

An appeal

- by -

Dr. Oleg Gavrilko Inc. operating as Acute Medical Dental Centre
("Dr. Gavrilko")

- 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: April D. Katz

FILE No.: 2003A/264

DATE OF DECISION: January 19, 2004

DECISION

SUBMISSIONS

Dr. Oleg Gavrilko	on his own behalf
Vijay Bharti Siripawa	on her own behalf
Bernie Gifford	delegate on behalf of the Director

OVERVIEW

Vijay Bharti Siripawa (“Vijay”) was employed as a receptionist by Dr. Oleg Gavrilko Inc. operating as Acute Medical Dental Centre (“Dr. Gavrilko”) from January 2001 until November 2, 2002. On Vijay’s last day of work with Dr. Gavrilko, Dr. Gavrilko stopped payment on her final pay cheque. Vijay filed a complaint with the Director of Employment Standards (“Director”) claiming that she was not paid for her last month of work, October 2002, and that during her employment she was not paid overtime and was not paid vacation pay. The Director notified Dr. Gavrilko of Vijay’s complaint and requested employment records. The Director notified Dr. Gavrilko about a mediation set for June 5, 2003 and a hearing on July 24, 2003. Dr. Gavrilko did not provide any records in relation to Vijay’s employment and did not attend the mediation session or the hearing. He did not contact the Director’s office to provide a reason for his not participating in the process. The Director’s delegate relied on the pay stub records prepared by the Dr. Gavrilko’s office and provided by Vijay at the hearing. The Determination concluded that Dr. Gavrilko owed Vijay wages for October 2002, vacation pay during her employment and overtime for a total of \$7687.69 plus interest. An administrative penalty of \$1500 was applied to Dr. Gavrilko and added in the Determination. Dr. Gavrilko was ordered to pay \$9483.98 including interest. Dr. Gavrilko filed this appeal to the Tribunal on the grounds that evidence has become available that was not available at the time the Determination was being made.

The appeal proceeded by way of written submissions from the Appellant, the Respondent and the Director.

ISSUE

The first issue to be decided is if new evidence has become available that was not available at the time the Determination was made as alleged in the appeal. If so the second issue will be whether the new evidence would change the outcome of the Determination.

ARGUMENTS

Dr. Gavrilko argues that he has evidence regarding Vijay’s claim that was not considered by the Director in making the Determination. He argues that he did not attend the hearing because of “personal reasons”. He submits that Vijay did not have signed pre approval for her overtime worked. Dr. Gavrilko argues his accountants paid Vijay her vacation pay. Dr. Gavrilko made no submissions on the administrative penalty imposed.

Vijay argues that her evidence was from the payroll pay stubs she had been given by Dr. Gavrilko's accounting firm. She argues they are the same as the records submitted with the appeal except some pages appear to have been photocopied to obliterate part of the information.

The Director's Delegate argues that the evidence relied upon at the hearing came from Dr. Gavrilko's accounting firm, his cheque marked "stop payment", and that the payroll records supplied do not show any annual vacation was paid to Vijay. Based on the evidence submitted the Delegate argues the Determination should be confirmed.

FACTS

The essential facts are not in dispute. Vijay worked as receptionist for Dr. Gavrilko from January 2001 to November 2002 and was not paid overtime or vacation pay. On her last day of work Vijay was given a paycheque for her last month of work and the Appellant stopped payment of the cheque.

The parties differ on the facts in a couple of areas. Dr. Gavrilko indicated in his letter that only pre-approved overtime was to be paid to employees and no signed approvals were submitted by Vijay. He does not deny the specific findings of hours worked as overtime.

LAW AND ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Section 112(1) of the Act provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination; or
- (c) evidence has become available that was not available at the time the determination was being made

Dr. Gavrilko relies on the third ground of appeal, that evidence has become available that was not available at the time the determination was being made. Dr. Gavrilko's states that not all of the overtime work was approved in advance. Dr. Gavrilko was notified of the complaint in February 2003 by Vijay. When the matter was not resolved Vijay filed her complaint on March 19, 2003. The Director's office contacted Dr. Gavrilko's office in May 2003 and again in July 2003 prior to the hearing. The Determination was completed on August 11, 2003.

Dr. Gavrilko's letter in support of his appeal states that he was receiving medical treatments and was out of the province. He did not provide any evidence of the dates when this situation prevailed. The implication is that he was unable to attend the hearing but he does not explain why no evidence was submitted between March and August 2003.

A copy of Dr. Gavrilko's payroll documents were submitted with the appeal. Dr. Gavrilko did not provide any information to suggest that this evidence was not available from March to August 2003 when this matter was before the Director. There is nothing identified in the documents which would alter the outcome of the Determination. In fact the documents support the pay stub information provided by Vijay.

The fact that Dr. Gavrilko did not want Vijay to incur overtime hours does not take away from the fact that he knew Vijay worked overtime from her time sheets. Vijay was paid for the hours worked at straight time and she was never denied payment for hours worked which included unauthorized overtime. Dr. Gavrilko did nothing to correct the contravention of section 34 of the *Employment Standards Act*.

The law contained in section 40 of the *Employment Standards Act* requires Dr. Gavrilko to pay overtime when it is worked, whether it has approved the overtime or not. The fact that Dr. Gavrilko allowed the pattern to continue throughout Vijay's employment period in ignorance is not relevant to the application of section 40 to this situation.

I find no evidence that the Director erred in concluding that the overtime was owed.

The Delegate relied on Dr. Gavrilko's records to conclude that Vijay was not paid vacation pay.

The copy of the pay cheque stamped Stop Payment for Vijay's October wages clearly shows these wages are outstanding and Dr. Gavrilko did not dispute this aspect of the Determination.

To be successful the submissions from the appellant must demonstrate some error in the Determination, either in the facts accepted, the factual conclusions reached or in the Director's analysis of the applicable law. I cannot find any evidence that was not available to Dr. Gavrilko prior to the Determination being issued that he could have filed with the Director. Dr. Gavrilko was served with a "Demand for Records" and did not reply or provide the information. There is no evidence to support this appeal.

CONCLUSION

Based on the evidence on the merits I find that there is no evidence of an error on the part of the Director in reaching the conclusions in the Determination. Dr. Gavrilko's appeal is dismissed.

ORDER

Pursuant to section 115 of the Act, the Determination dated August 29, 2003 is confirmed. Dr. Oleg Gavrilko Inc. must pay Vijay Bharti-Siripawa \$7983.98 plus interest pursuant to Section 88 of the *Employment Standards Act*.

April D. Katz
Adjudicator
Employment Standards Tribunal