

An appeal

- by -

Margaret Wilkie
("Wilkie" or "Employee")

- 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

TRIBUNAL MEMBER: Paul E. Love

FILE No.: 2003A/291

DATE OF DECISION: March 9, 2004

DECISION

OVERVIEW

This Decision deals with a referral back arising from an appeal by an employee, Margaret Wilkie (“Wilkie”) of a Determination dated December 27, 2004 issued by a Delegate of the Director of Employment Standards (“Delegate”), pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”).

In the Determination, the Delegate found that Wilkie was an employee of Victor Olsen and Mary Olsen, carrying on business as Black Watch Investigations & Security Services and Black Watch Security (“Black Watch” or “Employer”). The Delegate found Wilkie entitled to compensation for unpaid wages, an unauthorized deduction, and interest, in the total amount of \$5,207.24. The Delegate found that the employer also owed compensation for uniform maintenance but stated Wilkie had not substantiated a dollar figure. Wilkie appealed from the Decision on the basis of a breach of natural justice, which was sustained by the Adjudicator. The Adjudicator referred the Determination back to the Delegate to consider the totality of Wilkie’s claim. In particular the Adjudicator noted:

By referring this back I am indicating that the Director is bound to consider Wilkie's claims. I am not indicating that Wilkie is entitled to additional compensation for each of those issues, as that is for the Director to decide.

Prior to issuing the referral back report following re-investigation, the Delegate sought information from each party. The Delegate sent the calculations to both parties on July 17, 2003. Neither Wilkie nor Olsen or Black Watch responded to the calculations.

The Delegate found that the central issue was credibility. The Delegate relied on the allegations and records provided by Wilkie, in the absence of any records maintained, or provided by the Employer.

This is a case where the Employer did not cooperate in the re-investigation of the matter by the Delegate, and the Employer has not explained why new materials are being submitted to the Tribunal which were not submitted to the Delegate during the course of the investigation.

In particular the Delegate noted:

Despite repeated requests, the employer has only made unsubstantiated comment and /or inconclusive generalized statements regarding the complainant’s allegations suggesting that they are not valid. With interest in properly considering this assertion I had repeatedly asked for specific information, payroll records or documents to substantiate. Mrs. Mary Olsen indicated she would send them to me. To date neither she or Victor Olsen have provided the required information. Nor has she provided reconcilable evidence under this appeal despite repeated extensions granted by me as well as the Tribunal allowing time to submit this information.

The Delegate found that Wilkie was entitled to the following amounts:

Upkeep of uniform at \$5.00/ week for 89 weeks	\$445.00
Cell phone use estimated at \$7.50 / week for 89 weeks	\$667.50
Mileage claimed at .20 /km on 1259.4 km	\$251.88
Deduction of	\$700.00
Net amount of wages including overtime, statutory holiday and annual vacation pay	\$8,584.70
Interest pursuant to section 88 of the <i>Act</i>	\$937.32
Total	\$9,522.02

After the Delegate filed the referral back report with the Tribunal, the Vice-Chair of the Tribunal requested further submissions from the parties. The Employer then submitted an error had been made, and provided voluminous new records, challenging the amounts in the referral back report. The submissions do not in any substantive way summarize the errors made by the Delegate, or explain why new material was being submitted to the Tribunal at this time. The Employer did not make submissions which allows this Adjudicator to review, in any meaningful way, the conclusions reached by the Delegate.

In response to the Vice Chair's letter, Wilkie filed a submission listing of calculation errors. She claims to have received "nothing more" from the Delegate until receiving the Delegate's report in the mail from the Tribunal. She asks that the calculation errors be sorted out. I note that the Employer's calculations do not set out in any meaningful way, any method for me to discern that the Delegate has erred in the calculations.

ANALYSIS

The burden rests, in this case with the parties, to demonstrate an error in the referral back report.

The Employer apparently takes issue with the calculations, and has submitted voluminous new materials in this appeal. It appears that this Employer had ample opportunity to participate in the Delegate's re-investigation of the matter, and chose not to. The Employer has provided no reason as to why these documents were not produced at an earlier stage. On the basis of *Tri-west Tractor Ltd., BCEST #D268/96*, I am not relying or considering the new information produced. I am not satisfied from the submission of the Employer, that any error has been demonstrated by the Employer.

I note that the Delegate provided each party with detailed calculations using the computer software developed by the Employment Standards Branch. These calculations itemize calculations related to straight time wages, overtime, minimum daily pay, vacation pay. The submission made by Wilkie does not provide any meaningful information to identify errors made by the Delegate in the calculation. I am not satisfied from the submission of Wilkie that the Delegate erred in the calculations set out in the referral back report.

I therefore confirm the amounts found to be due and owing by the Delegate in the referral back report.

ORDER

Pursuant to s. 115 of the *Act*, the Determination dated December 22, 2002 is varied to provide for payment to Margaret Wilkie in the amount of \$9,522.02 in accordance with the referral back report dated January 9, 2004, together with interest pursuant to section 88 of the *Act*.

Paul E. Love
Member
Employment Standards Tribunal