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 -

Coastline Cleaning Services Ltd.
(the " Employer ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/086

DATE OF HEARING: June 1, 2000

DATE OF DECISION: June 6, 2000

DECISION

APPEARANCE

Ms. Donna Little on behalf of herself

This is an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on January 24, 2000. The Determination found that the Employer owed Ms. Little $3,435.54 on account of overtime wages. The Employer says that the Determination is wrong.

A hearing was scheduled for June 1, 2000. The Employer, who is the appellant in this matter, has the burden to prove the Determination wrong. The Employer says that it told Ms. Little not to work overtime. In its appeal submission, the Employer also says it never saw the overtime records presented to the delegate by Ms.Little. The delegate stated in the Determination

> "... it is the employer's statutory duty to keep a record of the daily hours of work incurred by the employees. To allow the employer to rebut Ms. Little's claim for overtime without any supporting (sic) would encourage other unscrupulous employer (sic) to do the same."

In my view, the delegate erred. It is improper to deny a party, in this case the Employer, an opportunity to dispute a claim for overtime simply because the party does not have documentary evidence to corroborate. In my view, the delegate must make a *bona fide* assessment of the relative merits of the parties' claim and make a determination based on that. In some cases this involves an assessment of the credibility of the parties and documents presented. To deny the Employer an opportunity to dispute the records presented by the employee – because it "would encourage other unscrupulous employers do to the same"– not only contravenes Section 77 of the *Act*, which provides that the Director must make "reasonable efforts to give a person under investigation an opportunity to respond", it is, as well, a serious denial of natural justice because it indicates that the delegate did not approach his assessment of the evidence in a *bona fide* manner. The fact that an employer does not have the records required under the *Act*, does not necessarily mean that the dispute over hours must be resolved in favour of the employee. I agree with the Tribunal's comments in *Queen Charlotte Lodge Ltd.*, BC EST #D353/99, that in situations where the employer has failed to keep or produce records they are required to keep, the Director must decide the number of hours worked and provide reasons for the decision.

However, in this case, although duly notified, the appellant Employer did not appear at the hearing. Ms. Little appeared and confirmed that she was owed overtime wages and that the records provided by her to the delegate were correct. In the result, even if I conclude, as I do that the delegate erred, I would still dismiss the appeal. The dispute between the parties boils down to the whether or not Ms. Little is owed overtime wages. That is a factual dispute. With only Ms. Little appearing before me in a position to provide evidence under oath or affirmation, and considering the burden on the appellant, I resolve the factual issue in favour of her and would dismiss the appeal.

In any event, I consider that the appeal has been abandoned and dismiss it.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated January 24, 2000 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal