

**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 -

Michael Smith operating as APM Clean Industries  
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE No.:** 2000/385

**DATE OF DECISION:** October 30, 2000

**DECISION**

**APPEARANCES/SUBMISSIONS**

Mr. Michael Smith                      on behalf of the Employer  
Mr. Rod Bianchini                     on behalf of the Director

**ANALYSIS**

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on May 12, 2000 which found that Richard Parks was entitled to \$1,898.46 on account of regular wages.

According to the Determination, the Employer is involved in the business of auto detailing, power washing and related services. Parks claimed to have worked for the Employer from January 15, 1999 to May 5, 1999 as a "detailer" at the rate of \$15.00 per hour. The Determination states, among other things, that the Employer failed to respond to the delegate's requests for documents and information:

"A Demand for Employer Records was issued on November 30, 1999. This Demand was returned unclaimed. It is not disputed that Parks did work for APM. Parks does not dispute that he had a company involved in auto detailing but this went out of business at the time he went to work for APM. APM produced faxed copy of a contract showing APM and Parks entering into a business relationship. ... This contract is unsigned by Parks.

The delegate visited the business address of APM on or about October 25, 1999 and spoke with the owner Michael Smith ("Smith") regarding Parks' allegations. Smith stated that he would provide all the documentation needed to support the position Parks was an independent contractor. No information was received. The delegate issued a Demand for Employer Records on November 30, 1999. No response to the demand was received. Phone calls were placed with no response. Smith eventually responded by faxing the following:

- a statement written by Smith
- copies of cancelled cheques issued to Parks as payment for work done
- copies of a contract not signed by Parks.
- ...

The delegate contacted Smith on or about April 4, 2000 and requested further clarification and requested the original documents pertaining to the contract. Smith promised a courier would forward the original documents no later than April 11, 2000. No documents were received.”

Based on the evidence available to him, the delegate concluded that Parks was an employee and awarded him regular wages under Section 34(2)(a) (minimum daily pay) as he was satisfied that Parks worked at least some hours in a day. The Determination is based on the minimum wage rate in effect from time to time.

Smith argues that the Determination is wrong. He disputes the finding that Parks is an employee and the hours of work found by the delegate to have been worked (or deemed worked). Among others he states in his appeal that the Determination is wrong “due to not enough information provided by myself.” In support of his appeal, Smith attaches substantial documentation. The delegate responded to the appeal. In a nutshell, he says that the majority of the material provided by Smith in this appeal was not provided to him in the course of his investigation and argues that the Determination should be upheld.

I am inclined to agree with the delegate and that the appeal must be dismissed. In my view, the Employer failed to co-operate with the delegate’s investigation. The particulars are set out in the Determination and in the delegate’s submission in the appeal. From the delegate’s submission it is clear, and not in dispute, that he made real and determined efforts to obtain information and documents from the Employer. In addition to what is set out in the Determination, the delegate’s submission states he spoke with Smith “at great length” about the “inadequate records” and, it appears, extended the time for providing information. The submission further states:

“Mr. Smith did not produce the records needed and on April 17, 2000 the delegate explained that a decision may be made with the information currently on file. Mr. Smith confirmed that he had employer records and promised to courier the records and documentation on or before May 3, 2000. This did not happen and a determination was written.”

The Tribunal will generally not allow an appellant who refuses to participate in the Director’s investigation, to file an appeal on the merits of the Determination (*Kaiser Stables*, BCEST #D058/97). The fact that Smith, in this appeal, relies on and produces documents which appear to support his claims does not assist him. These documents could have been produced to the delegate in his investigation. In the result, the appeal must fail.

**ORDER**

Pursuant to Section 115 of the Act, I order that the Determination dated May 12, 2000 be confirmed.

***Ib Skov Petersen***

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**Ib Skov Petersen  
Adjudicator  
Employment Standards Tribunal**