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 -

Wilma Croisdale operating as St. Francis House
(the " Appellant ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/402

DATE OF DECISION: September 15, 2000

DECISION

APPEARANCES

Kelly B. Routley	for the employer
Anita Korinth	for herself
Connie Jansen	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") on behalf of Wilma Croisdale, operating as St. Francis House, (the "employer") from a Determination dated May 17, 2000. That Determination found the employer liable for $10,295.65 in unpaid wages, vacation pay and interest to Anita Korinth. The Director's delegate determined that the employer had breached Sections 14(2), 15, 18(1), and 58(1) of the *Act*.

ISSUES TO BE DECIDED

1. Did the delegate fail to afford the Employer an opportunity to respond?

2. Was the employee incorrectly classified as a domestic?

3. Did the delegate err in accepting the complainant's time and payment records as the basis for determining the employer's liability?

FACTS

The employer operates a foster care home funded by the Ministry for Children and Families. The employer, throughout the material time, was providing home support services for two mentally handicapped adults and three "highly functioning children".

The complainant, Anita Korinth, while living in Winnipeg, placed an ad in a local B.C. newspaper seeking employment as a live in cook/housekeeper. The employer answered this ad. Ms. Korinth started work on April 1, 1999. Her duties included housekeeping, cooking and providing care for the residents.

Ms. Korinth worked until August 27, 1999. She subsequently filed a timely complaint with the Employment Standards Branch. It is from the Determination based on this complaint that the employer appeals.

ANALYSIS

I turn firstly to the issue of procedural fairness raised by the employer. The employer states that the delegate did not give her an adequate opportunity to respond to the complaints made by Ms. Korinth. This question is crucial to the employer's appeal as the Tribunal has a long-standing policy of excluding evidence and argument on appeal that could have or should have been made available during the investigation stage (see *Tri-West Tractor Ltd.* BC EST # D268/96; Re: *Kaiser Stables Ltd.* BC EST # D058/97)

Section 77 of the *Act* states:

> *If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.*

This section contains the mandatory word "must" and requires the Director, or a delegate, to make a reasonable effort to allow the employer to respond to the complaint. The fact that the employer did not respond to the complaint is not in and of itself determinative of this issue.

The employer states that she was not contacted by the delegate until January 30, 2000. She states that she cooperated fully with the delegate during this call.

The delegate in her submission states that she first attempted to contact the employer on December 29, 1999 but was unsuccessful. The delegate was unable to leave a message as there was no answering machine on the employer's telephone. The delegate states that on January 4, 2000 she spoke to the employer and advised her of the complaint. The delegate states that the employer claimed that she gave the complainant free room and board and occasional money "out of the kindness of her heart." The employer claimed that the complainant was not an employee. The delegate states that she left a further message with the employer's husband on January 12, 2000 to which the employer did not respond. The delegate states that she spoke with the employer again on January 30, 2000.

The evidence from both the employer and the delegate indicates that she was contacted no later than January 30, 2000. During this phone call the delegate discussed the nature of the complainant with the employer. The employer advised the delegate of the complainant's duties which included cooking and taking care of the children for a short time during the summer in exchange for room and board.

On February 2, 2000 the delegate issued a Demand for Employer Records. These Demands for Employer Records follow a standard format which require production of all records relating to wages, hours of work, conditions of employment, daily hours, evidence of wages paid, and all records an employer is required to keep pursuant to Part 3 of the *Employment Standards Act* and Part 8, Section 46 and 47 of the Employment Standards Act Regulations. The employer responded to the Demand on February 18, 2000. In that response she stated that she acknowledged the delegate's request for employer records for the complainant but was unable to comply as a contract of employment was never entered into with the complainant.

On March 27, 2000 the delegate wrote to the employer and referenced in her letter the telephone conversation of January 30 and the employer's response of February 18, 2000. She indicated to the employer that she felt the evidence showed that the complainant was employed as a domestic by the employer. The delegate referred to a copy of the newspaper ad that the complainant had placed and the fact that the employer had responded to that ad.

The delegate further stated in her letter that even though there was no written contract of employment that fact alone did not mean that the complainant's employment was not covered by the *Employment Standards Act*.

The delegate attached to this letter a summary of outstanding wages which was based upon the complainant's records. She asked that a cheque be made out and forwarded before April 11, 2000.

The delegate further stated that if the employer did not feel that the complainant was owed money to please forward in writing her reasons along with a copy of payroll records regarding the claim by the complainant for audit purposes. She further stated that she was available to discuss the situation and drew the employer's attention to her telephone number which was noted on the letter.

