

An appeal

- by -

M. McPhail & Associates Inc.
(“McPhail”)

- 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: Carol L. Roberts

FILE No.: 2008A/50

DATE OF DECISION: July 15, 2008

DECISION

SUBMISSIONS

M. McPhail	on behalf of M. McPhail & Associates Inc.
Karin Doucette	on behalf of the Director of Employment Standards
Chen Tan	on her own behalf

OVERVIEW

1. This is an appeal by M. McPhail & Associates Inc., (“McPhail”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued January 18, 2008.
2. Ms. Tan filed a complaint against McPhail claiming overtime wages. A delegate of the Director held a hearing into Ms. Tan’s complaint on October 4, 2007. At issue before the delegate was whether all the overtime hours in a time bank were paid at the correct rate. After considering all the evidence, the delegate issued a Determination in Ms. Tan’s favour. She concluded that the Employer had not established a time bank at the written request of the employee, as required by Section 42(1) of the *Act* and that, in any event, the establishment of a bank did not excuse the Employer from paying overtime wages at the rate provided in the *Act*.
3. The delegate determined that Ms. Tan had worked overtime. She accepted the accuracy of the Employer’s record of hours worked and paid. She reviewed payroll records for Ms. Tan’s last six months of employment. Because those records showed “banked time paid out”, the delegate also reviewed Ms. Tan’s payroll records for the full period of her employment to identify the overtime hours in the “bank”. The delegate calculated Ms. Tan’s overtime wage entitlement from a review of the records and the applicable overtime rates and determined Ms. Tan was entitled to \$5,658.34, including interest. The delegate also imposed an administrative penalty in the amount of \$500.00 for the employer’s contravention of section 40 of the *Act*.
4. McPhail filed an appeal with the Tribunal on March 27, 2008 alleging that the delegate failed to observe the principles of natural justice in making the Determination. This ground of appeal was not pursued in later submissions and I have not addressed it further. Although Ms. McPhail did not dispute the delegate’s conclusion that Ms. Tan was entitled to overtime wages, she took issue with the delegate’s calculation of the amount owed to Ms. Tan.
5. McPhail also sought an extension of time in which to file the appeal. I granted that extension, in part because the delegate acknowledged making errors in calculating Ms. Tan’s wage entitlement. (BC EST #D056/08).
6. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal’s Rules of Practice and Procedure dated June 2005 provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I find that this appeal

can be adjudicated on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination

ISSUE

7. Did the delegate err in calculating Ms. Tan’s wage entitlement?

ARGUMENT

8. McPhail argues that the delegate erred in calculating Ms. Tan’s overtime hours. Specifically, she contended that the delegate did not credit McPhail with the wages that were paid for regular hours of work.
9. The delegate says that McPhail’s evidence at the hearing, which the documents verified, was that all overtime hours were placed into a “bank” and paid out as regular wages during slow times to “top up” wages. The delegate identified and removed all overtime hours to calculate overtime wages for all pay periods except the one ending April 15, 2007 which the parties agreed was the sole exception to the overtime banking practise.
10. After reviewing McPhail’s submissions, the delegate acknowledged that she erred in her calculations. She acknowledged that McPhail paid Ms. Tan’s hours at a regular rate rather than an overtime rate and that it was only the overtime portion that remained outstanding rather than the entire amount. The delegate concluded that the amount owing should be varied to \$4,714.01.
11. McPhail contends that the delegate’s amended calculations contain yet another error, as they do not take into account payments made by way of a contract in March, 2006.
12. Ms. Tan submits that the amount of overtime ought to be calculated by the Branch rather than by her former employer and should be based on the paycheques issued to her. In a reply submission, the delegate notes that in her submissions, Ms. Tan relied on provisions of the *Act* that were amended in 2002. She referred to the correct provisions, as amended, largely, I take it, for Ms. Tan’s benefit.

THE FACTS AND ANALYSIS

13. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made
14. The burden of establishing the grounds for an appeal rests with an appellant. As noted above, the delegate acknowledged an error in the Determination arising from her calculations of overtime pay. As I

conclude that this constitutes an error of law (*Britco Structures Ltd.*, BC EST #D260/03), I allow the appeal.

15. Given that McPhail does not dispute the delegate's calculations except for one pay period, I accept that the calculations are correct. With respect to the pay period for the week of March 1 through to March 6, 2006, this week is outside the statutory six month recovery period. Therefore, even if I were to agree with McPhail that the delegate erred in calculating the overtime wages for this period, given that the delegate was limited to reviewing wages in the period December 1, 2006 until May 30, 2007, any error would have no affect on the amount determined owing.

ORDER

16. I Order, pursuant to Section 115 of the Act, that the Determination, dated January 18, 2008, be varied as follows: The amount owed to Ms. Tan is \$4,714.01 inclusive of vacation pay and interest.

Carol L. Roberts
Member
Employment Standards Tribunal