



An appeal

- by -

Panstall Inc.
("Panstall")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Cindy J. Lombard

FILE No.: 2000/419

DATE OF HEARING: November 1, 2000

DATE OF DECISION: January 8, 2001

DECISION

APPEARANCES:

Lyndon A. Best, Barrister and Solicitor, on behalf of Panstall Inc. and Dave Tomnuk.

Allen Walls; Ronald Brayshaw; Kurtis Hopson; Andrew Kyrns and Cory Pratt on their own behalf (“Walls”, “Brayshaw”, “Hopson”, “Kyrns” and “Pratt”).

Larry Bellman for the Director of Employment Standards (observed only).

EXHIBITS

The following Exhibits are marked for reference only and do not include all documents relied upon:

- #1. Employee Guideline Package
- #2. Panstall Payroll Summary (Allen Walls)
- #3. Panstall Employee Sheet and Terms and Conditions (Walls)
- #4. Panstall Cheque Nos. 5403, 5447, 5456, 5496, 5497, 5527, 5556, 5567 and 5586 to Walls
- #5. Letter from Ralph Biggar
- #6. Panstall Payroll Summary (Biggar)
- #7. Panstall Cheque Nos. 5268, 5314, 5338, 5378, 5414, 5442, 5468, 5477, 5491, 5551, 5602, 5651 to Biggar
- #8. Panstall Payroll Summary Sheet (Hopson) and Time Cards (Hopson)
- #9. Panstall Cheque Nos. 5453, 5503, 5561, 5601 and Cheque Stub No. 5650 (Hopson)
- #10. Panstall Inc. Employment Checklist and Terms of Employment (Kyrns)
- #11. Panstall Payroll Summary Sheet (Kyrns) and Time Cards (Kyrns)
- #12. Panstall Inc. Employment Checklist and Terms of Employment (Pratt)
- #13. Panstall Payroll Summary Sheet (Pratt)

#14. Panstall Cheque Nos. 5387, 5449, 5499, 5561, 5597 and Cheque Stub No. 5646 (Pratt)

#15. Panstall Bank Statement 1113-728, January 31, 2000

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Panstall Inc. (“Panstall”) of a Determination issued on May 26, 2000 (the “Determination”) by a Delegate of the Director of Employment Standards (the “Director”).

The Determination found that employees of Panstall had not received all regular and overtime wages, statutory holiday and vacation pay due to them under the *Act* upon their employment separation as follows:

a) Allen Walls

November 30, 1999 to December 11, 1999

76 hours x \$15.00 per hour	=	\$1,140.00	
14 hours x \$22.50 per hour	=	315.00	
3 hours x \$30.00 per hour	=	90.00	
Sub-total:		\$1,545.00	\$ 1,545.00

January 1, 2000

6 hours x \$15.00 per hour	=	\$90.00	\$90.00
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January 14, 2000

8 hours x \$15.00 per hour	=	\$120.00	<u>\$120.00</u>
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Sub-total: \$ 1,755.00

4% of \$1,755.00

\$70.20

\$1,825.20 \$1,825.20

Regular wages

October 7, 1999 to January 14, 2000

(less November 30, 1999 to December 11, 1999 above)

Gross wages calculated

(as per complainant information daily hours of work) = \$8,936.25

Less paid

(as per employer pay statement documents submitted) \$5,370.00

Sub-total: \$ 3,566.25 \$3,566.25

	Brought forward...	\$ 3,566.25	
<u>Annual Vacation Pay</u>			
4% of \$8,936.25 =	\$357.45	<u>\$ 357.45</u>	
	Sub-total:	\$5,748.90	
Plus interest pursuant to Section 88		<u>\$ 137.30</u>	
	Total:	<u>\$ 5,886.20</u>	

b) Ralph Biggar

Regular wages

August 26, 1999 to December 12, 1999			
112.5 hours x \$14.00 per hour =	\$ 1,575.00		
4% of \$1,575.00 =	<u>\$ 3.00</u>		
	Sub-total:	\$ 1,638.00	\$ 1,638.00

Overtime

August 26, 1999 to December 12, 1999
(as per complainant daily hours of work documents)

