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 -

316465 B.C. Ltd.
(the " employer ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/084

DATE OF HEARING: April 13, 2000

DATE OF DECISION: April 26, 2000

DECISION

APPEARANCES

for the employer	Partap S. Mehta
for the individuals	in person
for the Director	not appearing

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by 316465 B.C. Ltd. ("the employer") of a Determination which was issued on March 24, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that the employer had contravened Sections 57 and 58(1)(a) and (b) of the *Act* and Sections 17(b) and 35 (2) of the *Employment Standards Regulations* (the "*Regulations*") in respect of the employment of Ernest Merry ("Mr. Merry") and Lucy Merry ("Mrs. Merry"), (collectively "the complainants") ordered the employer to cease contravening and to comply with the *Act* and *Regulations* and ordered the employer to pay $11,139.51.

The employer filed this appeal on April 16, 1999 and raised several reasons for the appeal. I will summarize them:

1. The Director relied on false and incomplete information provided by the complainants to reach conclusions relating to wages and vacation pay received.

2. The Director did not provide the employer with a fair and reasonable opportunity to present their case. The employer alleged that the complainants had taken all bank and other records/accounts payments when they left their employment and, consequently, the information necessary to respond to the complaints was not readily available to provide to the Director during the investigation.

3. The Director led the employer to believe that no Determination would be made before the employer was in receipt of the missing financial information, which had been requested from the bank, was reviewed and the employer was given a chance to respond to the complaint.

4. The Director failed to take into account contradictions and inconsistencies with some of the information provided by the complainants. The employer noted that it could provide evidence to refute the claims made by the complainants.

5. The Director wrongly accepted that the complainants did not have any paid vacation time off and that they had, in fact, received in excess of their full vacation pay entitlement.

A hearing on the appeal was scheduled for August 19, 1999. In reply to the appeal, the Director raised a preliminary issue about whether the employer should be allowed to challenge the claims of the complainants and the conclusions of the Director as the "employer failed to produce or

submit any evidence, documented or otherwise, to support his position or negate/refute the complainants' claims despite all the opportunities (all those listed above) given to him". The Adjudicator addressed this matter as the first, and as it turned out, the only issue at the hearing. As a result of the conclusion reached by the Adjudicator, the appeal was dismissed and the Determination, with some modifications, was confirmed. The employer applied for reconsideration.

The reconsideration panel found that the Adjudicator should have at least considered the merits of the explanation given by the employer for failing to produce any documents during the investigation and, if the employer was to be foreclosed from challenging the conclusions in the Determination, provide a reasoned analysis for rejecting that explanation and disallowing the evidence. The reconsideration panel concluded that the failure of the Adjudicator to consider the issue "judicially" had, in effect, denied the employer a fair hearing. As a result, the application was granted, the decision of the Adjudicator set aside and the matter referred back to the Tribunal, "to re-hear the appeal including the issue as to whether all of the new evidence should be allowed".

Following the reconsideration decision, a hearing on the appeal was scheduled for March 13, 2000 in Prince George. The employer notified the Tribunal that the company's representative, Mr. Mehta, would be out of the country and unable to attend on that date. The hearing was reschedule for March 20, 2000 and was to take place by teleconference. That hearing did not proceed because the Tribunal was advised that Mr. Mehta would be in California on the scheduled hearing day. On March 29, 2000, the parties were notified that the appeal hearing would take place in Kamloops on April 13, 2000. The Notice of Hearing contained the following paragraph:

> Any records or documents that you want to be considered by the Adjudicator must be delivered to the Tribunal no later than April 7, 2000 so that they can be disclosed to the other parties.

On the same day the employer complained to the Tribunal about the venue chosen for the appeal hearing. On April 5, 2000, the Tribunal notified the employer of its reasons for the chosen venue and offered the employer the option of attending the hearing by teleconference. The employer agreed to attend by teleconference and a notice to that effect was sent to the parties.

At the commencement of the hearing, Mr. Mehta, representing the employer, complained that the complainants were present at the hearing and that he was not personally present to make submissions on behalf of the employer. He wanted the hearing adjourned and moved to Vancouver so he could be present. He argued that it was unfair that he was not there to present any documents that might not be in the material already submitted and on file, although he could not confirm that any such document existed. I advised Mr. Mehta that we would consider that concern when and if it arose, as well as whether any such documents could be introduced at this stage of the appeal, particularly in light of the Notice of Hearing, which instructed him to provide the Tribunal with any documents he wanted to be considered by April 7. The request for an adjournment and change of venue was denied and the hearing proceeded as arranged.

I should add that there was no documentation referred to by the employer during the hearing that was not in the file. As a result, the only reason Mr. Mehta had voiced about the employer attending by teleconference never materialized.

ISSUES TO BE DECIDED

There are several issues in this appeal. There is a preliminary issue about whether the employer should be allowed to introduce evidence to challenge the Determination which it failed or refused to provide to the Director during the investigation of the complaints. The substantive issues are whether the Director incorrectly calculated the complainants' wage rates and whether the Director incorrectly calculated the complainants' vacation pay entitlement.

FACTS

I have made the following findings of fact:

1. The complainants were employed by the employer as a husband/wife team to manage a 94 unit apartment complex in Prince George known as the Village Towers for a period commencing August 1, 1991 and ending November 30, 1997.

2. The complainants were entitled under the *Act* to claim vacation pay for the last 48 months of their employment. The complainants were entitled to vacation pay at 4% of total wages from November 30, 1993 to July 31, 1995 and at 6% of total wages from August 1, 1995 to November 30, 1997.

3. For the other wage claims, the complainants were limited under the *Act* to the last 24 months before the date of termination, from November 30, 1995 to November 30, 1997.

4. From January, 1994, Mr. Merry was paid $1165.00 a month: $665.00 at the beginning of each month; $250.00 mid-month and $250.00 as payment towards the rent of the complainants' apartment. Before that time he was paid $1415.00 a month: $665.00 at the beginning of each month, $500.00 mid-month and $250.00 as payment towards the rent of their apartment.

5. From January, 1994, Mrs. Merry was paid $1074.00 a month: $574.00 at the beginning of each month, $250.00 mid-month and $250.00 as payment towards the rent of their apartment. Before January, 1994 she was not paid the $250.00 mid-month.

6. The above amounts are net amounts. There was some evidence that the gross amount paid to Mrs. Merry at the middle of the month was $600.00 a month and that C.P. and U.I.C. were deducted from that amount.

7. The complainants were not issued a T4 Summary during the last six years of their employment.

8. If the employer kept payroll records for the complainants' employment, none were ever produced.

9. The employer had in its possession and control material that was relevant to the complaints, but no such material was ever provided to the Director during the investigation.

10. In early 1996, the employer set up a bank account on which Mr. Merry was a signing authority. Until his employment ended, Mr. Merry managed this account, from which he paid wages, expenses and other disbursements. Normally, the employer deposited funds in this account on a month by month basis to cover usual monthly costs, such as wages and utilities. In some cases, Mr. Merry would request that funds be deposited to cover a specific expense or disbursement and that was done. Mr. Merry provided a monthly accounting of all payments made from this account.

11. During the investigation, the employer alleged that Mr. Merry had taken all records relating to the operation of this account. The employer advised the Director that it had initiated a criminal investigation and was contemplating civil action against Mr. Merry. The letter to the R.C.M.P. outlining the criminal allegations against Mr. Merry was dated May 5, 1998. The employer also provided a copy of correspondence to the Bank of Montreal asking it to provide a copy of all its records relating to the operation of the account. The request to the bank was made on February 11, 1999 and There was a follow up letter to the bank in April, 1999 and the bank provided the requested information on May 12, 1999.

12. If it was ever commenced, the criminal investigation has now been terminated. No criminal or civil action has been taken against Mr. Merry.

13. The employer was originally contacted by the Director in January, 1998 and advised of the complaints. The Director communicated with the employer again in February, 1998, requesting payroll records for the complainants. None were provided. A formal "Demand for Employer Records" was made by the Director on March 9, 1998. The demand required records be produced by April 1, 1998. None were produced. On May 6, 1998 the employer communicated with the Director. The letter indicated that the employer took the position the complainants were independent contractors. It also alleged that the complainants had stolen the records, had abused their position of trust and had misappropriated funds. The letter concluded:

> All accounts and files pertaining to the tenure of Ernest and Lucy Merry as managers of our apartment building . . . in Prince George are currently being audited, and the situation described above has been referred to the R.C.M.P.

14. The Director communicated several more times with the employer, including a letter on January 14, 1999 that reminded the employer of the possible consequences of failing to produce any information to refute the complainants' claims. On February 1, 1999, Mr. Mehta told the Director that the company was going to initiate embezzlement charges against the complainants. He also stated that copies of cancelled cheques on the Bank of Montreal account would be available in 2 to 3 weeks, even though no request for such information had yet been made by the employer.

15. At the time the Determination was issued, March 24, 1999, the Director had not received any information from the employer.

ANALYSIS

The Preliminary Issue

In *Tri-West Tractor Ltd.*, BC EST #D268/96, the Tribunal stated:

> 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. An appeal under Section 112 is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. 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 during the investigative process.

That decision, as other decisions of the Tribunal have done, sought to balance the statutory objectives of providing fair and efficient procedures for resolving disputes under the *Act* and encouraging open communication between employers and employees against the objective of promoting the fair treatment of employers and employees. It also recognized that under the statutory scheme the Tribunal is an appeal body independent of the Director, not an investigative body. The Tribunal has neither the resources nor the inclination to investigate, or re-investigate, a complaint. The investigation of complaints is the responsibility of the Director and, to that end, the statute gives the Director the authority to compel participation in the investigation and supports that authority with penalties for non-compliance.

The basic approach of the Tribunal recognizes the objectives of the *Act*, statutory responsibilities of the respective parties involved in a complaint and the statutory scheme. Notwithstanding the basic approach, the Tribunal has also recognized that there may be circumstances where it is appropriate, as a matter of fairness, to allow parties to an appeal to introduce new evidence at the appeal stage. In *Speciality Motor Cars (1970) Ltd.*, BC EST #D570/98, the Tribunal said:

> There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and, in my view, an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason it was not initially disclosed and any prejudice to parties resulting from such nondisclosure. I do not intend the foregoing to be an exhaustive listing of all relevant criteria.

In this case, the employer alleged that the bank records of the account administered by Mr. Merry were not in its possession until after the Determination was made and that it was unfair and

unreasonable to deny the employer an opportunity to consider those records and respond to the claims made by the complainants. In its appeal, the employer states:

> I . . . had no documents to submit readily to the Industrial Relations Officer when requested by him to respond to the claims of the Merrys. Once the facts are taken into account they show such claims to be entirely unfounded.

While I have some difficulty with the lack of diligence exhibited by the employer in attempting to acquire the account records from the Bank of Montreal, there is no evidence contradicting the employer's claim that the information contained in these records were not available to them during the investigation. The employer had requested them before the Determination was issued and, at least from the employer's view, these records were critical to their ability to adequately respond to the complaints.

On balance, it is appropriate to exercise my discretion to allow these documents to be added to the record and to be considered on the appeal.

I do not reach the same conclusion about several other documents added to the appeal by the employer. In its appeal, at paragraph 1(E), the employer states:

> E. The Industrial Relations Officer arrived at his Determination about wages paid and applicable without looking into the validity and accuracy of the papers presented to him in support of the claimants' allegations. He did not take notice of the of the contradictions and inconsistencies which many of their contents clearly represent. I can present evidence showing how contradictory and inconsistent such documents are, and in particular (for example) how I paid Lucy Merry a portion of Ernest Merry's monthly wages to accommodate Mr. Merry's request to help his total family's income situation - SEE ATTACHED, #2 (authorization and examples of cheque records before and after). I can also provide evidence that refutes the Merry's distortion that they worked overtime and statutory holidays; other staff - the Assistant Caretaker, Diane Logan, and the Maintenance Man, Keith Cooper - were on hand for the express purpose of providing backup and relief to Mr. Merry in his role as Resident Caretaker.

The documents referred to above are documents that the employer had in its possession and control at the time the complaint was made and at the time the Director issued the Demand for Employer Records on March 19, 1998. They are documents the employer had in its file or cheques written on the employer's bank accounts with Bank of Montreal and Royal Bank of Canada branches in Vancouver. In addition to these documents, which were attached to the appeal, the employer added more material in the reconsideration. Once more, some of the material added were documents that were clearly in the possession and control of the employer during the investigation and at the time the demand was made. When asked to explain why these records were not provided during the investigation, Mr. Mehta provided three reasons: first, that at the time the demand was made by the Director he "only knew that the complainants had kept all the records"; second, that the investigating officer never asked him for anything; and third, that he had too much else going on at the time.

