

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

- by -

488432 Alberta Ltd. operating KDH Drywall  
(" KDH ")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 96/103

**DATE OF DECISION:** May 8, 1996

## DECISION

### OVERVIEW

This is an appeal by KDH pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 000871 issued by the Director on January 24, 1996. In this appeal KDH claims that the Director should not determined that annual vacation pay had not been paid as it was paid on each paycheque.

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128 (3) of the *Act* states:

If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this *Act*, as a complaint under this *Act*.

I have completed my review of the written submissions made by KDH, Kevin Towhey (“Towhey”) and the information provided by the Director.

### FACTS

The 4 complainants, Towhey, Blair Jones (“Jones”), David John Rehaume (“Rehaume”) and Denny S. Klein (“Klein”) were employed by KDH as labourers for various periods in 1995.

The complainants worked overtime hours and were not paid the overtime rates for those hours.

KDH did not keep payroll records as required by the provisions of the *Act*.

The Director investigated the 4 complaints and, subsequently, determination # CDET 000871 was issued.

### ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether KDH did pay overtime wages, statutory holiday pay and annual vacation pay as required pursuant to the provisions of the *Act*.

### ARGUMENTS

KDH argues that:

- each of the complainants was informed at the time of hire and knew that vacation pay was included in the wage rate of \$10.00 per hour
- vacation pay was paid on each pay cheque
- they concede that overtime wages were not paid for the overtime hours worked
- with respect to the hours of work alleged by Towhey, they are challenging the accuracy of the hours submitted

Towhey argues that:

- the hours submitted were submitted in the manner requested by KDH
- KDH did not challenge the hours submitted until the complaint was filed with the Branch
- he was never informed nor did he ever agree that the hourly wage of \$10.00 included annual vacation pay

The Director contends that:

- overtime wages were not paid as required by the *Act*
- statutory holiday pay and annual vacation pay were not calculated and paid as required by the *Act*
- in any event, the former *Act* did not permit the payment of annual vacation pay on each paycheque except with a variance from the Director and the current *Act* requires that such payment may only be made with mutual agreement of the employer and employee. There is no evidence of any such agreement
- the *Act* clearly requires that the regular wage rate (exclusive of any other benefit) must be recorded
- the *Act* clearly requires that any vacation pay paid must be identified as such
- KDH may not, pursuant to the *Act*, include annual vacation pay in the hourly wage rate

## **ANALYSIS**

Sections 27 and 28 of the *Act* are very specific as to the nature of the wage statement information to be provided and the payroll records which are to be kept. The evidence is clear that KDH did not provide the required wage statement information, nor did they keep the required payroll records. The time sheets provided clearly indicate that the regular wage rate of the complainants was \$10.00 per hour.

It is further clear from the pay stubs provided that KDH recalculated the complainants' pay for each pay period to give the illusion that annual vacation pay had been paid and was shown to be paid. In any event, the actions of KDH would have been contrary to the provisions of the former *Act* by the payment of annual vacation pay on each pay cheque except with a variance from the Director and the current *Act* requires mutual agreement between KDH and its employees to permit the payment of annual vacation pay on each pay cheque. There was no evidence

submitted to support any contention that there was either a variance from the Director, under the former Act, or, as required by the current *Act*, any mutual agreement to pay annual vacation pay on each pay cheque.

In the absence of any such variance under the former Act or of mutual agreement under the current *Act*, I must conclude that annual vacation pay has, in fact, not been paid to the complainants.

With respect to the hours claimed by Towhey, I find it very strange that after having paid Towhey the straight time rates for those hours as submitted without any apparent question as to the validity of those hours, KDH now argues that those hours are somehow suspect. I find that the allegation of KDH with respect to the credibility of Towhey's hours is not supported by the evidence provided.

I am satisfied that the calculations performed by the delegate of the Director with respect to the amounts owed to each of the complainants for overtime wages, statutory holidays and annual vacation pay is correct in all aspects, however, interest pursuant to section 88 of the *Act* is to be added to the amounts owed.

**ORDER**

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 000871 be varied to be the amount of \$2680.28 .

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**

May 8, 1996  
**Date**

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