Total gross wages calculated	\$ 8,837.50		
Less paid	<u>\$ 8,543.50</u>		
(as per employer pay statements)	\$ 294.00	\$ 294.00	

Annual Vacation Pay

4% of \$8,837.50	\$ 353.50	<u>\$ 353.50</u>	
	Sub-total:	\$ 2,285.50	
Plus interest pursuant to Section 88		<u>\$ 67.72</u>	
	Total:	<u>\$ 2,353.22</u>	

c) Ronald Brayshaw

Regular wages

26 worked days unpaid
December 12, 1999 to
January 28, 2000
Regular wages received
bi-weekly = \$1,230.76

Daily rate = \$123.07 per day		
27 days x \$123.07 =	\$ 3,322.89	
4% of \$ 3,322.89 =	<u>\$ 132.91</u>	
	\$ 3,455.80	\$ 3,455.80

Statutory Holidays

December 25, 1999	\$ 123.07	
January 1, 2000	<u>\$ 123.07</u>	
	\$ 246.14	
4% of \$246.14	<u>\$ 9.84</u>	
	Sub-total:\$ 255.98	\$ 255.98

Annual Vacation Pay

Pay period ending December 11, 1999		
Wages earned \$1,230.76		
4% of \$1,230.76 =	\$ 49.23	<u>\$ 49.23</u>
	Sub-total:	\$ 3,761.01

Plus interest pursuant to Section 88		<u>\$ 80.45</u>
	Total:	<u>\$ 3,841.46</u>

d) Kurtis Hopson

Regular Wages

Total Gross wages calculated	\$ 2,267.50	
Less wages paid	<u>\$ 1,130.00</u>	
Balance due	\$ 1,137.50	\$ 1,137.50

Annual Vacation Pay

4% of \$2,267.50	\$ 90.70	<u>\$ 90.70</u>
	Sub-total:	\$ 1,228.20

Plus interest pursuant to Section 88		<u>\$ 34.71</u>
	Total:	<u>\$ 1,262.91</u>

e) **Andrew Kyrns**

Regular Wages

October 12, 1999 to January 10, 2000

*January 10, 2000 – 6 hours

6 hours x \$ 10.00 per hour

\$ 60.00

4% of \$60.00

\$ 2.40

Subtotal: \$ 62.40 \$ 62.40

Total gross wages calculated

\$ 2,241.25

(as per complainant daily hours of work)

Less paid (October 12, 1999, to December 31, 1999)

\$ 1,647.50

(as per employer submitted pay statements)

\$ 593.75

\$ 593.75

Annual Vacation Pay

4% of \$2,241.25 =

\$ 89.65

\$ 89.65

Sub-total: \$ 745.80

Plus interest pursuant to Section 88

\$ 18.34

Total: **\$ 764.14**

f) **Cory Pratt**

October 12, 1999 to December 20, 1999

Total gross wages calculated =

\$ 3,297.60

Less wages paid =

\$ 1,790.00

Sub-total: \$ 1,507.60 \$ 1,507.60

Annual Vacation Pay

4% of \$3,297.60

\$ 131.90

\$ 131.90

Sub-total: \$ 1,639.50

Plus interest pursuant to Section 88

\$ 46.33

Total: **\$ 1,685.83**

All employees who are the subject of the Determination appeared at the hearing as set out under Appearances apart from Ralph Biggar (“Biggar”) who submitted a letter, which is marked as Exhibit #5.

Panstall Inc. appeals the Determination on grounds which vary with each employee but including allegations that full wages were paid or there was an overpayment of monies or days allegedly worked were not worked or work was not authorized.

The employees all worked in the field on various projects for Panstall Inc. whose main office is located in Kelowna, B.C., but whose projects during the relevant period of employment were located in Armstrong (Rogers Flour Mill), McLeod Project in Kaslo and in Prince George. The only exception is Ronald Brayshaw who worked in the Kelowna office.

Panstall is in the construction/renovation business.

Office personnel included Dave Tomnuk, a Director of Panstall, and Heather Tomnuk who did all of the payroll and who is also a Director of Panstall, but who did not appear as a witness.

The Determination rejected the employer Panstall's Construction Site Payroll Records on the basis that the investigating officer felt that they were prepared after the commencement of the investigation in that they did not match the hours recorded on the employee's pay statements. In particular, where the employee records showed overtime, Panstall's records for the most part indicated only regular days and no overtime recorded.

ISSUES TO BE DECIDED

The issue in this appeal is whether Panstall has shown that the Determination is wrong in fact or in law in its conclusion.

FACTS AND ANALYSIS

After analyzing the written documents and oral evidence given following a full day hearing and all evidence given and documentation submitted, the following factors and law were critical to the Tribunal's decision in the case of all employees:

- 1) Panstall Inc. did not keep proper payroll records as required by Section 28 of the *Act*:

Section 28.

(1) For each employee, an employer must keep records of the following information:

- (a) the employee's name, date of birth, occupation, telephone number and residential address;*
- (b) the date employment began;*
- (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;*
- (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;*

- (e) *the benefits paid to the employee by the employer;*
- (f) *the employee's gross and net wages for each pay period;*
- (g) *each deduction made from the employee's wages and the reason for it;*
- (h) *the dates of the statutory holidays taken by the employee and the amounts paid by the employer;*
- (i) *the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;*
- (j) *how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.*

(2) *Payroll* records must

- (a) *be in English,*
- (b) *be kept at the employer's principal place of business in British Columbia, and*
- (c) *be retained by the employer for 5 years after the employment terminates.*

Records such as the Payroll Summaries (e.g. Exhibit Nos. 2, 6, 8, 10 and 13) submitted by Panstall following the initiation of this dispute were not made contemporaneously but were reconstructed after the fact.

In appealing the Director's Decision, Panstall bears the onus of establishing that it was unreasonable for the Director's Delegate to rely on the employee records, i.e. time sheets which were made contemporaneously with work performed as being unreliable: see *Rodrigue* (BC EST #D600/97).

The obligation of maintaining proper records rests on the employer. The onus is not on the employee to prove hours worked, regular or overtime. Where there is doubt due to lack of proper record keeping by the employer, the benefit of the doubt will be in favour of the employee and their records will be preferred. See for example: *Hi-Rise Salvage Ltd.* (BC EST # D293/97), *Frechette* (BC EST #D021/99), *Dosanjh* (BC EST #D487/97).

The procedure was that time sheets were submitted to the Kelowna office by telephone or facsimile and cheques were issued without any breakdown shown of pay period, calculation of gross pay, deductions, etc.

- 2) The one witness who may have shed light on accounting questions i.e. Heather Tomnuk who did all payroll at the relevant time and was a director of Panstall was not produced as a witness on behalf of Panstall Inc.

Dealing with each employee:

1. Allen Walls ("Walls")

Walls was employed by Panstall commencing October 7, 1999, overseeing Panstall's projects in Armstrong and Kaslo. The parties disagree on the separation date. The employer

says it was December 31, 1999, while Walls says that it was January 14, 2000. In the Determination the Delegate concluded that the following wages are due to Walls based solely on information provided by Walls as the employer Panstall provided no information to the Delegate:

November 30, 1999 to December 11, 1999

76 hours x \$15.00 per hour =	\$ 1,140.00	
14 hours x \$22.50 per hour =	315.00	
3 hours x \$30.00 per hour =	<u>90.00</u>	
Sub-total:	\$ 1,545.00	

January 1, 2000

6 hours x \$15.00 per hour =	\$ 90.00	
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January 14, 2000

8 hours x \$15.00 per hour =	<u>\$ 120.00</u>	
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Sub-total:	\$ 1,825.20	\$ 1,825.20
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Regular wages

October 7, 1999 to January 14, 2000

(less November 30, 1999 to December 11, 1999 above)

Gross wages calculated

(as per complainant information daily hours of work) =	\$ 8,936.25	
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Less paid

(as per employer pay statement documents submitted)	<u>\$ 5,370.00</u>	
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Sub-total:	\$ 3,566.25	\$ 3,566.25
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Annual Vacation Pay

4% of 48,936.25 =	\$ 357.45	<u>\$ 357.45</u>
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Sub-total:		\$ 5,748.90
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Plus interest pursuant to Section 88		<u>\$ 137.30</u>
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Total:		<u>\$ 5,886.20</u>
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With respect to the Determination and the employee Walls, Tomnuk on behalf of Panstall says as follows:

- 1) Walls' employment terminated on December 31, 1999, not January 14, 2000, and therefore is due no wages or vacation pay for the period January 1 to 14, 2000.
- 2) The hours worked were incorrectly calculated in that according to "Panstall's Field Employee Terms and Conditions of Employment" (Exhibit Nos. 1 and 3):
 - a) Walls agreed to work a 40 hour week comprised of four ten hour days not including one hour per day lunch (1/2 hour) and coffee breaks (2 15 minute breaks).
 - b) Overtime was not authorized without the express consent of the employer.
- 3) The amount of wages paid by Panstall to Walls i.e. \$5,748.90 as determined by the Director was incorrect and in fact he was overpaid.

With respect to the matters raised by Panstall with respect to Walls:

- 1) Walls' employment terminated on December 31, 1999, not January 14, 2000, and therefore is due no wages or vacation pay for the period January 1 to 14, 2000.

Walls was hired on October 7, 1999, as a foreman to manage Panstall's contract in Armstrong. Walls states that his duties included overseeing the work of other Panstall employees at the site, hiring and providing payroll time sheets.

Walls states and I accept his evidence as credible that he did continue to work until January 14, 2000, even though by that time his paycheques had started being returned NSF in December. This evidence is corroborated by the Record of Earnings for Walls issued by Panstall, which indicates a "final pay period ending date" of January 14, 2000. Furthermore, the only records of hours worked during his employment are those time records, which Walls submitted and which support the determination of wages owing for that period.

- 2) The hours worked were incorrectly calculated in that according to "Panstall's Field Employee Terms and Conditions of Employment":
 - a) Walls agreed to work a 40 hour week comprised of four ten hour days not including one hour per day lunch (1/2 hour) and coffee breaks (two 15 minute breaks).
 - b) Overtime was not authorized without the express consent of the employer.

Panstall says that when Walls was hired, he was given a document entitled "Employee Guideline Package" (Exhibit #1) and Panstall Employee Sheet signed by him on October 12, 1999, and attached Terms and Conditions of Employment (Exhibit #3) which states that hours of work per week will be 40 hours based on a 4 day week and 10 hours per day

not including 1 hour for lunch and two 15 minute coffee breaks with the employees required to take ½ hour lunch break and two 15 minute coffee breaks to be considered as unpaid daily breaks. Furthermore, overtime was not authorized without expressed written consent of the owner.

Walls says that he was hired to work as a foreman at an hourly rate of \$15.00 per hour and that he was not given the “Field Employee Terms and Conditions of Employment” or the Terms and Conditions of Employment were not attached to the sheet he signed nor had he ever, prior to the Hearing, seen either document which were submitted on behalf of Panstall at the hearing. The Tribunal found Walls’ evidence to be credible.

Walls says that each Friday he submitted his time sheets as well as those of the other employees, that he was not required to deduct ½ hour for lunch as he used that time to do paperwork and that overtime was authorized for both himself and the other employees in order to get the job done.

- 3) The amount of wages paid by Panstall to Walls i.e. \$5,748.90 plus interest of \$137.30 as determined by the Director was incorrect and in fact he was overpaid.

Walls says that he faxed the time sheets to Ronald Brayshaw in the Panstall Inc. office and payroll was done by Heather Tomnuk.

In addition, if Walls was required to purchase materials on his own account for the job, he submitted the receipts and was reimbursed or he was given an advance for expenses and then submitted receipts. The cheques issued to Walls contain no breakdown by Panstall as to how wages and deductions are calculated nor in several instances whether the cheques represented net wages owing or reimbursement for expenses.

Walls states that the cheque numbers 5527, 5567 and 5586 were all expense cheques and not wages as indicated on the Payroll Summary Sheet submitted by Panstall, which is Exhibit #2 for reference. The employer’s omission in keeping proper records we find to be significant and an additional reason to prefer the records of Walls and find that Panstall has not discharged its onus of showing that the Director’s Determination was wrong.

