

**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 -

Diamond Tree Service Ltd.  
("Diamond")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Alfred Kempf

**FILE NO.:** 98/431

**DATE OF DECISION:** October 16, 1998

## **DECISION**

### **APPEARANCES**

This appeal proceeded by way of written submissions.

### **OVERVIEW**

This is an appeal pursuant to Section 112 of the Act of a Determination of the Director dated June 12, 1998 concerning wages owed to complainant Gurdial Dhami ("Dhami").

### **ISSUE TO BE DECIDED**

Whether Diamond satisfied the onus upon it to show error in the Determination.

### **FACTS**

The Determination is dated June 12, 1998. It followed an investigation by the Director in which Diamond had ample opportunity to present records and evidence in support of its position.

Under the Act Diamond is required to keep the sorts of records which were requested of it in the investigation. The records that Diamond produced were found by the Director's Delegate to be inconsistent. The Director's Delegate analyzed the available records including records produced by Dhami to conclude that Diamond was required to pay regular wages, overtime wages, and vacation pay to Dhami.

On July 3, 1998 in support of its appeal Diamond submitted a handwritten document not previously produced to the Director's Delegate. This document purports to contradict Dhami's time records and substantiate that vacation pay was included in the per "hector" rate of pay established for Dhami.

Diamond indicated in its letter in support of the appeal that:

we would like to appeal the Determination ... on the basis that at the time of the investigation I was unable to find the Daily hours records but I have found these records now.

No reason is offered by Diamond for the apparent unavailability of the records at the time of the investigation.

## **ANALYSIS**

The Director conducted a thorough investigation and made contact with Diamond. Diamond was asked to produce all of its records relating to the complaint. The records which were produced were inconsistent. The document presented in support of the appeal was not produced for consideration of the Director's Delegate.

An appellant cannot succeed on an appeal on the basis of documents that were not disclosed to the director during the course of an investigation absent extraordinary circumstances.

This tribunal has considered this issue in other cases such as Tri-West Tractor Ltd. BC EST #D268/96 and Kaiser Stables Ltd. BC EST #D058/97.

Diamond has not provided any justification for failure to provide the records to the Director's Delegate. There is no evidence before me upon which I can find any fault with the Determination.

Even if I did accept and consider the new evidence from Diamond, I am not satisfied on a balance of probabilities that the Determination is in error.

## **ORDER**

In summary, I order under Section 115 of the *Act*, that the Determination dated June 12, 1998 be confirmed.

**Alfred Kempf**  
**Adjudicator**  
**Employment Standards Tribunal**

ACK/cef