

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 -

Eric A. Dunning and Yvon Bourque operating as
Trev.com InterNETional Mfg.
("Trev.com")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Hans Suhr

File No.: 97/734

Date of Hearing: November 21, 1997

Date of Decision: December 17, 1997

DECISION

APPEARANCES

Eric A. Dunning	on behalf of Trev.com InterNETional Mfg.
Rachel Bains	observer
Yvon Bourque	on his own behalf
Michael R. Sporer	counsel for Yvon Bourque
Lyle Sandy	on his own behalf
Wendy Jones	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Eric A. Dunning and Yvon Bourque operating as Trev.com InterNETional Mfg. (“Trev.com”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated September 11, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Yvon Bourque (“Bourque”) is not appealing the Determination. Eric A. Dunning (“Dunning”) alleges that the delegate of the Director erred in the Determination by concluding that Lyle Sandy (“Sandy”) is owed wages in the amount of \$2,808.00 plus interest for a total amount of \$2,909.74.

A preliminary matter arises in this case. The appeal by Dunning is based on evidence that he did not provide to the Director prior to the Determination being made on September 11, 1997.

Dunning argues that the evidence he had at the appeal hearing demonstrated that Sandy did not complete the number of units that the Director has determined Sandy should receive the production bonus for. Dunning further argues that compelling reasons exist for the Tribunal to accept this evidence at this time.

FACTS

Sandy sought payment for hours worked, the production bonus for units produced, reimbursement of expenses and mileage incurred as an employee of Trev.com.

The Director wrote to Trev.com on April 9, 1997 to indicate that a complaint had been received from Sandy and, based on the information from Sandy, the amount of \$3,618.12 was owing.

Trev.com was requested to forward a cheque in this amount or , if the conclusions reached by the Director were in dispute, to provide all payroll records and other evidence relating to Sandy's employment.

There was a meeting at the Employment Standards Branch offices in Burnaby on June 26, 1997 attended by Dunning, Sandy and the delegate of the Director. Bourque was unable to attend. The delegate of the Director discussed with the parties the reasons for the conclusions included in the April 9, 1997 letter and after further discussion with all parties, set out her preliminary findings in a letter to Trev.com dated July 11, 1997.

The preliminary findings by the delegate of the Director revised the amount owing to Sandy to be \$2, 740.00 and again invited Trev.com to forward this amount by cheque no later than July 25, 1997 or, if there is still a dispute in regard to the preliminary findings, to provide any other evidence or documentation by that date.

Dunning sent a response to her July 11, 1997 letter by fax on July 25, 1997 to the delegate of the Director in which he stated "I will be un-able (sic) to comply with your order - because of a possible shortage of resources, to pay all or part of this order".

There was no evidence that Dunning either disputed the preliminary findings or that he had further evidence or documentation to provide.

The Director issued a Determination on September 11, 1997 based on the information provided by Dunning and Sandy, both before and during the meeting of June 26, ,1997.

During the hearing, Dunning did not dispute the Director's statements. Dunning argues that as he was more directly concerned with the operations of another company, he was not familiar with the information available at Trev.com and was therefore unable to find all of the relevant material during the investigation by the Director.

ISSUE TO BE DECIDED

The employer Trev.com through Dunning, participated in a limited manner in the investigation by the Director. The issue to be decided in this appeal is whether Trev.com is entitled to introduce evidence in appeal that it refused or failed to provide to the Director?

ANALYSIS

The Tribunal, in *Tri West Tractor* BC EST No. D268/96 and *Kaiser Stables* BC EST No. D058/97 and a number of subsequent cases, has considered the circumstances where an employer who refuses to participate during the investigation by the Director and then attempts to introduce evidence at the appeal. The Tribunal has consistently determined that the appellant employer was not permitted to do so.

In both *Tri West Tractor* and *Kaiser Stables*, the employer refused to participate in *any manner* during the investigations. In the case at hand, the employer did participate in the investigation, although, *in a limited manner*. The information provided to the Director was provided in response to a request dated April 9, 1997 for such information.

There was no further evidence provided by Trev.com (Dunning) despite the invitation to do so contained in the Director's letter of June 11, 1997. Trev.com (Dunning) now seeks to challenge the Director's Determination with evidence it acknowledged it did not give to the Director as requested. There was no evidence that the information now being presented by Dunning was not available at the time of the investigation, rather, the evidence was that he was not familiar with the workings of Trev.com and was unable to locate it.

I am not persuaded that a compelling reason existed which prevented Trev.com (Dunning) from providing to the Director during the investigation those documents and evidence which he is now attempting to introduce at the appeal hearing.

I concur with the reasoning of the Tribunal in *Tri West Tractor* and *Kaiser Stables* that an appellant cannot refuse or fail to provide information during the investigation by the Director and then attempt to introduce such evidence during the appeal. In my view, the principles expressed in *Tri West Tractor* and *Kaiser Stables* also extend to the circumstances of the case at hand, where the employer provided "limited participation" during the investigation and then attempts to introduce information and evidence that was not provided during the investigation.

The Determination, however, must still explain the basis of its conclusions. I am satisfied that it does that. The Determination sets out Sandy's uncontested hours worked in December 1996 and also sets out the unpaid production bonuses.

In the above circumstances, Trev.com's (Dunning's) appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated September 11, 1997 be confirmed in the amount of \$2,909.74 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal