

An appeal

- by -

Swiftsure Taxi Co. Ltd.
(the "Employer")

- 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: Ib S. Petersen

FILE No.: 2000/781

DATE OF DECISION: February 6, 2001

“The employer’s payroll records ... reflect that Ms. Fraser worked from August 30 to September 20, 1999. The payroll was written in pencil and the *hours for September 12-19 had been erased*. Fortunately, Ms. Fraser kept a separate record of her hours. The payroll reflects a wage rate of \$8.00 per hour and confirms that Ms. Fraser received \$608.00 for the pay period August 30 to September 4, 1999. On September 8, 2000, Mr. Kang has presented an *altered payroll record* that reflected a second pay rate of \$7.15. I assume that this was done in support of his contention that there were two rates of pay and to confuse the issue. He must have forgotten that I had a copy of the original unaltered payroll record. Ms. Fraser’s rate has been determined to be \$8.00 per hour for all the hours she worked.” [emphasis added]

The delegate determined from the records that “missing funds” had, in fact, been paid by Fraser to the other dispatchers. The Employer’s method of paying the dispatchers was, as noted by the delegate, unique. The dispatchers were paid in cash as advances during each pay period from the cash generated by the taxis and turned in to the office. Some times this would balance with the employee’s entitlement at the end of the pay period, sometimes not. In the result, employees were sometimes owed wages. The delegate found that the amount paid out in this manner approximated the amount Kang claimed to be missing--there was a minor discrepancy of some \$40 which the delegate attributed to the unique payroll system and the “mess” inherited by Fraser when she took over the position--and he did not accept the Employer’s explanation.

The delegate concluded that the Employer had failed to pay Fraser for overtime hours worked (Section 40), that her wages were not paid as required by the *Act* (Section 18), and that the Employer had failed to pay vacation pay (Section 58).

ISSUES AND ARGUMENTS

The Employer’s position is that the delegate made a wrong decision and that he failed to consider certain evidence, including a letter from a former employee who disputes the amount she was paid. The Employer’s appeal maintains that Fraser was a manager, responsible for supervising and directing other employees. The Employer also maintains that Fraser was paid in full by herself in cash. The Employer also says that Fraser refused to provide evidence of the hours worked by her and, generally, denies that she was ever asked to work extra hours.

The delegate says that the evidence supplied to him supports the conclusions set out in the Determination. On the issue of managerial status he points, among others, to the information from Fraser and the Employer’s records that Fraser worked a full shift as a dispatcher from 7:00 a.m. to 3:00 p.m. He also says that the additional duties performed by Fraser, set out above under the Overview, such as payroll does not make her a manager under the *Act*. As

for the Employer's assertion that he delegate did not--or did not properly--consider the evidence regarding Fraser's hours and the amount owed, the delegate points to the calculation sheet attached with the Determination which is based on the Employer's records of hours worked. The delegate also notes Fraser's explanation that she paid the money claimed by the Employer to have been misappropriated to other dispatchers, accepted by him as credible in the circumstances. The delegate does not accept the Employer's submission that the minor discrepancies with respect to the payment of wages to two employees indicates that these two employees were not paid. The delegate points out that in one case, the employee in question did not have complete records and that the amount of the discrepancy may not be accurate. With respect to the second employee, the Employer did not provide any evidence that the employee did not, in fact, receive the money she was owed. Fraser maintained to the delegate that she did pay the employee. In short, the delegate requests that the appeal be dismissed.

The issues on appeal are:

1. Did the delegate err in concluding that Fraser was not a manager?
2. Did the delegate err failing to consider--or properly consider--the evidence in determining the amount owed to Fraser?

FACTS AND ANALYSIS

The Employer, as the appellant, has the burden to persuade me that the Determination is wrong. The Employer has not, in my opinion, discharged that burden. I would like to add that, in my opinion, the delegate fully and fairly considered the evidence supplied to him by the parties and arrived at conclusions that were sustainable on the evidence before him.

I turn first to the Employer's argument that Fraser was a manager. In my view, there is nothing except bald generalizations to support this ground of appeal. Kang simply says that Fraser was responsible for supervising and directing other employees. This is insufficient and simply restates one aspect of one of the definitions set out in the *Regulation* (see Section 1(1) "manager"). The Employer is off the mark because the issue under the *Regulation* is whether her "primary" employment duties consisted of supervising and directing other employees or whether she was employed in an "executive capacity." The employer's appeal does not address these points. Even if the Employer is correct--that Fraser did supervise and direct--there is nothing to show that this was a primary employment duty. In my view, the delegate adequately addressed the issue of management status. This ground of appeal is dismissed.

As a general comment, the appeal simply reflects that the Employer's disagreement with the delegate's conclusions and findings. It is clear that the Employer does not agree. The

Employer says that the delegate should have considered the evidence in a different manner and given more weight to the Employer's opinions.

I find it noteworthy that the Employer does not dispute the delegate's finding that the Employer essentially falsified employment records. That is a serious matter. In the circumstances, it would not be surprising or, indeed, inappropriate if the delegate decided not to credit the Employer's information with no or any weight.

Moreover, I find it noteworthy that the employer does not in the appeal provide particulars of the alleged dishonesty--misappropriation of funds or theft, in fact--that it says Fraser engaged in. Surely, if dispatchers were not paid, and there were eight in addition to Fraser, as alleged, it is surprising that there are not more complaints of non-payment. Surely these employees would come forward and complain of non-payment. From my review of the material submitted in this appeal, there is only one letter from an employee who alleges that she was not paid all she was owed. In view of the records and explanation provided to the delegate by Fraser, the delegate could well concluded that this was a minor inaccuracy or, indeed, simply a failure on the part of that employee to keep complete records (which the employee admitted). The delegate's letters to the Employer, and the documentation filed with the appeal, set out specific amounts claimed to have been paid by Fraser to specific employees. I am troubled by the fact that the Employer relies on a general allegation of misappropriation of funds and has not stated specifically what amounts were or were not paid. These are not generally small amounts that--if the Employer's allegations were true--could easily be explained as an "oversight" on Fraser's part. Most of the payments are between \$500 and \$900. When allegations of dishonesty are made against an employee, I would expect, because of the seriousness of such allegations, the Employer to be able to comprehensively provide particulars of its allegations. I would expect clear and cogent evidence of such conduct. Neither was provided in the case at hand. Overall, I agree with the delegate's assessment of the evidence.

With respect to the hours claimed to have been worked, or the hourly rate for the work, there is nothing in the Employer's appeal that support an argument that the delegate erred in that regard. In fact, the records on which the delegate based his determination are the Employer's. For the Employer to claim that it was unaware of the records or that there is no evidence of the hours worked is disingenuous. That is particularly so in view of the undisputed fact that the Employer altered or falsified payroll records. The delegate would, in my view, have been quite justified in placing little or no weight on the Employer's statements in this regard.

In short, I am of the view that the Employer has not discharged the burden on the appeal and it is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated November 9, 2000, be confirmed.

IB S. PETERSEN

**Ib S. Petersen
Adjudicator
Employment Standards Tribunal**