Employment Standards TRIBUNAL

An appeal

- by -

H & H Logging Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** W. Grant Sheard

**FILE No.:** 2001/209

**DATE OF DECISION:** June 7, 2001

# DECISION

## APPEARANCES:

| | |
|---|---|
| David Herbert | on behalf of the corporate employer/appellant |
| Alan Boersma | the employee on his own behalf |
| K.J. (Ken) MacLean | on behalf of the Director |

## OVERVIEW

This is an appeal by H & H Logging Ltd. (the Employer), pursuant to Section 112 of the Employment Standards *Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on February 15, 2001. In this appeal the Employer claims that the Employee was not an Employee such that no wages are due or, in the alternative, the Employee was employed by some other entity or person, or in further alternative, that the Employee was paid in full.

## ISSUE

What use can be made of new evidence presented for the first time by the Employer at this appeal?

## THE FACTS

The corporate Employer, H & H Logging Ltd., operates a logging business for which the Director's delegate found that Mr. Boersma worked from June 19, 2000 to September 20, 2000 as a skidder operator at the rate of $18.00 per hour.

The Employee filed a complaint within the time period allowed under the *Act*. The Director's delegate notes in the determination of February 15, 2001 that "the Employer has failed to respond to the writer's attempts to contact the Employer (see attachment number 1). The Employer has failed to participate in the investigation of this complaint. The Employer has failed to provide payroll per records my demand for same, (see attachment number 2)." The attachments referred to in the Determination are a letter from the Director's delegate dated November 21, 2000 addressed to the attention of Edward David Herbert and Scott Herbert at H & H Logging Ltd., in Chase, B.C. and a "Demand for Employer's Records" dated December 6, 2000 directed to H & H Logging Ltd., in Chase B.C. The letter of December 21, 2000 alerts the Employer of the investigation and requests a written response to the allegations of the complainant. The letter also advises that, if they wish to dispute the allegations, to do so in writing along with the provision of copies of payroll records and any other supporting

documentation regarding the complaint. The Director's delegate requested a response by December 5, 2000. The Demand for Employer Records alerts the Employer to Section 85 of the *Employment Standards Act* and requires disclosure, production and delivery of employment records for Mr. Boersma by Thursday, December 21, 2000. That demand goes on to alert the Employer that, "failure to comply with a record requirement may result in a $500.00 penalty for each contravention as stated in section 28 of the regulations. See attached sheet".

The Employer did not respond and the Director issued a Determination on February 15, 2001 in favour of the Employee, Alan Boersma, against the corporate Employer, H & H Logging Ltd., for unpaid wages and annual vacation pay in the sum of $1, 330.70.

**ARGUMENT**

*The Appellant/Corporate Employer/H & H Logging Ltd.'s Position*

The appellant filed an appeal form on March 12, 2001 alleging an error in facts in the Determination, that facts were not considered in the Determination and seeking a cancellation of the determination. The appellant elaborated on the basis for the appeal in a written submission contained in a letter dated March 10, 2001 from David Herbert submitted along with the appeal form.

In that written submission, Mr. Herbert submits that Mr. Boersma was in fact employed under a contract with a different entity ("Aggressive Logging owner Ron Hagel") and that Mr. Boersma was self employed. Mr. Herbert submitted copies of invoices, a witness statement, a daily journal, a labour standards calculation sheet, and a room and board-meals record in further support of his submission. In a nutshell, Mr. Herbert submits that Mr. Boersma is not owed anything. Mr. Herbert further states that Mr. Boersma had agreed to drop his complaint with the Director and that "during this time we were working away from home a great distance which unabled us to provide information requested by the Director" (*sic*).

*Mr. Boersma (the Employee's) Position*

In a written submission dated March 27, 2001 Mr. Boersma maintains that he never worked for Ron Hagel and reiterates that he worked for Scott Herbert (of H & H Logging Ltd.). He reiterates the time worked, wage rate, and annual vacation pay due. Mr. Boersma does not acknowledge agreeing to drop his complaint with the Director and alleges that he was confronted by representatives of the corporate Employer who tried to get him to "take the labour board off their backs". He further states that David Herbert phoned him one night and tried to get him to phone the labour board and stop proceedings.

*The Director's Position*

In a written submission dated March 28, 2001, the Director's delegate, K.J. (Ken) MacLean states that, as the Employer failed to respond to his attempts to contact the Employer and to

participate in the investigation or provide payroll records as demanded, this appeal should be dismissed.

**ANALYSIS**

The issue of the use of new evidence at appeal which was not presented to the Delegate at the investigation of the complaint has been considered several times by this Tribunal. Indeed, in the case of *Specialty Motor Cars (1970) Ltd.,* BC EST #D570/98 there is reference to the "Tri-West/Kaiser Stables Rule". This issue was decided in *Tri-West Tractor Ltd.,* BC EST #D268/96 and *Kaiser Stables Ltd.,* BC EST #D058/97. In *Tri-West (supra),* the adjudicator there held evidence inadmissible because:

> "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…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 in the investigative process."

Notwithstanding this exclusionary rule, the adjudicator in *Specialty Motors* (supra) held as follows:

> "However, it should also be recognized that the *Kaiser Stables* principal relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigation officer. 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 why 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 the present case therefore, in addition to the failure to disclose the evidence at the investigative stage, the admissibility of this evidence also turns on other factors such as the importance of the evidence, the reason it was not disclosed and any prejudice to the parties from non-disclosure.

I find that the evidence is not important in that it is of little assistance. The invoices, daily journal, and other documentation do not establish or present clear evidence to suggest that Mr. Boersma was in fact a contractor rather than an Employee. I also find that no good reason has

been advanced for the failure to produce these documents at the investigative stage. It does not appear that any attempt whatsoever was made to contact the Delegate and advise him of any difficulty in responding in a timely fashion. In this day of telephone, fax, and electronic mail it is difficult to conceive that such a request could not have been communicated, notwithstanding any great distance between the appellant, its documentation and the delegate. Although Mr. Boersma may not be prejudiced in the sense that he could respond to this material in written submissions in this appeal, there is a general prejudice in not having the opportunity to respond to and investigate this material to resolve this matter at the earliest opportunity.

I find that the new material filed ought not to be allowed in deciding this appeal. The burden is on the Appellant to show, on a balance of probabilities that the Determination under appeal ought to be varied or cancelled (see, for example, *Arbutus Environmental Services,* EST No. D002/96 and *Kearns,* EST No. D200/96). That burden has not been met.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated February 15, 2001 and filed under number ER102460, be confirmed.

**W. Grant Sheard**
**Adjudicator**
**Employment Standards Tribunal**