

**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 -

Schellenberg Construction Ltd.  
("Schellenberg")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 97/459

**DATE OF DECISION:** July 28, 1997

## DECISION

### OVERVIEW

This is an appeal by Schellenberg Construction Ltd. (“Schellenberg”), under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination dated May 23, 1997 which was issued by a delegate of the Director of Employment Standards (the “Director”). Schellenberg alleges that the delegate of the Director erred in the Determination by concluding that Wayne D. Hunt (“Hunt”) was entitled to compensation for length of service. The Director’s delegate concluded that Hunt was entitled to compensation for length of service in the amount of \$5,366.40 plus interest for a total of \$5,507.84.

A preliminary matter arises in this case. Hunt filed a complaint with the Employment Standards Branch on November 12, 1996 alleging that he was entitled to compensation for length of service. Schellenberg’s appeal is based on evidence he did not provide the delegate of the Director prior to the Determination being made on May 23, 1997. I must first decide whether Schellenberg is entitled to put such evidence before the Tribunal.

### ISSUE TO BE DECIDED

Schellenberg failed to provide records in response to 2 separate ‘Demand for Employer Records’. Is Schellenberg entitled to introduce evidence in appeal that it failed to provide to the delegate of the Director?

### FACTS

The delegate of the Director advises that he served Schellenberg with a ‘Demand for Employer Records’ pursuant to Section 85 of the *Act* on February 24, 1997 and Schellenberg did not produce those records as requested.

On March 18, 1997 the delegate of the Director received a letter from C.J. (Kip) Wilson, Barrister & Solicitor, who indicated he represented Schellenberg and that he would obtain the necessary records and forward them in due course. No records were provided by either Schellenberg or his lawyer.

On April 30, 1997 a second ‘Demand for Employer Records’ was sent to both Schellenberg and his lawyer. No records were provided by either Schellenberg or his lawyer in response to this second demand.

The delegate of the Director further advises that he conducted his investigation based on the records and information provided by Hunt. He was unable to compare the Employer's records to those of the former employee. On the basis of his investigation, the delegate of the Director determined that Schellenberg owed compensation to Hunt for length of service and that the complaint should succeed.

The delegate of the Director performed the calculation of compensation owing by using the information provided by Hunt.

The delegate of the Director issued a Determination on May 23, 1997 for the amount of \$5,160.00 plus vacation pay and interest for a total of \$5,507.84.

## **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.

Neither Schellenberg or his lawyer provided records which were requested on 2 separate occasions. Schellenberg now seeks to challenge the Determination with evidence he 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 Schellenberg is not entitled to introduce evidence in appeal that it failed 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 length of Hunt's service with Schellenberg and establishes the amount of compensation owing to Hunt.

There is however, an error in the amount of vacation pay calculated as being owing. The vacation pay was calculated at the rate of 4% when, with Hunt's length of service being in excess of 6 years, the vacation pay calculation should have been at the rate of 6%. The revised calculation of vacation pay owing is therefore \$5,160.00 + (6%) \$309.60 for a total of **\$5,496.60 plus interest.**

I conclude that Schellenberg owes Hunt compensation for length of service plus vacation pay in the total amount of **\$5,496.60** plus interest.

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

### **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 23, 1997 be varied to be in the amount of **\$5,496.60** together with interest calculated pursuant to Section 88 of the *Act*. In all other respects, the Determination is confirmed.

**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**