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 -

Changing Times Hair Design Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No.: 2000/365

DATE OF DECISION: August 18, 2000

DECISION

OVERVIEW

This is an appeal by Changing Times Hair Design Ltd.("Changing Times" or "the employer") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination numbered ER# 048106 dated May 8, 2000 by the Director of Employment Standards (the "Director").

Changing Times operates beauty salons and employed Leah Dawonik ("Dawonik") as a receptionist from December 1998 to July 1999. On July 25th Dawonik filed a complaint alleging unpaid overtime. During the investigation by the Director, Changing Times was requested to provide all of the relevant documentation. Changing Times provided time sheets which they acknowledged were not necessarily accurate. Dawonik provided her own records from a day-timer.

The Director's delegate investigated the matter and determined that, in light of the acknowledged unreliability of the employer's records that Dawonik's records would be preferred. He found that the employer owed Dawonik $887.66.

Changing Times appeals from the Determination on the basis that certain computer records would show that Dawonik did not work the hours claimed by her. These computer records were not previously disclosed to the Director.

ANALYSIS

This appeal turns solely on the admissibility of the computer records for without them there is nothing new to warrant granting any sort of remedy on this appeal.

This Tribunal has considered on many occasions the admissibility of records at an appeal when such records have not been produced during the investigative stage of the process. Generally, the Tribunal will not admit such records where the employer, for some reason, chose not to provide the evidence to the delegate of the Director. In this case the employer chose not to provide the information to the delegate of the Director during the investigation. It now seeks to challenge the delegate of the Director's determination with that information it acknowledges it did not previously provide. The Tribunal will generally not allow that to occur. As reviewed in *BWI Business World Incorporated*, *Tri-West Tractor Ltd.* and *Kaiser Stables Ltd.*, the Tribunal will not allow an employer to either completely ignore the determination's investigation or to withhold certain information and then appeal the determination's conclusions.

The *Tri-West* and *Kaiser Stables* decisions were considered in a 1998 adjudication by adjudicator Thornicroft: *Speciality Motor Cars (1970) Ltd.* (1999) BCEST #D570/98. In *Speciality Motors* Thornicroft noted that the key issue was that in the previous decisions there had been a consistent and wilful refusal by the employer to participate in the delegate's investigation. Thornicroft notes that subsequent decisions of the Tribunal had adopted the approach that in the face of a

concerted refusal to participate in an investigation the employer will not be permitted to rely on evidence that was available and that could have been presented to the investigating officer. He goes on, however, to reject any suggestion that evidence is absolutely inadmissible merely because it was not provided to the investigating officer. He further notes that:

> "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 non-disclosure. I do not intend the foregoing to be an exhaustive listing of all relevant criteria"

The *Speciality Motors* decision followed a number of other decisions which had indicated that there had to be some degree of latitude in the acceptance of evidence at an appeal even if it had not been submitted previously. See for example: *Codfathers Fish and Chips Ltd.* (1996) BC EST #D323/96; *Freemart Financial Services Inc.* (1997) BC EST #D104/97; *Re: Aristocrat Cleaners* (1998) BC EST #D370/98. In *Aristocrat* the records sought to be entered on the appeal had been in the possession and control of a third party and therefore it had been difficult for the employer to acquire them prior to the determination. They were admitted on appeal.

The primary purposes of the *Act* set out in Section 2 include the need to promote the fair treatment of employers and employees and to provide fair and efficient procedures for resolving disputes. I am persuaded that the approach set-out in *Speciality Motors* meets those requirements. It is open to a party who has not produced records or other evidence to persuade the Tribunal that there are legitimate reasons why they were not initially disclosed. The adjudicator should consider those reasons carefully and fairly, weighing such factors as the importance of the evidence, the difficulty involved in acquiring it, who had the custody or control of the evidence, the diligence of the party in acquiring it, whether there was any deliberate or wilful refusal to co-operate in the investigation, the prompt disclosure of the evidence once acquired, and any prejudice to other parties resulting from the earlier failure to produce it.

In this case the records appear to have been in the custody and control of the employer at all times. It is certainly important evidence but it was always easily available to the employer. The employer has offered no explanation as to why the computer records were not previously produced. I can only conclude that the failure to produce the computer records was a choice made by the employer at the time.

I agree with the submission of the Director's delegate that to allow the production of those records at this stage would be contrary to the purpose of the *Act* to provide an efficient procedure for resolving disputes. It is the employer's obligation to keep full and accurate records of the hours worked by employees and to produce those records on demand by the Director's office. It would be contrary to the purposes of the *Act* to allow the employer to pick and choose which records to produce during the investigation and then to produce different records on the appeal, except under the circumstances outlined above.

I am not prepared to admit the computer records as evidence on this appeal. Without such records there is no other substantial evidence which would persuade me that the determination is

wrong. As the burden of persuasion is on the appellant I must dismiss the appeal and confirm the determination.

ORDER

I order, under section 115 of the *Act*, that the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal