

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-

Aman Bains operating Star of India Restaurant
("Bains")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	C. L. Roberts
FILE NO:	1999/90
DATE OF DECISION:	April 12, 1999

DECISION

This is a decision based on written submissions by Harjeet S. Bains for the Star of India Restaurant.

OVERVIEW

This is an appeal by Harjeet S. Bains & Sukhjot K. Rana of the Star of India Restaurant ("Bains"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued January 22, 1999. The Director found that Bains contravened Sections 16, 18, 58 and 63 of the Act in failing to pay wages and compensation for length of service. Pursuant to Section 28 of the Act, the Director Ordered that Bains pay \$442.06 to the Director on behalf of Linda Campbell ("Campbell") and \$180.39 on behalf of Joanne Kumar ("Kumar"), for a total amount of \$622.45.

Bains contends that no unpaid wages are owed to Campbell. Bains argues that he does not know an individual named Kumar, and as she is unknown to him, she is not owed any money.

ISSUE TO BE DECIDED

Whether the Director correctly determined that wages and compensation for length of service are owed.

FACTS

Campbell and Kumar both filed complaints with the Director. Campbell claimed that she was owed unpaid wages, and that she was fired without notice or compensation for length of service. Kumar claimed unpaid wages, and alleged that she was not paid minimum wage.

The facts, as found by the Director, are as follows.

Campbell and Kumar worked for Bains as waitresses in the Star of India Restaurant. Campbell worked from August 1997 to February 10, 1998, when her employment was terminated.

Kumar worked from March 18 to 28, 1998, when she quit.

The Director's delegate investigated the complaints, and sought information from Bains. Correspondence and a Demand for Records were sent to Bains' business address on June 9, 1998. No response was received. A Penalty Determination for failing to comply with the Demand for Records was issued on July 22, 1998. That Determination was not appealed, and the Director's delegate received no response from Bains.

Having no evidence from Bains, the Director's delegate relied on the evidence provided by Campbell and Kumar, and determined that they were entitled to wages as indicated above.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. I am unable to find that, on the evidence presented, that the burden has been met.

Bains refused to participate in the Director's investigation and was issued a Penalty for failing to do so. The Director made a determination based on the evidence provided.

Bains sent copies of hours worked, payroll records and cheques issued to Campbell in support of the appeal, but denied any knowledge of Kumar.

The Tribunal has a well established principle that it will not consider new evidence that could have been provided by the employer at the investigation stage (see *Tri-west Tractor Ltd.* (1996) BC EST #D268/96 and *Kaiser Stables Ltd.* (BC EST #D058/97). As the evidence offered by Bains with respect to Campbell was available at the time of the investigation, it will not be considered

An appeal is not an opportunity for an employer who is dissatisfied with a Determination to put forward evidence it ought to have provided at the first instance. Bains blatantly ignored the Director's attempts to obtain information, and was issued a penalty determination for that failure. It is not open to him to now put forward evidence on appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated January 22, 1999 be confirmed, together with whatever further interest that may have accrued, pursuant to Section 88 of the Act, since the date of issuance.

Carol Robert
Adjudicator
Employment Standards Tribunal