

An appeal

- by -

Joanne Morcilla
("Morcilla")

- 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: Norma Edelman

FILE No.: 2001/808

DATE OF DECISION: January 18, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Joanne Morcilla ("Morcilla") from a Determination issued by a delegate of the Director of Employment Standards on October 30, 2001. The delegate found that Rotair Pacific Industries Ltd. ("Rotair") owed \$61,559.27 to several former employees. Morcilla appealed the Determination on the basis that she is owed more wages than the amount calculated by the delegate.

ISSUE TO BE DETERMINED

Is Morcilla entitled to more wages than the amount set out in the Determination?

THE FACTS AND ANALYSIS

In the Determination the delegate said that Rotair was placed into receivership on September 17, 2001 and that he had partially completed an investigation to determine what wages were owing to the employees of the company. He included a calculation sheet showing the amounts owing to each employee. He said the Receiver and Rotair determined the amounts. He further said the Determination was an interim one that set out the minimum amounts known to be owing the employees and on completion of his investigation if it was determined that additional wages were owing, those wages may be included in a further interim or final determination. With respect to Morcilla, the delegate found she was owed \$310.50 for vacation pay.

Morcilla appealed the Determination on the basis that the award was incorrect. She stated she had no opportunity to respond to the investigation. She said that she is owed regular wages in the amount of \$4157.69 for hours worked in excess of 40 hours per week. These hours have been calculated at straight time. She further says she is entitled to \$3705.76 for vacation pay.

Both the Receiver and the delegate replied to the appeal.

The Receiver stated that Morcilla is only entitled to \$310.00 (or 1.5 days) for vacation pay because she took all vacation owing from April 1, 1999 to April 1, 2000, 13 of the 15 days owing to April 1, 2001 and 7.5 days for the period April 2, 2001 to September 14, 2001. Further, she is not entitled to overtime because she was a salaried employee and was not hired on the basis of salary plus overtime.

The delegate stated he issued the Determination using amounts believed by the Receiver and Rotair to be correct "...so as to effect the priority set out in the *Employment Standards Act* Section 87 and in an effort to pay out the outstanding wages prior to Christmas." He further stated that before proceeding further with the appeal the Tribunal ought to consider directing the

Receiver and Morcilla back to the delegate for a closer examination of the amounts claimed by Morcilla.

Morcilla was invited to reply to the submissions filed by the delegate and the Receiver. She does not accept the Receiver's calculations regarding the vacation pay and she says she had an oral contract whereby it was agreed she would receive straight time pay (or time off in lieu) for hours worked in excess of 40 in a week.

In an appeal, the burden is on the Appellant to show that a Determination should be varied or cancelled or referred back to the delegate for further investigation. In this case, I am satisfied that the Appellant, Morcilla, has met the burden to show the Determination should be referred back to the delegate.

Essentially, it is undisputed that Morcilla had no opportunity to respond to the investigation. Neither the delegate nor the Receiver challenge Morcilla's claim she was not involved in the investigation. Moreover, the delegate forthrightly indicates the Determination was an interim one and reflected minimum amounts owed to employees based on information provided by Rotair and the Receiver, and that the Tribunal ought to consider referring the matter back for a more detailed examination of the claim. I agree that the matter should be referred back to the delegate for further investigation. The Determination contains no particulars as to how it was decided that Morcilla was owed \$310.50. There are a number of factual disputes between Morcilla and the Receiver, which, it appears, have not been fully explored by the delegate. It is for the delegate to conduct an investigation in the first instance. The Tribunal's role is not to investigate the issues but to review the delegate's decision and decide whether it is correct or not or whether the matter needs further investigation. In my view, this case is appropriate for a referral back to the delegate for further investigation.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated October 30, 2001 be referred back to the delegate for further investigation to determine the amount of wages owed to Morcilla.

Norma Edelman
Vice-Chair
Employment Standards Tribunal