

An appeal

- by -

J.P. Drafting Ltd.

- 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

TRIBUNAL MEMBER: John M. Orr

FILE No.: 2005A/28

DATE OF DECISION: May 18, 2005

DECISION

OVERVIEW

This is an appeal by J.P. Drafting Ltd. (“JPD” or “the company”) from a Determination issued by the Director of Employment Standards dated February 16, 2005. The Determination found that JPD had employed Boris Viher (“Viher” or “the employee”) as a draftsman from June 15, 2001 to May 21, 2004. The Director found that certain overtime, statutory holiday pay and vacation pay were owing to Viher. The total wages payable with interest was \$2,243.10.

The Director also imposed two penalties of \$500.00 each for failing to pay overtime and failing to pay for statutory holidays. This brought the total payable to \$3,243.10.

JPD has appealed to the Tribunal on the basis that there was an error in the finding about statutory pay and has provided company records to confirm their position.

JPD also alleges that the overtime occurred only to assist the employee maintain his 40 hours per week because he was often absent from work for illness or other causes. JPD says that the employee agreed to work the extra hours at straight time rather than losing his pay on the days he off work. This was an informal means of ‘averaging’.

JPD also complains that the employee was misusing company time by using the computers for his own personal use and benefit.

In the exercise of its authority under section 36 of the *Administrative Tribunals Appointment and Administration Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ANALYSIS

The misuse of company time and equipment is a matter for company policy and possible discipline but this misused time cannot be set-off against wages owing: Section 21 (1) of the Act.

While the company may have acted out of fairness to the employee in allowing him to make up his lost time by working overtime the company needed to be aware of the risk of being liable to pay overtime rates in the absence of a written averaging agreement. Section 37 (2) of the *Act* requires that any such agreement is not valid unless it is in writing, provides the exact details of the arrangement and is signed by both parties.

The company has provided payroll records showing that statutory holiday pay was not earned by the employee on the three holidays for which the determination had compensated him.

The Director has taken a very reasonable position in response. While noting that these records should have been produced previously it is acknowledged that this part of the determination should be varied in the absence of any contrary submission from the employee.

Viher has not responded to this issue.

The Director recalculates the determination to remove the statutory holiday pay. The overtime wages are found to be \$1595.81 including vacation pay and interest. One of the penalties is removed so with the addition of one penalty of \$500.00 the total now owing is \$2,095.81.

These calculations respond to the company's concern about statutory holiday pay and the company's appeal on this issue is granted and the determination will be varied accordingly.

I find that the company's appeal on the overtime issue is not sustainable in the absence of a written averaging agreement.

ORDER

The appeal is allowed and the Determination is varied as follows:

Boris Viher is entitled to:

Overtime (Section 40)	\$1,490.63
Annual Vacation Pay (Section 58)	\$ 56.63
Accrued interest (Section 88)	\$ 45.55
Wages payable to employee	\$1,595.81
Administrative Penalty	<u>\$ 500.00</u>
Total Amount Payable	\$2,095.81

John M. Orr
Member
Employment Standards Tribunal