

An appeal

- by -

Paul Svisdahl
("Svisdahl")

- 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: David B. Stevenson

FILE No.: 2002/610

DATE OF DECISION: February 26, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Paul Svisdahl (“Svisdahl”) of a Determination that was issued on November 14, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Svisdahl’s employer, Svisdahl Holdings Ltd. (“Svisdahl Holdings”) had contravened Part 7, Section 58 of the *Act* in respect of his employment and ordered Svisdahl Holdings to cease contravening and to comply with the *Act* and to pay an amount of \$2,263.78.

Svisdahl had filed a complaint with the Director alleging he was owed overtime pay and vacation pay. The Determination found that Svisdahl was owed vacation pay, but did not find any overtime pay was owed.

In this appeal, Svisdahl says the Director’s analysis on the overtime claim demonstrates an incomplete understanding of his job. He also alleges the Director was biased in favor of his employer. He complains that he never even had a personal interview with the Director and asks that the matter be referred back to the Director for further investigation, including an opportunity to argue his case to the Director in person.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue in this case is whether Svisdahl has shown an error in the Determination sufficient to justify the Tribunal referring the matter back to the Director for further investigation.

FACTS

Svisdahl Holdings is a laydown service company operating in and around Fort Nelson. Svisdahl worked for Svisdahl Holdings from April 9, 2001 to February 28, 2002 as a ‘laydown truck operator at a rate of \$5000.00 a month.

One of the issues raised in the investigation was whether Svisdahl was an employee of Svisdahl Holdings for the purposes of the *Act*. The Determination analysed that issue and concluded Svisdahl was an employee. That finding has not been appealed. The following findings of fact were set out in the Determination:

Russ Svisdahl owns Svisdahl Holdings Ltd. He hired Paul Svisdahl to work as an operator and paid him \$5000.00 per month (no deductions) plus GST. The employer provided the laydown truck used and decided who did the work and for whom.

The complainant did not keep a record of hours worked. The employer produced a record of the hours the truck was operating. Some of these hours are completed and signed by the complainant while others are completed and signed by the employer and have no reference to the complainant. There is no record of hours worked by each operator.

On the overtime claim, Svisdahl said that because he was the ‘lead hand’, he was expected to stay at the work site and be available the entire time the truck was working. On that basis, he claimed he was entitled to be paid wages for all the hours the laydown truck operated. The analysis on the overtime claim stated:

The definition of “work” in the Act, previously cited [sic], explains that an employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee’s residence. The job site is not the complainant’s residence. The employee claims he had to be available to work at the site 24 hours and the employer claims he was free to do what he wanted to while the other operator was working.

Often the location of the jobs made it difficult to leave and given the given the complainant drove out in the work truck; he did not have a method of leaving the job site. However, inconvenience and circumstances affecting the ability to leave is not the same as being required by the employer to stay. While the complainant may have felt responsible for the work being done on the job and an obligation to stay, there is no evidence of direction from the employer that the complainant had to remain on site. Accordingly, in the absence of concrete evidence I have determined the complainant was not working while he was resting and the other operator was running the truck.

There was no record of hours kept by the complainant or the employer for time spent by the complainant running the truck. Therefore, I am unable to determine overtime hours or assess for overtime wages.

ARGUMENT AND ANALYSIS

The burden in this appeal is on Svisdahl to persuade the Tribunal that the Determination is wrong in law, in fact or in some combination of law and fact (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not a re-investigation of the complaint nor is it simply an opportunity to re-argue positions taken during the investigation. The appeal, from the decision on the overtime claim is, at its core, a challenge to the factual conclusion based on the absence of any evidence supporting the claim. Where an appellant is challenging a conclusion of fact, the appellant must show that the conclusion of fact was either based on wrong information, that it was manifestly unfair or that there was no rational basis upon which the findings of fact could be made (see *Re Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98).

I will deal first with Svisdahl’s statement in the appeal that he believed the Director was biased in favour of the employer. An allegation of bias against a decision maker is serious and should not be made speculatively. The onus of demonstrating bias lies with the person who is alleging its existence. Furthermore, a “real likelihood” or probability of bias must be demonstrated. Mere suspicions, beliefs or impressions, are not enough. Svisdahl has only stated his belief that the Director was biased. He has provided no evidence that would demonstrate with the degree of probability required that his belief has any basis in fact.

The allegation of bias against the Director is dismissed.

On the overtime pay issue, Svisdahl says the Director did not have a full understanding of his job a laydown truck operator, but has done nothing in the appeal to extend anyone’s understanding of his job or indicate how a ‘full understanding’ of his job would demonstrate an error in the Determination. The appeal also refers to a statement made by Svisdahl Holdings during the investigation that, “if the

complainant's name was not on the ticket billed to the customer then he was not working on that job", saying that was a false statement. There are two responses to this aspect of the appeal: first, the appeal does not include any material or information that would allow me to conclude the statement was false; and second, the Determination was not based on that statement, but on the absence of any evidence showing Svisdahl worked overtime. As the Director correctly notes in her submission on the appeal, an invoice written for the purpose of billing a customer is not a record of hours worked by the employees.

There is nothing in the appeal, or in the material on file, that would demonstrate the finding of the Director on the overtime claim was wrong, unreasonable, manifestly unfair or not rationally grounded on the material, information and evidence acquired during the investigation. Svisdahl has not met his burden and this aspect of the appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated November 14, 2002 be confirmed in the amount of \$2263.78, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal