

**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-

420919 B.C. Limited Operating Hog in The Pound  
("Hog in The Pound")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** C. L. Roberts

**FILE NO:** 97/85

**DATE OF HEARING:** June 12, 1997

**DATE OF DECISION:** June 13, 1997

**DECISION**

**APPEARANCES**

Clare E. Sargent

For Hog in The Pound

**OVERVIEW**

This is an appeal by 420919 B.C. Limited Operating Hog in The Pound ("Hog in The Pound"), 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 16, 1997 . The Director found that Hog in The Pound contravened Sections 17, 45, 46 and 58 of the *Act* in failing to pay Palausa Forma ("Forma") statutory holiday pay, and vacation pay on those wages.

Hog in The Pound claims that Forma was paid time and one half for the statutory holidays, and while conceding that some wages are owed due to clerical errors, contends that the amount is significantly less than that ordered by the Director.

**ISSUE TO BE DECIDED**

Whether the Director correctly determined that Forma was owed vacation pay and holiday pay in the amount of \$758.31.

**FACTS**

Forma worked for Hog in The Pound, for the purposes of this determination, from May 1995 until August 1996. The Director found that Forma was paid vacation pay for that time period.

During the investigation, the Director sought production of the employer records for Forma. Hog in The Pound provided a record of earnings, but not the daily time records or payroll records for this period. Upon a review of those records, the Director concluded that Hog in The Pound paid straight time, rather than 1 1/2 times the regular wage, as required under the *Act*. The Director relied upon the records available to him in arriving at his determination.

Upon filing the appeal, Hog in The Pound submitted copies of pay stubs for June 1995 to August 1996 and daily payroll records. Hog in The Pound argued that the Director erred in failing to correctly analyze the records submitted, and contended that no statutory holiday pay, with the exception of amounts conceded due to clerical errors, was due to Forma.

Hog in The Pound acknowledges owing Forma statutory pay for 11 hours on July 1, 1995, at a rate of \$6.50 per hour, and for 3 hours on April 5, 1996 at a rate of \$7.00 per hour.

Hog in The Pound stated that pay stubs were provided to the Director upon request. Some time later, the Director sought the production of additional documents. Ms. Sargent, for Hog in The Pound, claims that she attempted to reach the Director on three separate occasions after receiving the demand in order to determine precisely what records were needed. She states that none of her calls were returned, and that she never heard from the Director until the Determination was issued several weeks later.

Hog in The Pound argued that the requests for information were complied with to the best of their ability, and that despite further efforts to determine what additional documentation was required, no response was received.

## **ANALYSIS**

Appeals from a determination may, in certain circumstances, be a *de novo* hearing where it can be established that certain facts were not put before the Director, or where it is alleged those facts were misinterpreted. In this appeal, it is claimed that documents provided to the Director were misinterpreted, possibly because the information was incomplete.

I note that Forma provided no evidence to the Director upon filing his complaint. All of the documentation relied upon by the Director was provided by Hog in The Pound. Where the complainant fails to provide any documentary evidence whatsoever, every effort should be made to ensure that the documentation received from the other party, typically the Employer, is complete.

Previous Tribunal decisions have determined that where an employer refuses to participate in the Director's investigation, no appeal from that decision will lie (see *Kaiser Stables Ltd.* BC EST #D058/97). In this instance, the employer did provide records, albeit incomplete ones. However, I accept the evidence of Ms. Sargent, who states that she called the Director on three occasions after receiving a request for proper documents to determine what those documents were, having already provided a copy of Forma's pay stubs, but that none of those telephone calls were returned.

Hog in The Pound could have saved itself time and costs in providing complete information to the Director when it was initially requested. However, I note that the employer did not refuse to comply, or show any intransigence about providing those records. In fact, Hog in The Pound made reasonable efforts to clarify precisely what records would be required. Ms. Sargent's evidence was that the Director initially sought only pay stubs, which were provided. A subsequent request was made for further information, which is where the communication between the parties apparently broke down.

With the benefit of this additional documentation, I am satisfied that the Determination was incorrect.

**ORDER**

I order, pursuant to Section 115 of the *Act*, that the matter be remitted to the Director for reconsideration.

Carol Roberts  
Adjudicator  
Employment Standards Tribunal