Furthermore, in appealing the Director’s Decision, Panstall bears the onus of establishing that it was unreasonable for the Director’s Delegate to rely on Walls’ records and that Walls’ were unreliable. The facts do not bear out a finding that Walls’ records were unreliable. Furthermore, Panstall on the Payroll Summary (Exhibit #2) calculates overtime hours which are less than those noted on Walls’ daily time records and which are calculated at regular time on the grounds that they were banked hours. Walls denies banking any hours.

The employer kept no record as to what cheques were for and it is therefore reasonable to accept Walls’ evidence.

In conclusion, Panstall failed to discharge its onus to prove that the Director’s Determination was wrong and the Determination with respect to Walls is confirmed.

2. Ronald Brayshaw (“Brayshaw”)

Ronald Brayshaw was employed by Panstall commencing October 20, 1997, as the Kelowna Shop Manager.

In the Determination, the Delegate concluded that the following wages were due to Brayshaw.

Regular Wages

26 worked days unpaid December 12, 1999 to January 28, 2000

Regular wages received bi-weekly = \$1,230.76

Daily rate = \$123.07

27 days x \$123.07 per hour =

\$ 3,322.89

4% of \$3,322.89 =

132.91

Sub-total: \$ 3,455.80 \$ 3,445.80

Statutory Holidays

December 25, 1999

\$ 123.07

January 1, 2000

123.07

\$ 246.14

4% of \$ 246.14

9.84

Subtotal: \$ 255.98 \$ 255.98

Annual Vacation Pay

Pay period ending December 11, 1999

Waged earned \$1,230.76

4% of \$1,230.76

\$ 49.23

\$ 49.23

Sub-total: \$ 3,761.01

Plus interest pursuant to Section 88

\$ 80.45

Total: **\$ 3,841.46**

With respect to the Determination and the employee, Brayshaw, Tomnuk on behalf of Panstall says as follows:

- 1) Brayshaw did not work until January 28, 2000, as found by the Delegate of the Director but rather his employment ceased on December 31, 1999.
- 2) Deductions should be made from wages and vacation pay owing for:
 - a) time off to drive his children to school
 - b) vacation time taken and not deducted.

- 3) Brayshaw did not work until January 28, 2000, as found by the Delegate of the Director but rather his employment ceased on December 31, 1999.

The evidence clearly supports the finding of the Delegate of the Director that Brayshaw's employment was not terminated until January 28, 2000, including the following:

- a) the Record of Employment signed by Heather Tomnuk on February 2, 2000, indicates the final pay period end date to be January 28, 2000;
 - b) Brayshaw's evidence that he in fact worked until January 27, 2000, was credible.
- 4) Deductions should be made from wages and vacation pay owing for:
 - a) time off to drive his children to school
 - b) vacation time taken and not deducted.

The evidence of Brayshaw that

- a) the time he took off to drive his children to school was 15 minutes at the beginning and end of each day for an 8 day period and was done with the consent of Tomnuk and was made up by starting the day one half hour early and working through lunch, is accepted as credible;
- b) Brayshaw admitted that he did take some vacation during the July 2, 2000, pay period.

Brayshaw further gave evidence that he found a cheque indicating that he received full wages due for the month of December, 1999, but that all was remain owing from January 1 through January 2, 2000.

Based on the above findings of fact with respect to Brayshaw, wages and vacation pay are due to Brayshaw as follows:

January 1, 2000 to January 28, 2000

Based on the daily rate of \$123.07 determined by the Director and Brayshaw's record of days worked:

Regular wages

January 3, 4, 5, 10, 11, 12, 13, 14, 17, 18, 19,20, 21, 24, 25, 27 and 28 =		
17 days x \$ 123.07		\$ 2,092.19
4% of \$2,092.19		<u>\$ 83.68</u>
	Subtotal:	\$ 2,175.87 \$ 2,175.87

Statutory holidays

January 1, 2000	\$ 123.07	
4% of \$246.14	\$ 4.92	
	\$ 127.99	\$ 127.99
	Total:	<u>\$ 2,303.86</u>

Plus interest pursuant to Section 88 to be calculated.

3. Kurtis Hopson (“Hopson”)

Hopson’s employment with Panstall as a field worker commenced on October 26, 1999, and terminated on December 20, 1999. In the Determination, the Delegate of the Director determined that the following wages and vacation pay are due by Panstall to Hopson based on records submitted by Panstall:

Regular Wages

Total Gross wages calculated	\$ 2,267.50	
Less wages paid	<u>\$ 1,130.00</u>	
	Balance due	\$ 1,137.50 \$ 1,137.50

Annual Vacation Pay

4% of \$2,267.50	\$ 90.70	90.70
	Sub-total:	\$ 1,228.20
Plus interest pursuant to Section 88		\$ 34.71
	Total:	<u>\$ 1,262.91</u>

Panstall’s position is that Hopson was overpaid. Panstall agrees with the total wages owing of \$2,267.50 but says that the total gross paid to Hopson was \$2,330.00 not \$1,130.00. We reject this submission and uphold the Director’s Determination for the following reasons:

- a) for cheque No. 5650 which Panstall says was dated December 31, 1999, in the net amount of \$644.57 (gross alleged of \$800.00) Tomnuk produced only a cheque stub and no cancelled cheque. Hopson’s evidence is that he did not receive that cheque.
- b) The Panstall Payroll Summary and time cards of Hopson do not match as follows:

	<u>Panstall</u>	<u>Hopson</u>
October 26 to 29, 1999	36	40
November 2 to 5, 1999	23	24.5
November 2, 1999	29	69
November 12, 1999	74	87
	162 hours	220.5 hours

Panstall failed to keep proper records as required by Section 28 of the *Act* and doubt is cast on the veracity of payroll records not kept contemporaneously with the issuance of

paycheques. Furthermore, the cancelled paycheques give no breakdown of as to gross wages and deductions made.

In the case of Hopson, Panstall has failed to discharge its onus of showing that the Determination is incorrect.

4. Andrew Kyrns (“Kyrns”)

Andrew Kyrns commenced his employment at Panstall on October 12, 1999, at an hourly rate of \$10.00 per hour as a field labourer. In the Determination, the Delegate of the Director determined that the following wages and vacation pay remained outstanding:

Regular Wages

October 12, 1999 to January 10, 2000

*January 10, 2000 – 6 hours

6 hours x \$ 10.00 per hour

\$ 60.00

4% of \$60.00

\$ 2.40

Subtotal: \$ 62.40 \$ 62.40

Total gross wages calculated
(as per complainant daily hours of work)

\$ 2,241.25

Less paid (October 12, 1999, to December 31, 1999)
(as per employer submitted pay statements)

\$ 1,647.50

\$ 593.75 \$ 593.75

Annual Vacation Pay

4% of \$2,241.25 =

\$ 89.65

\$ 89.65

Sub-total: \$ 745.80

Plus interest pursuant to Section 88

\$ 18.34

Total: **\$ 764.14**

Panstall argues that the Determination is incorrect for the following reasons:

- a) The total gross wages of \$2,241.27 determined is incorrect on the basis that Kyrns did not work in January, 2000, apart from six hours on January 10, 2000.
- b) The total wages paid by the employer was \$2,035.77 not \$1,647.50
- c) Kyrns was paid twice for December 12, 2000

The employer does not appear to have kept contemporaneous payroll records and where they do not match the time cards kept by the employees, the time cards are preferable as being

accurate. In the case of Kyrns, Panstall's payroll summary and time cards of Kyrns do not match up for the following dates:

	<u>Panstall</u>	<u>Kyrns</u>
October 12 to 15, 1999	36	40
October 19 to 29, 1999	45	50
November 2, 1999	58.5	67
November 16, 1999	20.25	28.75
December 2, 1999	<u>20.25</u>	<u>29</u>
	180 hours	214.75 hours

In addition, there is no support for a finding that Kyrns was paid twice for December 12, 2000, and Kyrns' evidence that he did work one day in January, 2000, is credible.

Again, where the employer has failed to keep proper employee and payroll records as required by Section 28 of the *Act*, and there is no reasonable evidence that the employee records were unreliable, the evidence of the employee is preferred.

In summary, Panstall has not discharged its onus of showing that the Determination was wrong with respect to Kyrns and the Determination is therefore confirmed.

5. Cory Pratt ("Pratt")

Pratt's employment commenced on October 12, 1999, as a field labourer, at an hourly rate of \$10.00 and terminated on December 20, 1999. In his Determination, the Delegate of the Director found that the following wages and vacation pay remained due and owing to Pratt based on information submitted by the employer:

October 12, 1999 to December 20, 1999		
Total gross wages calculated =	\$ 3,297.60	
Less wages paid =	<u>\$ 1,790.00</u>	
	Sub-total: \$ 1,507.60	\$ 1,507.60
 <u>Annual Vacation Pay</u>		
4% of \$3,297.60	\$ 131.90	<u>\$ 131.90</u>
	Sub-total:	\$ 1,639.50
Plus interest pursuant to Section 88		<u>\$ 46.33</u>
	Total:	<u>\$ 1,685.83</u>

The employer says that the Determination is incorrect in that Panstall paid total wages of \$3,589.21 not \$1,790.00 and consequently there was an overpayment to Pratt.

Panstall submitted cheques indicating that Pratt had been paid the following wages and Pratt confirmed this evidence (see Exhibit #14):

5387	10/22/99	\$ 311.07
5449	11/05/99	627.20
5499	11/11/99	522.09
5561	12/03/99	304.87
5597	12/17/99	<u>473.05</u>
		\$ 2,238.08

5646 – stub only which Pratt says he did cash		<u>\$ 676.25</u>
		\$2,914.53

Pratt says that he was not paid for overtime but neither he nor Panstall kept records nor did Panstall detail deductions made for each pay period except in the payroll summary apparently made later. Taking into account the fact that overtime may not have been paid and not having the benefit of accurate contemporaneous payroll records, we can only conclude that Pratt did receive wages of \$2,914.53 which changes the Delegate's calculation as follows:

Total gross wages calculated	\$ 3,297.00
Less wages paid	<u>\$ 2,914.53</u>
	\$ 372.47
Annual vacation pay	
4% of \$372.47	<u>\$ 14.89</u>
	\$ 387.36

Plus interest pursuant to Section 88 of the *Act* to be calculated

6. **Ralph Biggar (“Biggar”)**

Biggar was employed as a welder by Panstall between August 26, 1999, and December 12, 1999, at an hourly rate of \$14.00 per hour.

In his Determination, the Delegate of the Director found that the following regular wages, overtime and vacation pay remained owing by Panstall to Biggar:

Regular wages

August 26, 1999 to December 12, 1999		
112.5 hours x \$14.00 per hour =	\$ 1,575.00	
4% of \$1,575.00 =	<u>\$ 3.00</u>	
Sub-total:	\$ 1,638.00	\$ 1,638.00

Overtime

August 26, 1999 to December 12, 1999
(as per complainant daily hours of work documents)

Total gross wages calculated	\$ 8,837.50	
Less paid	<u>\$ 8,543.50</u>	
(as per employer pay statements)	\$ 294.00	\$ 294.00

Annual Vacation Pay

4% of \$8,837.50	\$ 353.50	<u>\$ 353.50</u>
	Sub-total:	\$ 2,285.50
Plus interest pursuant to Section 88		<u>\$ 67.72</u>
	Total:	<u>\$ 2,353.22</u>

Panstall submitted payroll cheques (Exhibit #7) indicating as per its payroll summary (Exhibit #6) that Biggar received net wages of \$6,888.61, allegedly covering the period August 23, 1999, to December 31, 1999, and alleged gross wages of \$8,474.93.

No calculation was provided to the employee with each cheque giving a breakdown of regular and overtime pay and deductions.

In summary, Panstall has failed to discharge its onus of showing that the Delegate's calculation of wages and vacation pay owing is wrong and the Determination is therefore confirmed.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated May 26, 2000, is:

- 1) With respect to Allen Walls, confirmed.
- 2) With respect to Donald Brayshaw, varied to order that the sum of \$2,303.86 is owing plus interest pursuant to Section 88 to be calculated.

- 3) With respect to Kurtis Hopson, confirmed.
- 4) With respect to Andrew Kyrns, confirmed.
- 5) With respect to Cory Pratt, varied to order that the sum of \$387.36 is owing plus interest pursuant to Section 88 to be calculated.
- 6) With respect to Ralph Biggar, confirmed.

CINDY J. LOMBARD

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal