

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 -

Bains Bros. Demolition & Excavating Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO.: 97/897 and 97/898

DATE OF DECISION: April 16, 1998

DECISION

OVERVIEW

This is an appeal by Bains Bros. Demolition & Excavating Ltd ("Bains") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from two Determinations (File No. 022-880), one of which bears the identification CDET:007121 and the other PDET:000693 both dated November 26, 1997 by the Director of Employment Standards (the "Director").

In Determination CDET:007121 the Director's Delegate found that Bains owed wages to an employee, Satinder Sidhu ("Sidhu") which, together with vacation pay and interest, amounted to \$2173.97. In Determination PDET:000693 the Director's Delegate imposed a penalty on Bains in the amount of \$300.00.

Bains has appealed on the grounds that Sidhu's wages were wrongly calculated by the Delegate because, although the employee had a monthly wage of \$4000.00, the contract of employment provided that if the employee only worked a part of a month he was to be paid at a rate of \$16.00 per hour. The Appellant also says that the delegate wrongly calculated the amount of work performed in the applicable time period.

Bains also appeals the penalty determination on the basis that if the substantive appeal is successful there should be no penalty.

ISSUE TO BE DECIDED

The issues to be decided in this case are whether the employee's wage was wrongly calculated and whether there should have been a penalty imposed.

FACTS

The most relevant fact in this case is that the employer, Bains, did not participate in the Delegate's investigation. The Delegate sent a letter to the employer on July 04, 1997 outlining the details of the complaint and the alleged amounts owing to Sidhu. Bains did not respond. The employer's office was telephoned on several occasions but the calls were not returned.

The Delegate made findings based on the evidence of the employee together with copies of several pay stubs and in the absence of any evidence to the contrary from the employer calculated the wages accordingly. The penalty was for failure to comply with the *Act* and the *Regulations*.

The Delegate found that Sidhu had not been paid for his last work period, December 01 to December 12, 1997. Based on a monthly salary of \$4000.00 the Delegate calculated the wages

owing as being for 10 of 20 working days in December therefore being \$2000.00 plus vacation pay and interest.

Bains now says that the employee was hired on a monthly salary of \$4000.00 but the contract of employment provided that work in any partial month was to be paid on the basis of \$16.00 per hour. Bains says that during the period December 01 to December 12, 1997 Sidhu only worked a total of 48 hours. Accordingly Sidhu's wages owing before statutory deductions would have been \$768.00.

ANALYSIS

The Appellant in this case is presenting evidence for the first time on this Appeal. Bains declined to participate in the Delegate's investigation and did not provide any records to the Delegate at the time of the investigation to support the argument that the wages should have been calculated at \$16.00 per hour. This Tribunal has held in a number of decisions that the Tribunal will not consider new evidence that could have been tendered by the employer at the investigation stage (see for example *Kaiser Stables Ltd* [1997] BC EST #D058/97; *Tri-West Tractor Ltd* [1996] BC EST #D268/96.)

The employer has given no reason for the failure to participate and there is no reason for me to depart from the previous decisions of the Tribunal on this point. The employer's evidence was available at the time and adequate opportunity to participate was given by the Delegate.

The appellant states in the appeal of the penalty determination that if the appeal of the underlying determination is unsuccessful the penalty appeal should also fail.

ORDER

I order, under Section 115 of the *Act*, that both Determinations are confirmed.

John Orr
Adjudicator
Employment Standards Tribunal