

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 -

316465 B.C. Ltd.
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Hans Suhr

FILE No.: 1999/224

DATE OF HEARING: August 19, 1999

DATE OF DECISION: September 29, 1999

DECISION

APPEARANCES

Partap S. Mehta	on behalf of 316465 B.C. Ltd.
Lucy Merry	on her own behalf
Ernest Merry	on his own behalf

OVERVIEW

This is an appeal by 316465 B.C. Ltd. (the “Employer”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated March 24, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). The Employer alleges that the delegate of the Director erred in the Determination by concluding that Ernest Merry (“E. Merry”) and Lucy Merry (“L. Merry”) were owed regular wages, statutory holiday pay and annual vacation pay in the total amount of **\$11,139.51** (includes interest).

PRELIMINARY ISSUE

A preliminary issue arises in this matter. The submission of the delegate of the Director raises the issue that the Employer is attempting to introduce information in their appeal to the Tribunal that were not provided to the delegate of the Director during the investigation. The delegate of the Director submits that pursuant to earlier decisions of the Tribunal, this panel should not accept such information.

ISSUE

The issue to be decided in this appeal is whether the Employer is entitled to introduce information during the appeal that it did not provide to the delegate of the Director during the investigation ?

FACTS

E. Merry and L. Merry sought compensation for regular wages, overtime wages, statutory holiday pay and annual vacation pay. The Merry’s alleged that they were employed by the Employer as husband and wife resident caretakers to manage a 94 unit apartment complex known as the Village Towers (the “Towers”). The Merry’s further alleged they

were employed from August 1, 1991 to November 30, 1997. The Merry's finally alleged that they terminated their employment.

After being contacted by the delegate of the Director in January 1998, the Employer initially took the position that as the Employer's representative, Partap S. Mehta ("Mehta"), was preparing to travel abroad, the response from the Employer would be made in 3 weeks. The Employer did not provide a response in the promised 3 week time frame.

The delegate of the Director then sent a letter dated February 18, 1998 to the Employer whose response contended that the Merry's were independent contractors and had been so for at least 2 years. The Employer further contended that all records which were maintained at the workplace appeared to have been stolen.

The delegate of the Director sent a "Demand for Employer Records" (the "Demand") on March 19, 1998 for at least the years in which the Employer considered the Merry's as employees. The Demand required the Employer to produce records by April 1, 1998. The Employer did not respond until May 6, 1998 and then only to contend that the Merry's were independent contractors and were not owed any wages.

The delegate of the Director telephoned the Employer on May 6, 1998 to advise of the Employer's failure to provide records as required and that the delegate may be obliged to make a determination based on the information provided by the Merry's.

The delegate of the Director sent another letter dated January 14, 1999 advising the Employer of all of the details of the Merry's claims and further reminding the Employer that should he fail to produce any information to refute the claims made by the Merry's by January 28, 1999, a decision would be made based on the information supplied by the Merry's.

The delegate of the Director also telephoned the Employer on January 14, 15, 22 and 29, 1999 and left messages on his voice mail. The Employer returned a call on February 1, 1999 to advise the delegate of the Director that the Employer was going to initiate action against the Merry's for allegedly "embezzling" large amounts of money. The Employer further advised that he would obtain copies of cancelled cheques in the next 3 or 3 weeks to show that the Merry's had received more money than they were entitled to. On February 11, 1999 the Employer provided to the delegate of the Director by fax a copy of a letter to his bank requesting those cancelled cheques.

The Employer did not submit any information within the time frame agreed to and in fact, no information was received by the delegate of the Director prior to the issuance of the Determination on March 24, 1999.

The delegate of the Director argues that the Employer failed to produce or submit any evidence, documented or otherwise, to support his position or to negate and/or refute the

Merry's claims despite all the opportunities given to him over the more than one year period prior to the Determination being issued.

The Employer argues in his submission to the Tribunal that *"I did not have a fair and reasonable opportunity to present our case to the Industrial Relations Officer, because the complainant, Mr. Merry, took all bank records/payment account without authority without authorization when he left my employ, and to this day has never returned them to me. I therefore had no documents to submit readily to the Industrial Relations Officer when requested by him to respond to the claims of the Merrys. Once the facts are taken into account they show such claims to be entirely unfounded."*

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, the Employer.

The Employer did not provide any information to the delegate of the Director prior to the Determination being issued. Is the Employer entitled to introduce evidence in appeal that it did not provide to the delegate of the Director during the investigation?

I begin with a review of the adjudicative process arising from the filing of a complaint. *BWI Business World Incorporated BC EST No. D050/96* discusses the basis on which the Tribunal finds the Director's investigation and determination to be quasi-judicial:

Once a complaint has been filed, the Director has both an investigative and an adjudicative role. When investigating a complaint, the Director is specifically directed to give the "person under investigation" (in virtually every case, the employer) "an opportunity to respond." (Section 77) At the investigative stage, the Director must, subject to section 76(2), enquire into the complaint, receive submissions from the parties, and ultimately make a decision that effects the rights and interests of both the employer and the employee. In my view, the Director is acting in a quasi-judicial capacity when conducting investigations and making determinations under the *Act*. [Cf. *Re: Downing and Graydon* 21 O.R. (2d) 292 (Ont. C.A.)]

The decision making process was quasi-judicial in the case before me. The Employer was given numerous opportunities over the period of more than 1 year to make submissions to the delegate of the Director. The Employer, for their own reasons, chose not to provide any evidence to the delegate of the Director.

The Tribunal has addressed similar situations in *Tri-West Tractor Ltd. BC EST No. D268/96* , *Kaiser Stables Ltd. BC EST No. D058/97* and many others since that point in time. The Employer did not submit certain information to the delegate of the Director during the delegates' inquiry. On appeal, it sought to rely upon that information. Most

relevant to this case, however, the Tribunal would not allow an appellant who failed to provide information to the delegate of the Director during the 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.

The Employer chose to not provide 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 not allow that to occur. As reviewed *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 evidence is that, despite numerous opportunities to provide information to the delegate of the Director during the investigation, the Employer failed to provide any evidence to support its contentions. The Employer's failure to provide information during the investigation is significant.

For all of the above reasons, I conclude that the Employer is not entitled to submit information during the appeal that was not provided 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 clearly sets forth the information considered and the reasoning for the conclusions reached.

The delegate of the Director does however agree that an error was made in the calculation of vacation pay owing to the Merry's as payments of \$725.00 to E. Merry and \$400.00 to L. Merry were not taken into consideration.

The amount of wages determined to be owing to E. Merry is to be adjusted by deducting \$725.00. The wages owing to E. Merry is therefore $(\$9334.61 - \$725.00 =)$ **\$8609.61**.

The amount of wages determined to be owing to L. Merry is to be adjusted by deducting \$400.00. The wages owing to L. Merry is therefore $(\$1804.90 - \$400.00 =)$ **\$1404.90**.

In the above circumstances, the appeal by the Employer, except for the adjustments outlined above, is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated March 24, 1999 be varied to be in the amount of **\$10,014.51** together with whatever interest has accrued pursuant to Section 88 of the *Act* .

Hans Suhr
Adjudicator
Employment Standards Tribunal