

# An appeal

- by -

Canadian Truck & Trailer Repair Kelowna Inc. ("CTTR")

- 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/38

**DATE OF DECISION:** June 5, 2007



### **DECISION**

#### **SUBMISSIONS**

Ken Thompson on behalf of CTTR

David P. Dustan on his own behalf

#### **OVERVIEW**

- On November 10, 2006, a delegate of the Director of Employment Standards issued a Determination finding that Canadian Truck and Trailer Repair Kelowna Inc. ("CTTR") had contravened Sections 40 and 58 of the *Employment Standards Act* in failing to pay David Dustan overtime wages and vacation pay. He concluded that Mr. Dustan was entitled to vacation pay, wages and interest in the total amount of \$7,588.51. The delegate also imposed a \$1,000 penalty on CTTR for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
- <sup>2.</sup> CTTR appealed that Determination contends that the delegate erred in law in calculating Mr. Dustan's entitlement, which it said was a period of seven months rather than the six provided by the *Act*. CTTR also contended that the delegate erred in determining that Mr. Dustan was entitled to overtime, and in calculating his overtime wages.
- In a decision issued February 8, 2007 (BC EST #D016/07) I dismissed the appeal but for the issue of Mr. Dustan's overtime entitlement. I found that I was unable to determine from the record how the delegate arrived at his calculations on Mr. Dustan's overtime hours, and referred the matter back to the delegate for reconsideration on that issue only.
- On the referral back, the delegate found that Mr. Dustan's employment was terminated January 3, 2006, and therefore, that any wages payable prior to July 3, 2005 could not be awarded as a result of statutory limitation on wage entitlement (s. 80(1)(a)). The delegate noted that Mr. Dustan recorded his daily hours in a journal, and that those hours were credible. That journal indicated 258 hours of overtime paid at \$27.00 per hour, or time and one half his regular rate of pay. The delegate found that CTTR had not paid any wages as required by the *Act* for those additional hours.
- The delegate reviewed the hours from July 3, 2005 until January 3, 2006, and found a total claim of 208 hours unpaid after deducting 16 hours taken in lieu of overtime and 9.5 hours paid in October. The delegate calculated \$5,616.00 owing in overtime pay. Together with the annual vacation pay entitlement and interest, the amount owing to Mr. Dustan is \$6,259.97. The total amount payable by CTTR, including the two administrative penalties, is \$7,259.97.
- <sup>6.</sup> CTTR contends that the delegate erred in calculating Mr. Dustan's overtime wages. It says that Mr. Dustan claims 223 overtime hours, not 258, and that the net entitlement is therefore 197.5 hours, not the 208 as found by the delegate.
- Mr. Dustan says that CTTR's calculations are based on incomplete journal entries or illegible copies of his journal due to highlighting, and that the delegate's conclusions are correct.



## **DECISION**

<sup>8.</sup> I am not persuaded that the delegate erred in calculating Mr. Dustan's overtime entitlement. The April 5, 2007 referral back report sets out the basis for the calculations, and I am not persuaded that those are in error.

## **ORDER**

<sup>9.</sup> I Order, pursuant to Section 115 of the Act, that the Determination, dated November 10, 2006, be varied to the amount of \$7,259.97, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts Member Employment Standards Tribunal