

**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 -

Mark Twain Enterprises Ltd.  
Operating as Mark Twain Restaurant  
("Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Richard S. Longpre

**FILE NO.:** 1999/369

**DATE OF DECISION:** August 18, 1999

**DECISION**

**WRITTEN SUBMISSIONS**

Rudi G. Gellert	on behalf of the Employer
William Sui	on behalf of the Employer
Jennifer D. McNaught	on behalf of Tom McLaughlin

**OVERVIEW**

This is an application filed by the Employer pursuant to Section 112 of the *Employment Standards Act*. The Employer is seeking review of a Determination, dated May 21, 1999, by the delegate on behalf of the Director of the Employment Standards Branch, ER File 028-704.

The Determination dealt with complaints by former employees of the Employer: Tom McLaughlin, Peter Muir and Tracey Indra. The delegate concluded that the Employer owed McLaughlin \$33,242.92 in wages, vacation pay, compensation for length of service and interest. Muir was owed \$1,293.35 in regular and overtime wages, vacation pay and interest. Indra was owed \$36.74 in regular wages and interest.

On June 14, 1999, the Employer appealed the Determination's conclusion of McLaughlin's complaint. The appeal focuses on evidence McLaughlin gave to the delegate and findings of fact made in the Determination. The Employer alleges that McLaughlin was "an investor and shareholder" and not an employee of the Employer. The Employer also argues that McLaughlin was compensated for all hours worked. The Employer asks that the Determination be set aside and the Tribunal hold an oral hearing into its appeal application. The Employer further asks that the appeal hearing be adjourned until its main witness is medically fit to give evidence.

The Employer made further submissions on July 2 and 7, 1999. In those submissions, the Employer set out the names of a number of witnesses it intends to call in a hearing.

**ISSUE TO BE DECIDED**

A preliminary issue must first be addressed. The delegate sought submissions from the Employer before issuing his Determination on the complaint. The Employer did not make a submission. It now seeks to call evidence and make arguments that it failed to give the delegate. Counsel for McLaughlin argues that should not be permitted.

**FACTS**

The Determination sets out the evidence McLaughlin filed in pursuing his case:

Tom McLaughlin

Alleges he was hired to work as a manager at the rate of \$3,000.00 per month. He did not receive his wages regularly and was not provided pay statements for the wages he did receive. He attempted to secure his outstanding wages during his employment but was unsuccessful although he did receive a signed acknowledgement of his outstanding wages and terms of employment from the directors for the period ending September 30, 1998.

He alleges he was terminated without just cause, notice or pay in lieu of notice by Mr. Ellison who was acting on behalf of the directors.

He alleges he was not paid vacation pay on any wages during his employment.

Later in the Determination, the delegate states that McLaughlin provided him with a letter signed by the directors, Barbara Lagore, William Siu and Penny Louie. The letter set out his terms of employment as a manager. McLaughlin provided other evidence to support his complaint.

The Determination also sets out the Employer's response to McLaughlin's complaint:

Penny Louie, President, referred Mr. McLaughlin's complaint to Mr. William Su, (*sic*) the Company accountant and general manager.

Mr. Siu, in a message dated March 30, 1999 referred the delegate to Mr. Rudy Gellert of Gellert & Associates, legal counsel.

.....

I have had no response to date to the complaints from the employer or counsel for the employer.

**ANALYSIS**

As counsel for McLaughlin points out in her submission, the Tribunal has not permitted a party to ignore the complaint and then seek appeal of the Determination. Referring to *Tri-West Tractor Ltd.* (B.C.E.S.T. Decision No. 268/96) and *Kaiser Stables Ltd.* (B.C.E.S.T. Decision No. 58/97), her submission reads:

It is well established and fundamental principle that an employer who fails and/or refuses to participate in an investigation will not be permitted to rely on evidence or arguments which were available and could have been presented to the investigating officer.

The Employer made submissions to the Tribunal on June 14, July 2 and July 7, 1999. The Employer's submissions do not take issue with the delegate's statement that neither the Employer nor its counsel responded to the delegate's request for a response to McLaughlin's complaint. The appeal submissions do not explain why it failed to participate in the delegate's investigation of the complaints. I accept McLaughlin's counsel's argument that there is no basis to waive the Tribunal's reluctance to hear new evidence and argument on appeal.

When an appeal submission presents a *prima facie* case, the Tribunal normally holds a hearing into the appeal. The Employer alleges that McLaughlin was an owner of the Company; however, no documentary evidence was submitted with the appeal to support that claim. Similarly, the Employer's submission states that McLaughlin was compensated for all work performed. No documentary evidence was submitted to support that claim. Accordingly, the Employer's submissions provided no basis to hold a hearing.

Finally, the delegate understood that McLaughlin had the obligation of proving his case. McLaughlin gave the delegate the letter signed by the Employer's directors that set out his terms of employment and an acknowledgement of outstanding wages owed up to the end of August, 1998. McLaughlin provided evidence concerning monies owed him between September 1998 and January 1999. The Determination was based on the evidence before the delegate.

**ORDER**

The Employer's appeal application is dismissed. Pursuant to Section 115 of the *Employment Standards Act*, the Determination dated May 21, 1999 is confirmed.

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**Richard S. Longpre**  
**Adjudicator**  
**Employment Standards Tribunal**