



An appeal

- by -

DeDieu Kibasi
(“Kibasi”)

- 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/29

DATE OF DECISION: June 28, 2011

DECISION

SUBMISSIONS

Ros Salvador	counsel for DeDieu Kibasi
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 DeDieu Kibasi (“Kibasi”) 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 Kibasi. The appeal only relates to that part of the Determination relating to the Director’s finding of the wages owing to Kibasi, 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 Kibasi regular and overtime wages, statutory holiday pay, compensation for length of service and vacation pay and ordered Khaira to pay Kibasi an amount of \$9,504.02, an amount which also included interest under section 88 of the *Act*.
3. Counsel for Kibasi says the Director erred in that part of the Determination applying to Kibasi by misstating the amount deducted for meals (food and lodging).
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 Kibasi 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. Kibasi 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, Salmon Arm, Revelstoke, and Golden.

8. The Director found Kibasi worked a total of 36 days on the Kamloops contract and 4 days on the Salmon Arm 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 \$5,737.70 for this work.
9. The Director found he worked a total of 515.25 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 \$9,936.00 for this work.
10. The total wages the Director found were earned by Kibasi was \$17,181.15, an amount which included statutory holiday pay in the amount of \$206.64, compensation for length of service in the amount of \$640.00 and vacation pay in the amount of \$660.81.
11. The Director found Kibasi had been paid gross wages in the amount of \$7,822.88 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 Kibasi says his pay stubs show an amount of \$2,250.00 was deducted by Khaira from his wages for food and lodging, but the Director found there was only \$1,910.00 deducted for food and lodging. She asks that the Tribunal to recognize the error of the finding made by the Director and decrease the amount shown as gross wages paid to Kibasi by \$340.00.
13. Counsel for Khaira says Kibasi earned a gross salary of \$6,421.62 and received that amount in six cheques issued by Khaira between April 8, 2010, and July 22, 2010, a cash advance made on May 15, 2010, and a \$25.00 "store purchase". 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 Kibasi, a view which was not accepted by the Director for reasons stated in the Determination.
14. The Director agrees there was an administrative error in stating the food and lodging deduction. He says the total amount deducted for food and lodging was, in fact, \$2,250.00, as indicated by counsel for Kibasi. He says that applying that amount, the correct amount of gross wages paid by Khaira to Kibasi is \$7,482.88 and the amount of gross wages owing should be adjusted accordingly.
15. This appeal succeeds. The amount by which the calculation of the wages owing to Kibasi would be changed is clear and not in dispute and I am able to vary the Determination in this decision.
16. Accordingly, the wage calculation will be changed to show wages paid to Kibasi by Khaira as being \$7,482.88. The subtotal in the summary calculation, which reflects gross wages payable, will become \$9,698.27 and section 88 interest will need to be calculated on that amount to reach a final balance owing.

ORDER

17. Pursuant to section 115 of the *Act*, that part of the Determination dated February 4, 2011, relating to the wage calculation for Kibasi, shall be varied to show the gross wages owing as \$9,698.27, together with any interest that has accrued on that amount under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal