



An appeal

- by -

Toms Mupenda Masumbuko
(“Masumbuko”)

- 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: David B. Stevenson

FILE No.: 2011A/28

DATE OF DECISION: June 28, 2011

DECISION

SUBMISSIONS

Ros Salvador	counsel for Toms Mupenda Masumbuko
Pir Indar Sahota	counsel for Khaira Enterprises Ltd.
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Toms Mupenda Masumbuko (“Masumbuko”) of part of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 4, 2011. In its entirety, the Determination applied to fifty-eight former employees of Khaira Enterprises Ltd. (“Khaira”), including Masumbuko. The appeal only relates to that part of the Determination relating to the Director’s finding of the wages owing to Masumbuko, and this decision applies only to that part of the Determination.
2. In respect of the relevant part of the Determination, the Director found that Khaira had contravened the *Employment Standards Act* (the “*Act*”) by failing to pay Masumbuko regular and overtime wages, statutory holiday pay, compensation for length of service and vacation pay and ordered Khaira to pay Masumbuko an amount of \$12,169.62, an amount which also included interest under section 88 of the *Act*.
3. Counsel for Masumbuko says the Director erred in that part of the Determination applying to Masumbuko by miscalculating the amount of gross wages received by him from Khaira.
4. The Tribunal has discretion whether to hold an oral hearing on an appeal. The Tribunal has decided the issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

ISSUE

5. The issue is whether Masumbuko has shown the Director made a reviewable error in the Determination.

THE FACTS

6. The Determination indicates that Khaira does reforestation work throughout British Columbia, mostly through contracts from the BC Ministry of Forests. The work done by Khaira includes tree planting, brushing (clearing bushes and cut grass using hand tools around newly planted trees to allow growth) and other silviculture work. In 2010, up to mid-July, Khaira had contracts to do reforestation work on Texada Island and in Powell River, Kamloops, Salmon Arm, Revelstoke, and Golden.
7. Masumbuko was hired by Khaira as a tree planter and brusher. He was employed from March 17, 2010, to July 17, 2010, on contracts on Texada Island and in Powell River, Kamloops, Revelstoke, and Golden.

8. The Director found Masumbuko worked a total of 41 days on the Kamloops contract over three pay periods on a piece rate of \$0.20 per tree for all days except from May 8 to 12, 2010, when he was at \$0.25 per tree. The Director found he earned a total of \$5,827.25 for this work.
9. The Director found he worked a total of 534.5 regular and overtime hours on the Texada Island, Powell River, Revelstoke, and Golden contracts at a rate of \$16.00 an hour. The Director calculated he was entitled to be paid hourly wages in the amount of \$10,464.00 for this work.
10. The total wages the Director found were earned by Masumbuko was \$17,805.83, an amount which included statutory holiday pay in the amount of \$189.74, compensation for length of service in the amount of \$640.00 and vacation pay in the amount of \$684.84.
11. The Director found Masumbuko had been paid gross wages in the amount of \$5,822.85 and deducted that amount from gross wages earned to reach an amount of gross wages payable, to which interest under section 88 was added to reach an amount which represented the balance of wages owing. The Director's calculation of the gross wages paid is the matter in dispute in this appeal.

ARGUMENT AND ANALYSIS

12. Counsel for Masumbuko says the Director made two errors in calculating the total amount of gross wages paid to him. First, counsel says the Director made a typographical error that attributes \$20.00 more to the amount of an NSF cheque issued by Khaira to Masumbuko than it actually was. Second, counsel says the Director erred when determining the amount of gross wages by pro-rating the amount of money that was deducted for food and lodging, effectively, and incorrectly, including some of the money that was attributed to food and lodging in the wages found to have been received by him. Counsel says money deducted for food and lodging should be deducted in its entirety from the calculation of gross wages received and to do otherwise would be to permit unauthorized deductions from gross wages.
13. Counsel for Khaira says Masumbuko earned a gross salary of \$5,108.18 and received that amount in five cheques issued by Khaira between April 7, 2010, and June 22, 2010. I am unable to accept any aspect of the submission made on behalf of Khaira, as the assertions made in it are totally inconsistent with the findings made by the Director. The submission depends entirely on Khaira's view of the hours worked and the hourly and piece work wage for Masumbuko, a view which was not accepted by the Director for reasons stated in the Determination.
14. The Director agrees there may have been a miscalculation in arriving at the gross wages payable to Masumbuko when he prorated the meal deduction on the NSF cheque. He acknowledges he may have erred in not applying the full amount of the food and lodging deduction in arriving at the wages paid to Masumbuko. The Director says that if the full amount of the food and lodging deduction is included in the calculation, the wages paid to Masumbuko would have been \$5,222.85 and the balance owing would be adjusted accordingly. In recalculating the wages paid to Masumbuko, the Director has corrected the error in transcribing the amount of the NSF cheque.
15. I find the Director has made a reviewable error in calculating the wages owing to Masumbuko.
16. I agree with counsel for Masumbuko that the actual amount deducted from Masumbuko wages for food and lodging should be the amount used in calculating whether wages are owing and, if so, the amount of wages owing. To that extent, the appeal succeeds.

17. If the respective calculations of counsel for Masumbuko and the Director were more clear, I could exercise my authority under section 115(1) (a) and vary the Determination by an agreed amount. However, the Director has indicated that the calculations in the appeal are based on net wages, while his calculations are based on gross wages. I have no idea whether that will make any difference to the final calculation, but I should not presume it won't. I am also unclear about whether the amounts of the NSF cheques were considered by the Director to represent net or gross wages, and, if it was the former, whether the gross amount should not have been determined and used in the calculation.
18. Rather than guessing on these questions, the preferable course in this case is to refer this matter back to the Director and allow him to recalculate the wage summary for Masumbuko based on the comments and questions found in this decision.

ORDER

19. Pursuant to section 115 of the *Act*, that part of the Determination dated February 4, 2011, relating to the wage calculation for Masumbuko, is referred back to the Director.

David B. Stevenson
Member
Employment Standards Tribunal