

An appeal

- by -

Reel Appetites (1992) Ltd.
("Reel Appetites" or "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: Paul E. Love

FILE No.: 2002/621

DATE OF DECISION: February 26, 2003

DECISION

OVERVIEW

This is an appeal by an employer, Reel Appetites (1992) Ltd. (“Reel Appetites” or “Employer”), from a Determination dated November 21, 2002 (the “Determination”) 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”). The employee, Megan Penny (the “Employee”), was terminated by the Employer. The Employee filed a complaint seeking compensation for time worked in excess of 40 hours per week, at her regular hourly rates of pay from time to time. The Employer failed to participate in the investigation, and raised on appeal challenged the decision of the Delegate to rely on employee information and records. The Employer also argued a lack of authorization to work overtime, and accord and satisfaction through pay increases. This was a proper case for the application of the principle in *Tri-West Tractor Ltd., BCEST #D268/96*. An appellant may not lie in the weeds, and raise issues and provide documents, for the first time on appeal. I confirmed the Determination in the amount of \$13,657.98 including interest, and vacation pay.

ISSUE:

Did the Delegate err in finding that the Employee was entitled to compensation for banked time for additional hours worked for the Employer?

FACTS

I decided this case after considering the written submissions of the Employer, the Employee and the Delegate.

Megan Penney was employed as an Office Manager/Film Coordinator from July 16, 1996 to May 2, 2002. The Employer terminated her. I note in this case the Employer raises an issue of whether the Employee quit or was terminated. Her rights, however, do not depend on a finding of termination or resignation.

The Delegate contacted the Employer on numerous occasions, by phone and mail. The Employer was served with a Demand for Employer Records, and failed to respond. The Delegate noted in the Determination that:

Given the complete failure of the Employer to participate in this investigation, the only evidence available about the terms of Penney’s employment are her assertions that there was an agreement to bank time.

The Delegate accepted the oral evidence of Ms. Penney that she had an agreement with the Employer to bank time, and be paid for banked time. The Delegate found an entitlement to banked time, at straight time rates. Ms. Penney's rate of pay from May 2000 to February 2001 was \$16.83 per hour, from March 2000 to January 2002 was \$20.19 per hour, and from February 2002 onward \$24.04 per hour. The Delegate found that Ms. Penney worked the following hours, above her 40 hour work week, at the following rates:

Hours Worked	Hourly Rate	Amount
216.75	\$16.83	\$3,647.90
387.75	\$20.19	\$7,828.67
46.5	\$24.04	\$117.86
6 % annual vacation pay		\$755.67

The Delegate made these findings of hours worked based on records kept by the Employee. The Delegate issued a Determination in the amount of \$13,657.98, consisting of \$12,594.43 pay for banked hours, annual vacation pay on the bank in the amount of \$755.67, and interest in the amount of \$307.88. The Delegate found that the Employer contravened the provisions of Part 3, Section 18(1) of the *Act*, and ordered the Employer to cease violating the *Act*.

Employer's Argument:

The Employer provided an appeal form which indicates that the Employer wishes the matter sent back for further investigation. The extent of the appeal submission is noted under the grounds of appeal and the full text of it reads as follows:

Other information from archives needs to be located to confirm the company's position.

...

The Employer sought a suspension of the Determination with the following comment:

Yes, The records submitted by Penny are from herself, not company records. "Overtime" was not approved or authorized by Ms. Mundy. Certain records need to be located from archives to resolve. Ms. Penney did not get laid off - she quit and walked out.

The only further information filed by the Employer with the Tribunal was a letter dated January 9, 2003 attaching a time sheet for the period May 1 to May 15, 2001. The letter indicates that the company has no record of any agreement to bank time. The letter refers to time sheets, and encloses a typical time sheet, on which the words " No Approval of O/T" were noted. The Employer says that any overtime worked was not authorized by the company. The Employer says that Ms. Penney was provided with raises to compensate for previously worked extra hours. The Employer argues that Ms. Penney quit and was not laid off from employment.

Employee's Argument:

Ms. Penney submits that there was an oral agreement that the Employer would pay straight time rates for all time worked. She submits that she did not reach any agreement with the Employer to forego her "banked time" in return for pay increases. She submits that the appeal should be dismissed.

Delegate's Argument:

The Delegate says that the Employer gives no details of appeal in the appeal document. The Delegate submits that the Employer was given many opportunities to participate in the investigation, and chose not to, and was warned of the consequences of failing to participate in the investigation. The Delegate submits that the appeal should be dismissed.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

Section 77 of the *Act* provides that:

If an investigation is conducted, the director must make reasonable efforts to give a person under investigation the opportunity to respond.

I find that the Delegate did accord a reasonable effort or opportunity to the Employer to participate in the investigation which resulted in this Determination. I note that it is not an error for a Delegate to determine the matter based solely on employee records, and the oral evidence of an Employee where the Employee participates in the investigation, but the Employer fails or neglects to participate in the investigation. The purposes of the *Act* would be frustrated if the Employee's rights were entirely dependent on whether the Employer chose to participate in an investigation.

I note that this is a case where the Employer failed to participate in the investigation and now suggests a variety of defences, including arguments that :

- (a) the Delegate should not have relied on the Employee records;
- (b) the Employee was not authorized by the Employer to work overtime;
- (c) an "accord and satisfaction" was reached when the Employer offered, and the Employee agreed to a pay raises, in return for forgiveness of any hourly compensation for banked time.

I note that the Employer did not provide any information to the Delegate during the course of the investigation related to its defences. If an appellant wishes the Tribunal to deal with an issue on appeal, it must participate in the investigation, and provide information and documents to the Delegate. The primary function of the Tribunal is to correct errors that a Delegate made during the course of the investigation. While a result may have been different if a party participated, this cannot be said to be Delegate error.

I dismiss this appeal on the basis of the principles set out in *Tri-West Tractor Ltd.*, BCEST #D268/96. An appellant is not permitted to lie in the weeds during an investigation, and then raise issues or provide documents that should have been dealt with at the time of the investigation.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated November 21, 2002 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal