

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 -

Gustelas Holdings Ltd.
("Gustelas")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 97/416

DATE OF DECISION: July 28, 1997

DECISION

OVERVIEW

This is an appeal by Gustelas Holdings Ltd. ("Gustelas"), under Section 112 of the *Employment Standards Act* (the "Act"), against a Determination which was issued by a delegate of the Director of Employment Standards on May 16, 1997. Gustelas alleges that the delegate of the Director erred in the Determination by basing calculations on information which was not an accurate reflection of the facts. Gustelas further alleges that the delegate failed to take into account an agreement made with the employees in regard to training. The Director's delegate concluded that wages, annual vacation and daily guarantees in the total amount of \$1,400.00 were owed to three former employees, Aaron O'Flannagan ("O'Flannagan"), Karen Kushnir ("Kushnir") and Audrey Pineau ("Pineau").

A preliminary matter arises in this case. The complainants filed with the Employment Standards Branch on April 22, May 5 and May 9, 1997. The Employer's appeal is based on evidence he did not provide the delegate of the Director prior to the Determination being made on May 16, 1997. I must first decide whether the Employer is entitled to put such evidence before the Tribunal.

FACTS

O'Flannagan, Kushnir and Pineau sought payment for time worked, attending training sessions, staff meetings, minimum daily wage guarantees and the appropriate vacation pay.

The delegate of the Director advises that he served Gustelas with a 'Demand for Employer Records' pursuant to Section 85 of the *Act* and Gustelas did not produce those records as requested.

The delegate of the Director further advises that he conducted his investigation based on the records and information provided by O'Flannagan, Kushnir and Pineau. He was unable to compare the Employer's records to those of the 3 former employees. On the basis of his investigation, the delegate of the Director determined that Gustelas had improperly applied the *Act* and that the complaints should succeed.

The delegate of the Director performed the calculation of wages owing by using the information provided by O'Flannagan, Kushnir and Pineau.

The delegate of the Director issued a Determination on May 16, 1997 covering each of the 3 former employees.

Gustelas argues in this appeal that the calculations of the delegate of the Director were based on wrong information and *now* provides information which they allege supports this claim. Gustelas *now* also argues that there was an agreement with these 3 former employees with respect to “voluntary” attendance at training sessions and staff meetings. Gustelas further argues that their former manager failed to notify them in regard to the ‘Demand for Employer Records’.

ISSUE TO BE DECIDED

Gustelas refused to provide records in response to the ‘Demand for Employer Records’. Is Gustelas entitled to introduce evidence in appeal that it refused to provide to the delegate of the Director?

ANALYSIS

The Tribunal addressed similar situations to the case at hand in *Tri-West Tractor Ltd.* (1996) BC EST No. D268/96 and *Kaiser Stables Ltd.*(1997) BC EST No. D058/97. Those employers did not submit certain information to the delegate of the Director during the investigation. On appeal, the employers sought to rely upon that information. In *Tri-West Tractor Ltd.* the employer argued that the information had been given to its lawyer on the understanding that the information would be passed on to the Director, however, its lawyer had not passed the information on to the Director.

The Tribunal refused to see a distinction between the lawyer and the client in these circumstances, Most relevant to this case, however, the Tribunal would not allow an appellant who refused to participate in the Director’s investigation, to file an appeal on the merits of the determination. To grant standing on appeal would be entirely at odds with the quasi-judicial nature of the investigation and determination.

Gustelas attempts to explain away its failure to provide records by alleging that the former manager did not bring the ‘Demand for Employer Records’ to their attention. The manager was an agent of Gustelas, therefore, the failure to provide records is Gustelas’ failure. Gustelas did not provide employer records as requested by the delegate of the Director. Gustelas now seeks to challenge the Determination with evidence it acknowledged it did not provide to the delegate of the Director as requested. As set forth in *Tri-West Tractor Ltd.* and *Kaiser Stables Ltd.* the Tribunal will not allow an appellant to completely ignore the determination’s investigation and then appeal its conclusion.

I conclude that Gustelas is not entitled to introduce evidence in appeal that it refused to provide to the delegate of the Director during the investigation.

The Determination, however, must still explain the basis of its conclusions. I am satisfied that it does that. The Determination sets out the time spent in training sessions and staff meetings for all 3 former employees. The delegate of the Director's finding of failure to pay the minimum daily guarantees is established in those documents.

For all of the above reasons, Gustelas' appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I confirm the Determination in the amount of \$1,400.00 together with interest calculated pursuant to Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal