

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-

Tahtsa Timber Ltd.

(“Tahtsa” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/777

DATE OF DECISION: February 5, 1999

DECISION

OVERVIEW

This is an appeal brought by Tahtsa Timber Ltd. (“Tahtsa” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 17th, 1998 under file number 75-617 (the “Determination”).

The Director determined that Tahtsa owed its former employee, Bruce Beler (“Beler”), the sum of \$3,123.76 on account of unpaid wages and interest.

ISSUE TO BE DECIDED

Tahtsa’s appeal is predicated on the assertion that Beler is not owed any monies; in fact, Tahtsa asserts that Beler was overpaid by \$7,172.28.

FACTS AND ANALYSIS

According to the information set out in the Determination (and which is not contested by the employer), Beler was employed as a logging equipment operator from January 1st, 1996 until February 5th, 1997; his hourly wage was \$22.50. Based on the employer’s payroll records provided in response to a demand issued by the delegate, the delegate determined that Tahtsa paid Beler, during the relevant period, \$62,646.07 but that Beler had earned, during the same period, \$65,487.23 thus leaving an unpaid balance of \$2,841.16. The Determination was issued for this latter amount together with accrued interest (see section 88 of the *Act*).

The employer’s position is that it, in fact, paid Beler \$63,723.44 plus a further \$8,936.07 on account of “taxable benefits”. With respect to the latter taxable benefits, the employer says that these monies were paid to Beler in lieu of overtime pay. I understand that these benefits were, principally if not exclusively, paid in the form of a vehicle allowance.

Tahtsa’s position is more fully set out in its written submission to the Tribunal dated January 12th, 1999. The employer says that by reason of an audit conducted by Revenue Canada, that federal government agency determined that Beler had been paid \$63,723.44, however, a copy of the Revenue Canada audit has not been submitted to the Tribunal.

By way of reply, the Director’s delegate written submission notes that the calculation of the amount of wages paid to Beler was based on the *employer’s own payroll records*. The delegate noted, correctly in my view, that any amounts paid to Beler on account of a vehicle allowance were not credited as wage payments because “allowances or expenses” are specifically excluded

from the definition of “wages” set out in section 1 of the *Act*. Further, the delegate also noted, again correctly in my view, that by reason of section 4 of the *Act*, any alleged agreement by Beler to waive entitlement to overtime pay in exchange for a vehicle allowance was not a valid and enforceable agreement. I might further add that the employer has not, in any event, produced any evidence to corroborate its assertion regarding this latter “overtime waiver” agreement.

Finally, it should be noted that the delegate, in issuing the Determination now under appeal, was obliged to interpret and apply the relevant provision of the *Employment Standards Act*. The fact that certain payments might be characterized as taxable income under an entirely separate enactment (*i.e.*, the federal *Income Tax Act*) is irrelevant when determining if those same payments constitute “wages” as defined in the *Act*. For example, undoubtedly “tips” or “gratuities” must be reported as taxable income under the *Income Tax Act* and yet, equally clearly, such monies do not constitute “wages” as defined in section 1 of the *Employment Standards Act* inasmuch as such payments are specifically excluded from the section 1 definition of “wages”.

In my view, the employer has simply failed to meet its evidentiary burden of showing that the Determination is incorrect.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$3,123.76** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal