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 -

Homecraft Solid Oak Furniture Ltd.
("Homecraft")

- of Determinations issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 1999/410

DATE OF HEARING: September 29, 1999

DATE OF DECISION: October 28, 1999

DECISION

APPEARANCES

Pinky Sidhu	For the employer
Paul Rai	Witness
Baldev Heer	The Complainant

OVERVIEW

Homecraft Solid Oak Furniture Ltd. ("Homecraft", also, "the employer") appeals a Determination by a delegate of the Director of Employment Standards dated June 17, 1999. The appeal is pursuant to section 112 of the *Employment Standards Act* (the "*Act*").

The Determination stems from a Complaint by Baldev Singh Heer. It orders Homecraft to pay Heer regular wages, overtime pay and vacation pay totalling $1,208.64, and interest on top of that.

Homecraft was sent notice of the Complaint and a Demand for Employer Records by registered mail but the mail went unclaimed. The Determination was issued in the absence of any submission by the employer. On receiving a copy of the Determination, Homecraft filed the appeal and, on appeal, seeks to introduce evidence which is said to show that Heer did not work as claimed and that he is not owed pay as is awarded by the Determination. The employer claims that no overtime was worked by Heer, that the employee's last day of work was in fact the 23rd of December, 1998, and that cancelled pay cheques show that he was paid to that point, leaving only about a week at issue. Homecraft also argues that the delegate's conclusions are quite unreasonable in that they are not supported even by the evidence which was supplied by the Complainant.

ISSUE TO BE DECIDED

I must decide whether to accept or not accept the new evidence of the employer.

FACTS

Heer was employed by Homecraft and worked at 13486 76 Avenue in Surrey (the "76th Avenue address").

The employment was severed. Heer filed his Complaint. Notice of the Complaint and a Demand for Employer Records was sent to the employer's 76th Avenue address. That was by registered mail.

Canada Post attempted to deliver the registered mail on three different days in May of 1999 but was unsuccessful. The registered mail was returned as "unclaimed".

Without paying a visit to the employer, telephoning the employer, nor making any other attempt to contact Homecraft, outside of sending what he did by registered mail, the delegate issued the Determination. His explanation for doing so is that "the employer was given the opportunity to participate in the investigation and failed to do so".

The Determination was sent to Homecraft's 76th Avenue address. That was by registered mail with copies going to directors/officers of the company. Canada Post failed in three attempts to deliver the Determination to the 76th Avenue address and that registered mail was returned as "unclaimed".

Homecraft received a copy of the Determination which had been sent to one of its directors/officers.

The employer is still to this day building furniture at the 76th Avenue address. In corresponding with the Tribunal, Homecraft gives the 76th Avenue address as its address. Homecraft tells me that when mail is delivered to its 76th Avenue address, it is forwarded to office staff at 13251 72nd Avenue in Surrey. The employer suggests that Canada Post, in attempting to deliver registered mail to the 76th Avenue address, must have done so outside of normal business hours. It does not explain why the registered mail went unclaimed.

ANALYSIS

This is a case in which a party seeks to present evidence to the Tribunal which could have, indeed, should have, been presented to the Director's delegate.

Through decisions of the Tribunal, notably *Tri-West Tractor Ltd.* (BCEST No. D268/96) and *Kaiser Stables Ltd.* (BCEST No. D058/97), the Tribunal has set forth a principle which is that an employer will not normally be allowed to raise issues or present evidence which could have been raised or presented at the investigative stage. In *Tri-West*, the principle is stated as follows:

> This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with 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.

In *Kaiser Stables*, the concerted efforts of a delegate to have an employer participate in the investigation of a Complaint were ignored by the employer. The employer then appealed the delegate's Determination and sought to introduce new evidence on appeal. That evidence was ruled inadmissible. The Adjudicator in that decision states, "the Tribunal will not allow an employer to completely ignore the Director's investigation and then appeal its conclusions".

Decisions like *Tri-West* and *Kaiser Stables* preserve the fairness and integrity of the *Act*'s decision-making process. They greatly reduce the chance of anyone being blindsided on appeal. And if it were not for such decisions, the role of the Director would be seriously impaired and the appeal process would become unmanageable and eventually fall into disrepute.

The Tribunal has not set an absolute bar to the production of new evidence on appeal. "There are many decisions of this Tribunal which follow the reasoning in *Tri-West Tractor Ltd.* but almost all qualify the rule to some degree using such words as 'generally' or 'normally' new evidence will not be allowed at the appeal stage" (*Re Poretsis*, BC EST #D370/98). That is because there will in some cases be good reason to allow a party to raise a new issue or introduce new evidence on appeal. As another Adjudicator has said in *Speciality Motor Cars (1970) Ltd. and Russell David Reid* (BC EST #D570/98),

> … it should also be recognized that the Kaiser Stables principle relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigating officer. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer … .

Homecraft does not give me any good reason to allow its new evidence to come in on appeal. For the purposes of the *Act*, it is enough, for service to occur, that a demand be sent to the employer's last known address by registered mail (section 122). Notice of the Complaint and a demand for records was in this case sent to the employer's current business address by registered mail. Despite repeated attempts to deliver that mail, it went unclaimed. Homecraft has no explanation for that. I am in this case led to believe, as it is so very likely, that Homecraft could have submitted evidence at the investigative stage of

the Complaint but did not only because a person or persons at Homecraft chose not to pick up its registered mail.

The employer is only allowed to argue whether the Determination is or is not adequately supported by the evidence which was before the delegate.

ISSUES TO BE DECIDED

I must still decide whether there is or is not a rational basis for the Determination's conclusions.

Depending on my decision in respect to the above, I may also need to decide whether there is or is not reason to vary or cancel the Determination or refer a matter or matters back to the Director.

FACTS

Heer, in filing his Complaint, claimed that he was employed from May 28, 1998 to January 7, 1999. He claimed regular wages for 72 hours of work, 45 hours of overtime spread over the entire length of his employment, and that he had not received vacation pay. The Determination awards regular and overtime wages as claimed by the employee, $1,116 in total, and 4 percent vacation pay on earnings of $2,316. The delegate provides little explanation for doing so. He states that Heer "provided some time cards to show the hours he worked", that the employee "has evidence of time worked", and "there is no evidence to disprove his claim that wages, overtime and vacation pay are owed". And, as noted earlier in this decision, the delegate observes that the employer was given the opportunity to participate in the investigation and failed to do so.

On hearing from Heer, I find that support for his claim consists of nothing more than undated time cards and a T4 which shows that he earned $8,024 working for Homecraft in 1998.

The time cards are the employer's time cards. They may be for Heer in that his name is written on the cards. The time cards are not date specific and, as such, there is no way to know, from the cards alone, what month or months they are for.

The time cards do not show 45 hours of overtime in the period covered by the time cards, what is a 17 day period, and they do not show that there was 72 hours of work at straight-time pay. They at the very least indicate 110 hours of work. Yet they are incomplete in that there are two instances where there is a failure to punch out for the day after punching in. There is also an instance where the reverse is true. If there was 8 hours of work on each of those days, the time cards would then appear to represent 134 hours of work.

There is no punching out and in for lunch. No lunch would mean that a half hour of overtime was worked on some days, and that there was 8.5 hours of overtime over the period covered by the time cards. But if lunch breaks of ½ hour a day were taken, then it is unclear whether any amount of overtime was worked.

ANALYSIS

Section 81(a) of the *Act* requires that each and every determination include the reasons for it.

> 81 (l) *On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:*
>
> *(a) the reasons for the determination; ….*

That applies even where the employer fails to provide records. To say that the employee had time cards and that employer did not provide records and failed to participate in the investigation is not to explain the Determination.

It is not explained why pay for 72 hours of work at the employee's regular wage rate is awarded on the basis of undated time cards which bear so little relation to the employee's claim for regular wages. The time cards leave me wondering if the employee has really any clear idea of what he is owed in the way of wages, if anything. And the Determination leaves me wondering whether there is a rational basis for the conclusion that regular wages are owed.

The time cards do not show 45 hours of overtime work. The delegate does not explain why it is that he decides that the employee is owed 45 hours of pay at overtime rates. Again I am left wondering if there is any rational basis for a determination.

I recognize that it is the employer that must show that the employee has been paid the vacation pay to which he is entitled under the *Act*. Homecraft, of course, did not do that. But the delegate fails to explain his use of $2,316 in calculating what is owed in vacation pay. The figure appears 'out of the blue'. It is inconsistent with Heer's T4 for 1998. It is not clear to me that there is a rational basis for the decision that Heer is owed vacation pay as is set out in the Determination.

The Director has important entry and inspection powers by virtue of section 85 of the *Act*. When, as here, there is, no response from an employer in regard to notice of the Complaint and the demand for records, a delegate has a choice to make: Proceed further with the investigation in an attempt to secure additional evidence, using the Director's entry and inspection powers, if necessary, or issue a Determination on the basis of the evidence at hand. In this case, the delegate chose to end his investigation, without bothering to make even a telephone call to the employer, never mind paying the employer a visit. And, from what I can see, the delegate has paid no attention to the evidence before him but drawn

conclusions on some other basis. He has apparently forgotten that, even in cases where the employer fails to provide records, the Director still has a statutory and legal obligation to adhere to the principles of fairness and reasonableness when exercising her authority under the *Act*.
A delegate may not award wages and other moneys to an employee simply because an employer fails to cooperate with an investigation. That is to penalise an employer in a way not contemplated by the *Act*.

I am satisfied that this Determination cannot be allowed to stand. But to cancel it, or to vary it at this stage, would be unfair to the employee. I have for that reason decided to send the whole matter of the Complaint back to the Director for further investigation and a new Determination.

ORDER

I order, pursuant to section 115 of the *Act*, that the matter of the Complaint by Baldev S. Heer be referred back to the Director of Employment Standards.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal