

An appeal

- by -

Robert Blois Crawley

- 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: Yuki Matsuno

FILE No.: 2008A/43

DATE OF DECISION: July 15, 2008

DECISION

SUBMISSIONS

Robert Blois Crawley	for himself
Rainer Maas	for Peace Reach Adventures Ltd. carrying on business as Torwood Lodge
Emily K. Yao	for the Director of Employment Standards

OVERVIEW

1. Mr. Crawley appeals a Determination of the Director of Employment Standards (the “Director”) issued April 9, 2008 (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “Act”). The Determination arose from a complaint that Mr. Crawley filed with the Employment Standards Branch on November 18, 2007. On February 22, 2008, a delegate of the Director (the “Delegate”) held a hearing by teleconference call on Mr. Crawley’s complaint.
2. In the Determination, the Delegate found that the Employer had contravened section 40 of the *Act* when it did not pay Mr. Crawley overtime wages for work performed during his period of employment. The Delegate ordered the Employer to pay Mr. Crawley \$1,879.72, inclusive of interest in the amount of \$58.59 calculated under section 88 of the *Act*.
3. The Delegate also imposed four \$500.00 administrative penalties on the Employer, as prescribed by section 29 of the *Employment Standards Regulation* (the “Regulation”), for contravening sections 33, 40, and 27 of the *Act* and section 46 of the *Regulation*. The total amount of the Determination is \$3,879.72.
4. Mr. Crawley now appeals the Determination. He does not indicate in his appeal submission that an oral hearing is necessary. Given that a finding of credibility is not essential to the disposition of this appeal and no viva voce evidence is otherwise required, I will decide this appeal on the basis of the parties’ submissions and the Record. I have reviewed and carefully considered these documents in coming to my decision.

BACKGROUND

5. According to the Determination, Mr. Crawley was employed as a chef at Torwood Lodge from August 22 to September 30, 2007. The Delegate made the following findings of fact that are relevant to this appeal:
 - Mr. Crawley worked 84 hours in August;
 - In September, Mr. Crawley worked on average 12 hour shifts when he was scheduled for a full day of work, and worked a total of 252 hours that month;
 - At the start of his employment, Mr. Crawley’s wage rate was \$17.30 per hour based on a monthly salary of \$3,000.00 a month for a 40 hour work week;

- In September, Mr. Crawley’s wage rate rose to \$20.83 per hour based on daily salary of \$250.00 for a 12 hour work day; and
 - Mr. Crawley is entitled to both weekly overtime (as a result of working an average of 55 hours per week) as well as daily overtime.
6. Mr. Crawley appeals the Determination on the grounds that the Delegate failed to observe the principles of natural justice in making the Determination. I have reviewed his arguments and have ascertained that they also suggest that the Delegate erred in law with respect to the calculation of the overtime wages; further, Mr. Crawley’s submission includes what he characterizes as “new evidence”. Although Mr. Crawley did not check off the other two grounds of appeal on his appeal form, I will in the circumstances proceed to consider the merits of all three available grounds of appeal under section 112(1) of the *Act*. The Tribunal should not take a mechanical approach to appeals relying solely on the grounds of appeal that are indicated by the appellant on the appeal form; rather, it should take a large and liberal view of the appellant’s explanation as to why the determination should be cancelled, varied or referred back to the Director: *Triple S. Transmission Inc.*, BCEST #D141/03.

ISSUES

7. Did the Delegate err in law or fail to observe the principles of natural justice in making the Determination? Has evidence become available that was not available at the time the Determination was being made?

ARGUMENT AND ANALYSIS

8. The Delegate submits that Mr. Crawley is attempting to reargue his case through the appeal process. Indeed, in much of his appeal submission Mr. Crawley takes issue with the Delegate’s findings of fact. Although I have considered the entirety of Mr. Crawley’s submission, I will proceed to address only those of Mr. Crawley’s arguments which are relevant to the grounds of appeal.

Error of Law

9. The Tribunal has established jurisprudence on how to determine whether an error in law has been made. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal noted that panels have used the following definition of “error of law”, set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia* (Assessor of Area #12 – Coquitlam), [1988] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the *Act*;
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and

5. adopting a method of assessment which is wrong in principle (in the employment standards context, exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05).
10. The argument Mr. Crawley presents that goes to error of law is as follows:

The calculations made by the adjudicator are somewhat in error as [the Delegate] worked out my hourly wage and what was owing, in doing so, gratuities, benefits and vacation pay should not go in as hourly wages, see the pay slip that has been sent along and this was submitted by the employer during the adjudication. . . .
11. This argument points out two possible errors by the Delegate: 1) that the hourly wage rate was incorrectly calculated because of the inclusion of gratuities, benefits and vacation pay and 2) that the total amount owing to Mr. Crawley was incorrectly calculated because of the inclusion of gratuities, benefits and vacation pay. The Delegate's submission only addresses the first of these possible errors by correctly pointing out that these factors were not included in the calculation of the hourly wage rates.
12. With respect to the calculation of the amount owing to Mr. Crawley, a review of Mr. Crawley's final pay slip indicates a year-to-date amount for "Benefits" of \$387.10 as having been paid; however, the same amount is then subtracted as "Taxable Benefits" from the total "Gross Paid". Therefore, the net effect of pay for "Benefits", according to the final pay slip, is zero. Further, year-to-date vacation pay in the amount of \$227.54 is properly included in the amount already paid to Mr. Crawley, as vacation pay is included in the wages that are payable to an employee.
13. However, it does appear that the Delegate erred in including gratuities in the amount of \$663.25, as shown in the Mr. Crawley's final pay slip, as part of the gross amount in wages already paid to Mr. Crawley. The Record contains a document showing that the initial employment agreement between the Employer and Mr. Crawley as "Pay is \$3,000 per month, plus room & board, gratuities and two weeks holiday the first two weeks in January . . ." The final pay slip shows a separate entry for "Gratuities". Clearly the salary and gratuities are distinct elements of the compensation package to which Mr. Crawley agreed. The *Act* makes a distinction between wages and gratuities; section 1 expressly excludes "gratuities" from the definition of "wages". By including the amount representing gratuities in the wages already paid to Mr. Crawley, the Delegate misapplied the definition of "wages" in section 1 of the *Act* and therefore made an error of law.

Failure to Observe the Principles of Natural Justice

14. In order to successfully appeal on this ground, a person must prove a procedural defect, amounting to unfairness, in how the Director carried out the investigation or made the Determination. Such procedural defects include failing to inform a person of the case against him or her and not allowing a person an opportunity to respond to a complaint. The Delegate argues that Mr. Crawley presents no arguments that support this ground of appeal. I agree. No failure to observe the principles of natural justice is made out.

New Evidence

15. Mr. Crawley's appeal includes "new evidence", including a copy of an original letter signed by Mr. Maas, a welcome letter from the Employer, and a letter dated April 28, 2008 from a fellow employee regarding the employment conditions at Torwood Lodge. With respect to the April 28, letter in particular, the

Delegate submits that it is not new evidence because the information contained in the letter was available at the time of the hearing and could have been presented at the hearing. I agree with the Delegate that the information Mr. Crawley presents as “new evidence” was available at the time the Determination was made and does not constitute evidence which would be admissible under the test in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03.

Result

16. The appeal succeeds in part.

ORDER

17. Pursuant to Section 115 of the *Act*, I order that the Determination dated April 9, 2008 be varied as follows: that the amount of wages payable to the employee, \$1,879.72, be increased by \$663.25, together with any interest that has accrued under Section 88 of the *Act*. In all other respects the Determination is confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal