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 -

Associates Financial Services of Canada Ltd. operating as The Associates
("The Associates" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/629

DATE OF HEARING: November 27, 2000

DATE OF DECISION: December 22, 2000

DECISION

APPEARANCES:

Mr. David Towill	on behalf of the Employer
Mr. John Lamb	on behalf of himself
Mr. Jim Dunne	on behalf of the Director

FACTS AND ANALYSIS

This is an appeal by The Associates pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on August 22, 2000 which found that Jon Lamb was entitled to $3,261.99 on account of compensation for length of service.

The Employer is involved in the financial services business. The Lamb worked for the Employer from June 12, 1995 to May 15, 2000, as Assistant Branch Manager. He was earning $2,961.65 per month.

The Employer disagrees with the Determination and argues that it was not afforded a reasonable opportunity to participate in the Director's investigation.

The Determination notes that, despite several extensions of time to provide information, the Employer did not do so:

> "The employer failed to provide reasons for the termination of the complainant or produce payroll records although requested to do so on at least two occasions. The employer's only response to the investigation was that the complainant was terminated for just cause. In the absence of any evidence to the contrary, I accept the position of the complainant regarding his allegations for compensation for length of service."

A hearing was scheduled for November 27, 2000. At the hearing, the parties agreed that the preliminary issues before me was whether or not the Employer had failed to participate in the Director's investigation and whether, in any event, the merits of the Determination--*i.e.*, the termination of Lamb--ought to be referred back to the Director for further investigation.

The material facts on the preliminary issues are not in dispute.

1. Lamb was terminated from his employment on May 15, 2000.

2. On June 12, 2000, the delegate writes to the Employer, indicating that a complaint has been received alleging that compensation for length of service is owed. The letter sets out the basic components of the complaint and requires the Employer to provide reasons

for the termination and payroll records by June 26, 2000. The letter also indicates that failure to do so may result in a determination being issued suing the information supplied by the complainant.

3. On June 21, 2000, the Employer's in-house legal counsel (in Ontario) writes to the delegate that Lamb had been terminated for cause, breach of company policy.

4. The same day, the delegate responds by fax, requesting more detailed information, including the particulars of the reasons for the termination and relevant documents. The delegate requests that the information be provided by June 28, 2000. The delegate also provides a telephone number for contacts or inquiries. The delegate's letter also noted that the burden of proving cause rests with the employer.

5. On June 30, 2000, the delegate again writes to the Employer's in-house counsel, indicating that he has not received any response to his June 30 letter regarding the circumstances of Lamb's termination. The letter indicates that the delegate understands the employer's position to be that Lamb was terminated for cause, breach of company policy. The delegate notes that if the Employer wish to supply the detailed information requested in the June 30 letter, an extension is granted until July 7, 2000. If the Employer does not respond by that date, a determination will be issued based on the information on file. The letter also notes that failure to respond may adversely affect the Employer's opportunities to appeal a determination to the Tribunal.

6. On July 7, 2000, the Employer responds to the letter, received by it on July 4. The employer indicates that it is not able to meet the July 7 deadline. The Employer asks if it may have "a short extension of the time to reply."

7. The delegate responds by fax the same day extending the deadline to July 14, 2000. The delegate's fax also notes that if the Employer requires more time, to contact him.

8. The Employer's in-house counsel says she did not see the July 7 fax from the delegate. In the result, the Employer did not respond.

9. There does not appear to be any dispute that the delegate faxed the Employer on July 7.

10. The Employer did not subsequently contact the delegate.

11. On August 22, 2000, the delegate issued the Determination subject of this appeal.

I am of the view that the appeal must be dismissed.

The Employer argues that it did not intentionally fail to participate in the delegate's investigation. In fact, says the Employer, it informed the delegate of its position, namely that Lamb had been terminated for just cause, breach of company policy. This, says the Employer, indicates that it intended to participate in the investigation. The failure to respond to the July 7 letter was inadvertent. In the circumstances, this does not constitute a failure to participate in the investigation and the appropriate remedy in this case is to refer the matter back to the Director (see *316465 BC Ltd.*, BCEST #D038/00, reconsideration of BCEST #D400/99). The employer says that decision stands for the proposition that *Kaiser Stables*, BCEST #D058/97 and *Tri-West*

Tractor Ltd., BCEST #D268/98, apply only where there has been a "concerted and wilful refusal by the employer to participate in the delegate's investigation." The Employer was denied a reasonable opportunity to participate in the investigation contrary to principles of natural justice and fairness (see Section 77 and 2).

The delegate argues that the responses were faxed to the Employer and that several extensions of time to provide information and documents were granted to the Employer. The letter from the Employer dated July 7, requested a "short extension." However, the employer did not contact the delegate to inquire if the extension was granted. The result, the Determination was issued. The delegate says that the circumstances in this case are similar to those in *Kaiser Stables*, *Tri-West* and *McCall Bros. Funeral Directors Ltd.*, BCEST #D403/98, upheld on reconsideration and judicial review. Lamb supports the Director's position.

In the circumstances of this case, I am of the view that the Employer failed to co-operate with the delegate's investigation. 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*, *above*). It is clear, and cannot be disputed, that the delegate made real efforts to obtain information and documents from the Employer. It follows that I do not agree with the Employer's argument that the delegate failed to afford it a reasonable opportunity to respond to the issues raised by Lamb's compliant.

First, in this case the correspondence clearly indicated, for example, the June 12 and June 30 letters, that a determination could be issued based on the information on file if the Employer did not provide information and documents. While it could be argued that the Employer responded to the June 12 letter with the brief statement that Lamb had been discharged for cause based on breach of company policy, it ought to have been clear to the Employer that this was insufficient from the delegate's point of view. I note, as well, that the delegate expressly advised the Employer of the onus upon it in a termination case.

Second, the delegate granted several extensions to the Employer. In the June 12 letter, the deadline was June 26. This was extended to July 7 in the delegate June 30 letter. The employer does not respond to this letter until July 7, having received it on July 4. The employer indicates that it is not able to meet the July 7 deadline. The Employer asks if it may have a short extension of the time to reply. The states: "Please advise if we can expect a short extension of the time to file a reply." Each piece of correspondence from the delegate indicates that the employer may contact the delegate to discuss the complaint. A telephone number is provided for that purpose. The Employer--in effect--ignores this. The Employer does not, despite the previous correspondence, contact the delegate to ascertain if the delegate is agreeable to extending the time from July 7. There is no explanation for this. It is clear from the correspondence, as well, that the delegate was prepared to grant extensions of time to accommodate the Employer's circumstances.

Third, despite having requested a "short extension," the Employer does not provide the requested reasons and documents. The Determination is issued about a month and a half after the Employer has requested a "short extension." It cannot be argued that the delegate "rushed' to issue the Determination after the Employer failed to meet his last deadline--July 14, in the letter, the Employer's in-house counsel says she did not see (and there is nothing before me to contradict that).

In the result, the appeal must fail.

ORDER

Pursuant to Section 115 of the Act, I order that the appeal be dismissed.

Ib S. Petersen

Ib S. Petersen
Adjudicator
Employment Standards Tribunal