The employer states that upon receiving the March 27, 2000 letter she contacted legal counsel. Legal counsel requested that the employer collect all relevant information, return with it and at that time she could decide whether to retain him. The employer argues that she misunderstood legal counsel's instructions and assumed that he had been retained to deal with the matter. She then went on vacation from April 28, 2000 to May 21, 2000. During this period of time the delegate forwarded a letter dated May 1, 2000. She referenced her letter of March 27, 2000 and stated that the complainant would be willing to discuss a settlement. She asked that the employer contact her on or before May 8, 2000 to discuss the settlement option. She further stated "if we cannot come to an agreement I will have no alternative but to issue a Determination for the entire amount and apply the *Employment Standards Act* in its entirety." A Determination was issued dated May 17, 2000 as no response was received.

Upon receiving the Determination the employer returned to legal counsel. Legal counsel prepared and filed this appeal which is dated June 9, 2000. In the appeal legal counsel states that the employer's failure to respond was due to a misunderstanding and her unavailability while out of the country on holidays. Legal counsel argues that the employer's actions were not an intentional disregard of the investigation process and that the complainant would not be prejudiced by allowing the employer to adduce fresh evidence with respect to the hours the complainant alleged she worked.

The employer, through legal counsel, further states in the letter of appeal that she cooperated with the investigation up to the time that she contacted a lawyer. At that time, believing that the lawyer was dealing with the matter, she went on vacation for about 3 weeks. When she got back from her vacation she found out that her lawyer was not dealing with the matter and that the delegate had made the determination while the employer was on holiday.

In my view the requirements of Section 77 were fulfilled by the delegate. There is no dispute that the employer was advised of the complaint by no later than January 30, 2000. On February 2, 2000 a Demand for Employer Records was issued. The employer responded on February 18, 2000 saying that she was unable to comply. The delegate wrote again to the employer on March 27, 2000 setting a time frame of April 11, 2000 for a response. The employer indicates that she contacted legal counsel but I conclude from the submissions that she did not comply with legal counsel's request for information nor did she provide a retainer to legal counsel. Rather she went on vacation for approximately three weeks. During this period of time the delegate wrote again on May 1, 2000 setting a May 8, 2000 date for response to discuss a settlement option. When the delegate did not hear from the employer by May 17, 2000 the Determination was issue.

I find that the delegate made a reasonable effort to give the employer, who was the person under investigation, an opportunity to respond. The employer did not respond to the delegate's March 27, 2000 letter, did not respond adequately to legal counsel's request for information, and did not respond to the May 1, 2000 letter. She then left the country without making adequate provisions for important information to be forwarded to her or informing the delegate of her absence. In my view the employer was afforded an opportunity to respond but failed to take advantage of that opportunity.

Secondly, legal counsel argues that the complainant was incorrectly classified as a "domestic" rather than a "live-in support worker". As stated earlier in this decision the Tribunal has a long standing policy of excluding evidence and argument on appeal that could have or should have been made available during the investigation stage. This classification argument was not raised by the employer in the conversations with the delegate. Rather, during those conversations, the employer argued that the complainant was not an employee. That is a much different argument from acknowledging that she is an employee but arguing that she is improperly classified. The classification argument is a new argument raised on appeal, that in accordance with Tribunal policy, will not be sustained in this decision.

Finally, the employer argues that the delegate erred in accepting the complaint's time and payment records as the basis for determining the employer's liability. Once again, this is an argument that was not made during the investigation process, notwithstanding that the delegate, in her March 27, 2000 letter to the employer, attached a summary of the outstanding wages which were based upon the complainant's records. In situations where the employer has not responded adequately to a Demand for Employer Records or kept the required records the delegate is entitled to utilize the best evidence available to make calculations. Where an employer challenges the employee's records on appeal the onus rests on the employer to show that it was unreasonable for the delegate to rely on the records and to establish that the records were unreliable. (See Re: *Rodrigue*, BC EST #D600/97)

I have reviewed the evidence submitted on appeal by counsel for the employer. I do not find that evidence provides a sufficient reason to conclude that the records presented to the delegate are unreliable. For example, copies of cheques made payable to the complainant do not indicate on the face of the cheque what the payment was for. As stated previously the employer was not able to comply with the Demand for Employer Records that had been made by the delegate. An

appeal should not be decided on new information a party failed to supply during the investigative process. (See Re: *Horizon Fiberglass Products Ltd.* BC EST #D444/97)

For the above reasons this appeal is dismissed.

ORDER

The Determination, dated May 17, 2000 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal