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 -

Mohammad Golchehreh
operating as Falafel Garden
(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/272

DECISION DATE: July 21, 1999

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DECISION

SUBMISSIONS

Mr. Mohammad Golchehreh ("Golchehreh")	on behalf of the Employer
Ms. Roya Amjadi ("Amjadi")	on behalf of the herself
Mr. Nupur Talwar	on behalf of the Director

FACTS AND ANALYSIS

This is an appeal by 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 April 15, 1999 which found that Amjadi was entitled to $1,446.84 on account of regular wages, overtime wages and vacation pay. The Determination also includes a "$0.00" penalty.

According to the Determination, Amjadi was employed by Falafel Garden from February 16 to March 25, 1998 as a cook. She alleged that she did not get paid during all of her employment. She provided records of her hours worked to the delegate.

The Determination states:

> "On August 26,1998 a letter was sent to the employer's address advising him of a complaint against his company (see attachment 2). No reply was received.
>
> On September 29, 1998 a Demand for Employer Records was issued. It was necessary to issue a Demand for Employer Records as Amjadi alleged that she did not receive wages and the records were required to determine what hours had been worked and what wages had been paid. The Demands were returned "unclaimed" (see attachment 3).
>
> As the employer never produced records or replied to the Demand for Employer Records a Penalty Determination was issued on March 5, 1999 for $500.00."

In the result, the delegate relied on the information provided by Amjadi.

In his appeal, the Employer claims that the Determination is wrong. He argues, among others, that Amjadi was paid in cash and questions the hours worked.

In a submission dated May 18, 1999, the delegate argues that the facts are as set out in the Determination. Moreover, the Employer did not participate in the investigation, failed to produce records, and should not now be permitted to challenge the Determination. He also notes that the Employer has "still not provided any records to suggest that the complainant (Amjadi) has been paid for the hours she worked".

In a May 26 response to a submission from Amjadi, the Employer explains that the Falafel garden was sold on June 1, 1998. (Attached to the response, as well, is a copy of an agreement dated June 1, 1998 transferring the business of the Employer.) That is the reason he did not respond to the delegate August 26 request for information and the reason the Demand for Employer Records was returned "unclaimed". Attached to the response is a document setting out the days, dates, times, and hours worked between February 16 and March 25, 1998. According to this document Amjadi worked a total of 131.35 hours for $921.50 and was paid $920.00, mostly in cash. (I note that there is no explanation of the origin of this document.)

The issue is whether the Determination should be varied, confirmed or cancelled when the Employer refused to participate in the investigation. On this point I agree with my colleagues in *Kaiser Stables*, BCEST #D058/97, and numerous other cases, that the Tribunal will generally not allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the merits of the Determination. The issues raised by the Employer--including the claim that Amjadi had been paid in cash for the time worked --could have been addressed during the investigation.

Section 122 of the *Act* reads, in part:

> 122. (1) A determination or demand that is required to be served on a person under this Act is deemed to have been served if
>
> (a) served on the person, or
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> (b) sent by registered mail to the person's last known address.

In this case the request for information and Demand for Employer Records were served in accordance with the *Act.* The correspondence was addressed to the Employer's business address. That is sufficient. Moreover, there is no explanation of the circumstances of the Employer's alleged failure to receive it mail. Did the Employer have its mail forwarded? What about other business mail sent to the address? What arrangements did the Employer have to receive its mail? In my view, the Employer refused to participate in the investigation and I will not allow the Employer to raise the merits of the complaint at this stage and, therefore, the appeal must fail.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated April 15, 1999 be confirmed.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal