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 -

First Nations Artists Corporation
("FNAC")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/753

DATE OF DECISION: February 11, 1998

DECISION

OVERVIEW

This is an appeal by First Nations Artists Corporation ("FNAC") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against Determination CDET dated September 24, 1997 by the Director of Employment Standards (the "Director").

The Employer appeals on the grounds that Kristina House ("House") is not owed any money for overtime and that her hourly wage was not $12.50. They also ask that the Determination with respect to the liability of June Bernard as a Director be reconsidered since the calculations with respect to the wages owing by the Employer are reduced by the wages already paid, whereas this was not done with respect to Ms. Bernard's liability. That matter is dealt with in a separate Decision.

ISSUE TO BE DECIDED

Does FNAC owe House for unpaid wages, unpaid overtime and compensation for length of service ?

FACTS

House was employed as a talent scout with FNAC from August 26, 1996 to May 2, 1997. House filed a compliant with the Director of Employment Standards who in a Determination dated September 24, 1997 concluded that House was owed $8,624.81 in unpaid wages, overtime, vacation pay and compensation for length of service. The Director's delegate concluded that as of November 4, 1996, House was entitled to an hourly rate of $12.50. For the period prior to that, her wage rate was $1,100 per month, which was less than the minimum wage. He also found that the employer had not paid for overtime of 31.5 hours or compensation for length of service since her employment was terminated without notice or just cause.

ANALYSIS

Counsel for FNAC argues that the hand-marked calendar pages submitted by Ms. House should not have given the weight of a contemporaneous record of hours worked as they were prepared after the fact. It is also claimed that they were "designed to support Ms. House's position on the dates and numbers of hours of work". It is argued that the employer's contractual relationship with an agency of the federal government is not the issue here and should not be treated as setting out the relationship between the employer and Ms. House. Ms. House is not a party to the contract and it should not be used to support her interpretation of her arrangement with the FNAC.

House argues that the agreement between the appellant and the federal Job Opportunities program to employ her from November 4, 1996 to March 4, 1997 outlines her training entitlement and that the employer did not live up to this portion of the agreement. She says that her hours "ranged from 9:30 - 6:00 p.m. Monday to Friday" and that her hours varied "depending on the contract given to First Nations Artists Corporation from various film and television producers". She denies any wrongdoing in soliciting business away from FNAC and says that her employment contract was terminated because FNAC was unable to meeting its financial obligations. House also maintains that the contract sets out FNAC's obligation to pay her $12.50 per hour, 60% or $7.50 of which was paid by the federal program.

The Determination under appeal set House's hourly rate at $12.50 per hour based on the November 4, 1996 contract between the employer and the federal Job Opportunities program. This was the only independent evidence setting the hourly rate and the employer, despite several requests, failed to provide payroll records as called for by the *Employment Standards Act.* The employer provided cancelled cheques, file notes and a list of wages, but did not keep a record of hours worked by House. I agree with the Determination that the best evidence of the wage rate beginning on November 4, 1996 was the contract between the employer and the Job Opportunities program.

The main portion of the contract states:

> 2.01 Subject to other provisions of this agreement, the CORPORATION agrees to pay the EMPLOYER the following:
> (i) subject to subparagraphs (ii) and (iii), the EMPLOYER shall be reimbursed an amount equal to the product obtained by multiplying the approved hourly rate(sic) specified in Schedule B to this agreement in the section entitled "Wage Costs", by the total number of hours for which wages were paid to the employees during the work/training period;
> (ii) the maximum contribution in respect of the cost of wages paid to an individual employee in any week shall not exceed $300.;
> (iii) the maximum total contribution in respect to all wage costs shall not exceed the maximum contribution amount specific in the Schedule B in the section entitled "Wage Costs".

Schedule B does not specify wage rate, but Schedule A states:

EMPLOYER CONTRIBUTION

> The employer shall be financially responsible to pay 40% of wages, Mandatory Employment Related Costs, supervision and administration.

ADDITIONAL CLAUSES

> * Wages will be reimbursed for the actual hours worked by participant to the maximum contracted per Schedule B ...

BUDGET

> Participant wage:
>
> $12.50 at 60% = $7.50 SATES portion
> $7.50/hr x 20 wks x 37.5 hrs = $5,625
> Training costs:

It is clear from the contract that the payment to FNAC was based in the assumption that the participant (i.e. House) was to be paid $12.50 per hour, with the government providing 60% or $7.50 per hour. The remaining 40% was to be paid by FNAC. Given that FNAC accepted funding on the premise of a $12.50 hourly wage, it cannot now say that its obligation to House was $7.50 per hour. It is argued that this contract cannot be used to determine House's wage rate but even though House was not a party to that contract, it is evidence relevant to the employer's operations. Moreover, the employer was unable to produce any other records on this point. I agree that the hourly rate prior to that date was less than the statutory minimum wage and thus confirm that aspect of the Determination which fixed her wage rate before that date at $7.00 per hour.

With respect to the hours of work, the employer has sometimes said that House always worked from 10:00 a.m. until 6 p.m. but at other times that she worked outside those hours. The Director's delegate examined a calendar of specific hours worked by House, saying that it "appeared credible" and was not contradicted by any evidence provided by the employer. Thus, House's records were used as the basis for the Determination. FNAC asserts that House's records should not be given the same evidentiary weight as contemporaneous records as they were prepared after the fact. I have some sympathy for this argument but note there is no other evidence on hours of work, the Director's delegate found House's records to be "credible" and the other employer acknowledges some work out if ordinary working hours. The onus in an appeal is on the appellant and in the absence of evidence to the contrary or strong evidence that the Director's delegate was wrong in relying on House's version of events, this aspect of the appeal is dismissed.

As counsel made no submission on the question of dismissal for cause, I find that this argument was abandoned. Some initial submissions indicated that compensation for length of notice ($300.00) has been paid but that amount was subsequently identified as vacation pay on the Record of Employment. House denies any wrongdoing that would justify dismissal. Thus, this aspect of the Determination is also confirmed.

ORDER

Pursuant to Section 115 of the *Act*, I confirm the Determination in this matter, dated September 24, 1997.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal

LP:sr