

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 -

Son Builders Ltd.
(the “Employer”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE No.: 2000/201

DATE OF DECISION: July 24, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Son Builders Ltd. (the “Employer”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 28, 2000. The Determination found that the Employer owed ten former employees a total of \$15,556.05 for unpaid wages, overtime pay, living-out/meal allowances, vacation pay and interest. The Determination also imposed a zero dollar penalty on the Employer. The Director’s delegate noted in the Determination that the Employer had not participated in the investigation of complaints filed by former employees.

The Employer appealed the Determination on the grounds that it had paid each of the complainants all amounts owed to them.

ISSUE TO BE DECIDED

The issue to be decided in this case was whether the Employer should be allowed to introduce evidence in support of its appeal previously withheld from the Director’s delegate.

FACTS

The Employer is a construction company. A number of former employees filed complaints of nonpayment of wages, living-out/meal allowances and overtime. Initially, seven former employees filed complaints. Subsequently, three more former employees also filed complaints, all within the time limits in the *Act*. The Director’s delegate wrote to Mr. Rio McNeil (“McNeil”), the sole director of the Employer, on January 25, 2000 advising him of the complaints and requesting that he contact the delegate to discuss the complaints. The letter was sent by mail and facsimile. The delegate did not receive a reply.

The delegate sent a Demand for Employer Records to the Employer on February 4, 2000 by letter and facsimile. Again, the Employer did not reply.

In response to a complaint filed in Cranbrook Office of the Employment Standards Branch (the “Branch”), a representative of the Branch telephoned the Employer on January 20, 2000 and was told that the Employer would look into the matter and call back. When the Branch did not receive a reply, a member of the staff followed up the initial call on January 24, 2000. In response to another telephone call, the Employer agreed on January 25, 2000 to send a cheque to the Branch to resolve the complaint. The Branch did not receive the cheque. A representative of the Branch in the Cranbrook office wrote to the Employer on February 25, 2000 requesting that the Employer settle the complaint or present reasons to support a position that the complaint was incorrect. The Branch did not receive a reply.

On February 21, 2000, McNeil came to the Kamloops office of the Branch unannounced. The Director’s delegate assigned to the case was not available to meet with him. McNeil left a

Calgary telephone number at which he could be reached. When the delegate called that number, he was informed that it was not in use.

The Director's delegate examined the complaints from the 10 former employees and found them credible. In light of the Employer's unwillingness to cooperate in the investigation, the Determination was issued in favour of the complainants. The Determination found that the Employer had violated Parts 3, 4, 5 and 7 of the *Act*, in particular, Sections 18, 20, 21, 40, 44, 45, 46 and 58 of the *Act*.

The Employer appealed the Determination, stating that the complainants had received their "holiday" pay, i.e., annual vacation. The Employer further argued that living-out/meal allowances were not part of the complainants' contract of employment, but were a "company perk on performance and responsibilities," and had been rescinded because the complainants had charged personal expenses to their hotel rooms. Payroll records were attached to the appeal for each of the complainants indicating that they had been paid in full for their work.

ANALYSIS

Section 2(d) of the *Act* states that one purpose of the *Act* is to:

Provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.

The legislative scheme of the *Act* is that the Director's delegate performs a quasi-judicial function in investigating a complaint and reaching a conclusion that a contravention of the *Act* has or has not occurred. The subject of a complaint must cooperate with a delegate's investigation of the complaint.

The Tribunal has held consistently that an appellant who has refused to participate in the investigation of a complaint cannot re-hear a case on appeal based on information that should have been provided to the delegate. See *Re Kaiser Stables Ltd.* BC EST #D058/97, *Re Tri West Tractor*, BC EST #D268/96.

This case falls squarely under the rule stated above. The Director's delegate carefully documented his efforts to contact the Employer. The Employer refused to cooperate, so the delegate was required to issue a Determination based on the evidence available.

The records submitted by the Employer with its appeal did not meet the requirements of Section 28 of the *Act*. Moreover, on their face, the records were not convincing. Although the pay periods covered several months, the records appear to have been written with the same pen or pencil.

ORDER

For these reasons, the Determination of February 28, 2000 is confirmed. The Employer is obligated to pay the complainants named in the Determination a total \$15,556.05, plus any additional interest due under Section 88 of the *Act* from the date of the Determination.

Mark Thompson
Adjudicator
Employment Standards Tribunal