

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 -

Jandy Kim

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/062

DATE OF HEARING: April 14, 2000

DATE OF DECISION: April 26, 2000

DECISION

APPEARANCES

Jandy Kim	for herself
No one	for the employer
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by the complainant, Jandy Kim, from a Determination dated January 14, 2000. In that Determination the Director’s Delegate found that the complainant was owed the sum of \$123.00 plus interest as unpaid wages. The complainant appeals on the basis that the finding does not accurately reflect the amount of unpaid wages she is properly owed.

ISSUES

1. Should private work records kept by the complainant but not produced during the investigative stage be admitted as evidence on appeal?

FACTS

The employer, Graham Crane operating as Global Crane Enterprises, operated a telemarketing business in Vancouver, B.C. The complainant worked as a telemarketer from May 10 to May 25, 1999.

In her complaint the complainant alleged that she was owed the amount of \$650.00 in back wages and \$25.00 for the May 24, 1999 statutory holiday. At the hearing the complainant testified that originally the employer had agreed to pay her \$10.00 per hour for weeks in which she worked 25 or more hours. If she did not work 25 hours in a week the wage rate was to be \$9.00 per hour. The one pay cheque that she did receive had calculated her gross amount at the minimum wage of \$7.15 an hour.

The complainant testified that she had not worked more than 25 hours in any of the weeks of her employment and that on three days she worked only three hours. She also indicated that there were two days where she reported for work but the employer did not show and therefore no work was performed. She also indicated that she reported for duty on Victoria Day and once again the employer did not show.

The complainant did receive a cheque for \$123.00. She also received a cash payment of \$20.00. That cheque along with the cash payment was compensation for 20 hours at the minimum wage of \$7.15 per hour.

The complainant specifically disputes the findings of fact in the Determination with respect to the hours she worked versus the hours she was scheduled for; her hourly rate; the fact that she was not paid for four hours on days where she reported for work but less than four hours work was provided; and, that she was not paid any time for days where she reported for work, including the Victoria Day statutory holiday, and the employer did not arrive to open the business.

It should be noted that the employer did not respond to the demands for documents that were issued by the Director's Delegate. Those Demands for Employer Records were issued on July 8, October 22 and November 22, 1999. Additionally, the employer did not attend at the hearing. The Tribunal's records indicate that the employer was sent a Notice of Hearing along with the file material by mail. None of the correspondence from the Tribunal to the employer had been returned. When the employer did not appear at the 9:00 a.m. scheduled start for the hearing I and the complainant waited for 10 minutes for him to appear. When he had not appeared I adjourned the hearing until 9:45 a.m. The Tribunal made attempts to phone the respondent only to learn that the phone number was not in service. A search of telephone listings showed that there was no phone listing for the employer or Mr. Crane personally. I therefore reconvened the hearing at 9:45 a.m. without the employer being present.

ANALYSIS

The complainant submitted a computer printout which was a reconstruction of a May 1999 calendar with the days and hours that she worked inserted in the appropriate spaces. The complainant asserted at the hearing that she had kept a day timer noting the hours that she had worked each day but that she did not present that evidence to the Director's Delegate when he was doing his investigation. She reconfirmed that she did not send this information because ". . . I did not think it was sufficient evidence and that someone could easily lie about their own work schedule." The complainant wanted to tender the pages from the day timer as evidence at the hearing on April 14, 2000.

I am not able to accept the day timer pages as "new" evidence. The evidence that the complainant sought to introduce was evidence that was available and should have been presented at the time of the initial investigation. The Tribunal has consistently refused to allow such evidence and information to be tendered and considered on appeal. See Re: *D.J.M. Holdings Ltd. (c.o.b. Romeo's Place)* BC EST #D461/97.

There are strong policy reasons for not allowing this type of evidence to be tendered at an appeal hearing. Section 112 of the *Act* is not meant to be a complete reexamination of a complaint but rather is, by its nature, a rehearing of the evidence and the underlying Determination. The Tribunal does not allow the appeal procedure to be used to make a case that should have been

given to the Delegate during the investigative process. See *Tri-West Tractor Ltd.* BC EST #D268/96; Re: *Kaiser Stables Ltd.* BC EST D058/97.

I do have some sympathy for the argument advanced by the complainant that had the employer properly cooperated with the investigation her payroll records would have been readily available. However true that may be it does not help the complainant in this case. Employee records including day timers and calendars showing dates and times worked are accepted at the investigative stage if those types of records are the best evidence that is available. In this case the information was available but the complainant failed to produce it. Consequently, the established policy of the Tribunal must prevail. The complainant is entitled to the payment of the \$123.00 plus interest accrued to date.

ORDER

The Determination dated January 14, 2000 is confirmed. The complainant is entitled to any additional interest that has accrued since that time.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal