

An appeal

- by -

Thomas Wilkinson

- 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 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2007A/8

DATE OF DECISION: March 19, 2007

DECISION

SUBMISSIONS

Karin Doucette

On behalf of the Director of Employment Standards

OVERVIEW

1. This decision arises out of an appeal by Thomas Wilkinson, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued January 24, 2005. In June 7, 2005, Tribunal member Frank A. V. Falzon issued a decision concluding that the delegate had failed to address certain matters in assessing Mr. Wilkinson's overtime claim, and referred the matter back "for a full and proper consideration of whether [Mr. Wilkinson] is entitled to overtime pay over and above the overtime awarded in the January 24, 2005 Determination" (BC EST #D078/05).
2. On November 2, 2005, the delegate issued a letter finding Mr. Wilkinson entitled to additional wages in the amount of \$5,220.41. The delegate rejected some of Mr. Wilkinson's hours on the grounds that they were not credible.
3. In his February 14, 2006 decision, Member Falzon concluded that the process used by the delegate to determine the overtime entitlement was contrary to natural justice and the Tribunal's order. (BC EST #D017/06) As such, he referred the matter back to the delegate a second time with a directive to comply with the Tribunal's original Order.
4. The Tribunal received no response to the delegate's February 12, 2007 letter on that second referral back from either Mr. Wilkinson or his former employer, Double "R" Safety Ltd.
5. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practise and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ANALYSIS

6. In the second referral back, a second delegate assumed responsibility for the file, as the original delegate was on leave. She reviewed the original complaint, attachments and submissions, and spoke with the parties to clarify certain information.
7. The delegate noted that the employer had not maintained a record of Mr. Wilkinson's hours. She noted that while Mr. Wilkinson was diligent about recording some tasks, the notations were minimal. The employer's response to Mr. Wilkinson's claim was merely to question the number of hours without providing any evidence to bring his record into question. The employer confirmed that Mr. Wilkinson was required to work the hours necessary to get the job done, and rewarded him with a bonus to reflect those hours. The delegate found Mr. Wilkinson's hours to be the best evidence of his hours worked.

8. The delegate calculated Mr. Wilkinson's wages for the period of time specified in the referral back. She determined that the bonus paid to Mr. Wilkinson constituted wages, as it was money paid by an employer as an incentive and related to "hours of work, production or efficiency", and thus included it as earnings for the period in question. She prorated it over 8.5 pay periods, or the time that Mr. Wilkinson was in the field. She found that Mr. Wilkinson had been paid all his regular wages, and calculated the amount outstanding for his overtime hours. She concluded that he was entitled to \$3,606.66 in overtime wages, plus 4% vacation pay on those wages, in the amount of \$144.27. She recalculated the interest owing under section 88 of the *Act* and concluded that a total of \$4,355.93 was owed.
9. The delegate noted that in an April 9, 2006 submission, Mr. Wilkinson had attempted to include additional overtime hours in his complaint, and determined that he was not entitled to amend his complaint so far into the process.
10. As noted above, neither Mr. Wilkinson nor the employer responded to the delegate's letter by the deadline provided by the Tribunal. As a result, I infer that both are satisfied with both the process as well as the determination of Mr. Wilkinson's wage determination.
11. As I find that the delegate has complied with both natural justice requirements, and based her determination of Mr. Wilkinson's wage entitlement on the best evidence, I confirm her award.

ORDER

12. I Order, pursuant to Section 115 of the *Act*, that the January 24, 2005 Determination of the delegate be varied to show Mr. Wilkinson is owed \$4,355.93.

Carol L. Roberts
Member
Employment Standards Tribunal