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-

Brian Chwyl operating as
"B.C. Roofing and Maintenance"

("Chwyl")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 1999/355

DATE OF DECISION: August 18th, 1999

DECISION

OVERVIEW

This is an appeal brought by Brian Chwyl operating as "B.C. Roofing and Maintenance" ("Chwyl") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on May 17th, 1999 (the "Determination").

The Director's delegate, in the absence of any contrary information from Chwyl, determined that Chwyl owed his former employee, Raymond M. Poyner ("Poyner"), the sum of $2,666.02 on account of unpaid wages (regular wages, overtime pay, vacation pay and statutory holiday pay) and interest. In addition, by way of the Determination, a $0 penalty was levied pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation* given the employer's apparent failure to comply with certain specified wage payment provisions set out the *Act*.

ISSUES TO BE DECIDED

In his appeal documents filed with the Tribunal on June 7th, 1999, Chwyl made the following submissions in support of his appeal:

- Poyner's allegations "are false and misleading";

- that Poyner was not authorized to work overtime hours except that "there were, however, certain days when we would work 9 or 10 hrs. [and] it was agreed that the extra hours would be added to days when we only worked 3 or 4 hours...";

- that Poyner did not work any overtime hours during the period October 15th to 31st, 1996--this assertion, however, is irrelevant since the delegate did not award Poyner any overtime pay for this particular period--and that Poyner was paid for the November 11th, 1996 statutory holiday;

- that Poyner only worked 4 days during the period from December 2nd to 16th (the delegate found that Poyner worked 5 days during this period) and that Poyner was paid "as cash [sic] with no deductions"--however, there is no corroborative evidence before me of any such cash payment being made;

- finally, Chwyl acknowledges withholding some $200 in wages from Poyner pending the return of certain of Chwyl's goods--this ground of appeal is without merit in light of section 21 of the *Act* which prohibits such deductions from pay and even if Poyner agreed to such an arrangement (as is asserted by Chwyl), that agreement is of no legal force given section 4 of the *Act*.

FACTS AND ANALYSIS

As is detailed at some length in the Determination, the delegate made a number of efforts during his investigation to contact Chwyl in order to discuss Poyner's unpaid wage claim. Despite those efforts, Chwyl made no effort whatsoever to put his position vis-à-vis Poyner's claim on the record. In his appeal documents, Chwyl acknowledges that he was aware of Poyner's unpaid wage complaint during the latter part of 1997 and yet he made no effort to contact the delegate to discuss the matter.

In *Tri-West Tractor Ltd.* (B.C.E.S.T. No. D268/96) the Tribunal held:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it...The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

The evidentiary rule established in *Tri-West* was applied in *Kaiser Stables Ltd.* (B.C.E.S.T. No. D058/97) and has been consistently applied ever since. It is a rule that has obvious application in this case inasmuch as Chwyl simply refused to participate in the delegate's investigation and now wishes to challenge the Determination based on evidence and arguments that were never placed before the delegate.

Furthermore, and in any event, I find that Chwyl has simply not proven his various assertions and, by his own words, shows that he does not appreciate his obligations under the *Act* or other governing employment legislation. For example, if overtime hours are to be "banked" they must be banked at the prevailing premium (*i.e.,* time and a half or double time) not on an "hour for hour" basis; another example, employers are not legally entitled to make arrangements with their employees so that the latter are paid in cash without any records being maintained or statutory remittances being made.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be confirmed as issued in the amount of **$2,666.02** together with whatever further interest that may have accrued, in accordance with section 88 of the *Act,* since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal