22 and June 21. Other records, which on first glance, appears to be payroll records for Henney were also attached. There are deletions and changes to these documents.

The delegate's submissions, dated December 22, 2000 and January 18, 2001 states that the ROE and other documents were not provided to her in the course of the investigation. The December 22 submission details her attempts to obtain information from the Employer.

The Employer does not take issue with the delegate's assertions and I accept them.

From the correspondence on file, the following facts may be extracted:

- On April 6, 2000, the delegate contacted Melnychuch. He committed to providing records of Henney's employment. He did not do so.
- On May 17, 2000, the delegate sent a Demand for Employer Records. The Employer did not respond to the demand.
- On August 22, 2000, the delegate sent a letter to the Employer. The letter set out the particulars of the claim: regular wages for two days in June 1999 (\$297.00), vacation pay (\$225.81), travel expenses (\$108.00) and compensation for length of service based on a employment start date of the summer of 1991 (\$4,608.00). The latter was based on \$18.00 per hour and an average of 32 hours per week. The letter stated that the Employer had confirmed that Henney worked for him four days a week. The letter also stated:

“If you disagree that money is owed please forward all records and relevant information by September 15, 2000. Subsequent to that date I will be writing a Determination based on all available information. Failure to participate in the investigation may affect your ability to appeal the Determination.”

- On November 14, 2000, the delegate issued the Determinations: one for the wage claim and another for the penalty.

In my view this appeal turns on whether the Employer failed to cooperate with the delegate's investigation such that the Employer is barred from now arguing the merits of the Determination?

Considering all of the circumstances of the instant case, I am of the view that the Employer failed to cooperate with the delegate's investigation. The demand for records was sent to the Employer. The Tribunal will generally not allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the merits of the Determination. There is no reasonable explanation of why the Employer did not cooperate with the investigation. The Employer simply asserts that “[d]ue to extended health problems responses to [the delegate's]

requests were not dealt with quickly.” The delegate sought information and documentation with respect to the issues raised in Henney’s complaint with Melnychuck between early April and mid September, or about six months. The Determination was not issued until about a month after the expiry of the last deadline given to him. Surely, if there had been a health problem--and there is nothing else but Melnychuck’s assertion to that effect--he would have raised it with the delegate. There is nothing in the appeal to suggest that he did. In fact, as stated by the delegate, he committed to providing her with information and documentation already in April 2000. He just did not live up to his commitment. Subsequently a Demand for Employer Record was issued. Again, this was not responded to. Later, again, the delegate provided him with a further opportunity to provide information and documentation. He did not. In my view, Melnychuch had ample opportunity to provide information and documentation to support his case. The issues raised by the Employer-in particular, compensation for length of service--could have been addressed during the investigation. In my view, the Employer refused to participate in the investigation and I will not allow the Employer to raise these issues at this stage. As such, the appeal must fail.

ORDER

Pursuant to Section 115 of the Act, I order that the Determinations in this matter, dated November 14, 2000, be confirmed together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

IB S. PETERSEN

**Ib S. Petersen
Adjudicator
Employment Standards Tribunal**