I do not accept the validity of the first explanation. It was apparent from the evidence at the appeal hearing that the employer had made no effort to determine whether or what employment records it had. Its initial response to the complaints was to take the position that the complainants were independent contractors. Within three weeks of the Determination being issued, the employer was able to provide the Tribunal with several documents from the employer's records. I do not accept that these documents were unknown to the employer before the Determination was issued. Even if they were, a reasonable degree of diligence by the employer during the investigation was required and, I am certain, would have disclosed their existence. The second reason given is simply incredible. There is nothing more to say about it. The final explanation does not provide a legitimate reason for the failure of the employer to cooperate in the investigation.

There is no indication in the explanation provided or in any other material in the file that the employer tried to comply with the Director's demand. It should be noted that any decision to allow this material after the employer has failed to comply with the Demand for Employer Records effectively condones the employer's breach of its statutory obligation under Section 46 of the *Regulations*.

This appeal demonstrates the mischief that the Tribunal has sought to avoid by adopting an approach that forecloses an appellant who has failed or refused to participate in the investigation from introducing and relying on evidence in the appeal to challenge the factual conclusions in the Determination. The documentation added to the appeal is selective, supporting only those points of disagreement made by the employer. It is possible there are still documents that remain in the possession and control of the employer that might not support those points of disagreement or, more directly, might support the position of the complainants. It is also possible that compliance with the Director's demand would have provided information that could have materially affected other aspects of the complaints. I am left to guess about that because the employer continues to be generally non-responsive to the Demand for Employer Records, revealing only what it feels is important to its position in this appeal.

As a result, I will not allow the employer to introduce or rely on documents which were in its possession and control during the investigation but which were not provided to the Director. This includes the cheques from the two company accounts in Vancouver, the Petty Cash Monthly Summaries and the January 1994 memo from Mr. Merry to Mr. Mehta.

The Substantive Issues

The employer says the Director incorrectly calculated the complainants' wage rates. The employer says that an amount of $250.00 was not included in the wage rate of Mr. Merry, but should have been, and the same $250.00 was included in the wage rate of Mrs. Merry, but should not have been. The *Act* defines wages in Section 1:

> ***"wages"*** *includes*
>
> *(a) salaries, commissions or money, paid or payable by an employer to an employee for work,*
>
> *(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,*

> *(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,*
> *(d) money required to be paid in accordance with a determination or an order of the tribunal, and*
> *(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefits, to a fund, insurer or other person,*
>
> *but does not include*
>
> *(f) gratuities,*
> *(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,*
> *(h) allowances or expenses, and*
> *(i) penalties.*

There is no dispute in this appeal that Mrs. Merry was an employee of the employer or that she was paid $1074.00 each month. The Director was entitled, for the purposes of investigating her complaint and issuing the Determination, to conclude that amount was wages under the *Act*, as it was an amount she was *"paid"* for the work she performed for the employer. Similarly, there is no dispute that the amount of wages Mr. Merry was *"paid"* each month was $1165.00. The $250.00 in question was never *"paid"* to him and there is no indication that it was ever *"payable"* to him. In my view, it would be inconsistent with the clear wording of the term *"wages"* to consider that amount to be part of his wages. The appeal on this issue is dismissed.

The second issue is whether the Director incorrectly calculated the vacation pay entitlement of the complainants. The Director has acknowledged that the vacation pay calculation in the Determination is incorrect because it failed to take into account $725.00 in vacation pay received by Mr. Merry and $400.00 in vacation pay received by Mrs Merry in 1995. Apart from that acknowledgment, the employer has not shown the vacation pay calculation for the complainants was incorrect.

None of the bank records received by the employer from the Bank of Montreal account administered by Mr. Merry support the arguments raised by the employer in this appeal. Mr. Mehta was unable to direct me to anything in these records that showed the complainants had received vacation pay in an amount greater than amount found in the Determination to have received[1]. The appeal on this issue is also dismissed.

[1] In the appeal submission, the employer argued that material provided by the complainants showed they had received some vacation pay in 1995 which the Director had not included in the Determination calculations. The Director did make an adjustment to the complainants' vacation pay entitlement based on that submission and that adjustment has been recognized in this appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated March 24, 1999 be varied to show the total amount owing to the complainants as $10,014.51, together with whatever interest has accrued on that amount under Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal