

An appeal

- by -

Carlo Magno

- 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.:** 2009A/069

**DATE OF DECISION:** July 15, 2009

## DECISION

### SUBMISSIONS

Carlo Magno	on his own behalf
Fadia Sorial	on behalf of New Vision Enterprises Ltd.
Andres Barker	on behalf of the Director of Employment Standards

### OVERVIEW

1. This decision arises out of an appeal by Carlo Magno, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued September 19, 2008. On December 17, 2008, I issued a decision concluding that the delegate had failed to give reasons in determining Mr. Magno's overtime claim and referred the matter back for an explanation of Mr. Magno's overtime wage calculations. (BC EST # D121/08)
2. As the delegate who issued the original Determination is no longer with the Employment Standards Branch, a new delegate decided to conduct a fresh investigation on the issue of overtime and on May 20, 2009, issued a letter finding that Mr. Magno had not proven his claim.
3. Mr. Magno disagrees with the report, contending, in essence, that the delegate erred in preferring the employer's evidence over his.
4. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the *Tribunal's Rules of Practice and Procedure* 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). This appeal is decided on the section 112(5) "record", the written submissions of the parties, and the Reasons for the Determination.

### FACTS AND ANALYSIS

5. The new delegate reviewed the original complaint and conducted a fresh investigation into Mr. Magno's claim. I find no error in his approach given that, in these circumstances, it would have been impossible for him to explain the calculations of a previous delegate. He conducted an investigation into this issue, seeking submissions from both parties.
6. The delegate determined that Mr. Magno's overtime claim was founded on New Vision's payroll information, using those records to produce his own overtime wage calculations.
7. New Vision noted inconsistencies between Mr. Magno's overtime claim to Employment Insurance and his original complaint form to the Branch. Mr. Magno explained that his EI claim was made before he received the employer's detailed payroll records.
8. New Vision provided the delegate with a breakdown of Mr. Magno's hours of work at his regular wage and his overtime rate during the recovery period provided under the *Act*. The employer also provided an accounting of the hours as they appeared on the Record of Employment (ROE). After the delegate inquired

into the employer's accounting methods, the employer submitted an amended ROE, explaining that she had understood that this was the proper way to make the calculations.

9. New Vision repeated arguments to the delegate that it made before the Tribunal at the first instance, which was that the original delegate's calculations were in error because they were based on a bi-weekly pay period rather than a semi-monthly pay period.
10. The delegate noted that neither party was able to provide a schedule of Mr. Magno's daily hours of work. He found that New Vision's failure to produce records had prejudiced Mr. Magno's ability to determine his true entitlement. However, he noted that an employer's failure to produce records did not automatically substantiate a complainant's claim and that Mr. Magno had the burden of substantiating his case. He noted that Mr. Magno had not maintained a contemporaneous record or any record at all, of his hours of work and relied on New Vision's failure to produce more detailed records as a basis for his argument that his claim should be accepted.
11. The delegate considered Mr. Magno's initial complaint to the Branch as well as his EI claim in arriving at his decision. He noted discrepancies between those claims and the current claim as well as Mr. Magno's reasons for those discrepancies.
12. The delegate also noted discrepancies in New Vision's records, specifically that although the employer was not able to provide payroll records due to a computer malfunction, it was still able to provide a breakdown of his hours of work. He also noted that New Vision was unable to provide a source record to substantiate the claim. He further noted that the employer's ROE was allegedly based on a declaration of Mr. Magno's overtime hours which it later acknowledged was incorrect.
13. The delegate discounted the evidence of a witness for Mr. Magno on the basis that it did not substantiate Mr. Magno's claim in any way.
14. In conclusion, the delegate was not convinced Mr. Magno had established his claim and determined that no wages were owed.

## **ARGUMENT**

15. Mr. Magno says that the delegate erred in relying on the employer's amended ROE. He contends that the ROE was changed without any logical explanation and the delegate's reliance on it is 'contemptuous'. He submits that his evidence has been consistent throughout and should be preferred to the employer's evidence.
16. In a supplementary response, Mr. Magno alleged that the delegate failed to comply with principles of natural justice by telephoning the employer to ask how it calculated his hours of work on the ROE and did not include him in that discussion. Further, he alleges that because the employer turned down a request for a conference call on this issue, the delegate arrived at an erroneous conclusion on this issue. He further submits that it was unfair for the delegate to require him to produce his daily records to prove his case after his employment had been terminated. He says that the delegate erred in placing the burden on him to prove his hours of work particularly after the delegate failed to obtain and verify the employer's payroll records.
17. The delegate says that the parties provided him with extensive written materials and that, near the end of the refer-back investigation, he offered the parties the opportunity of a conference call to make any final statements or arguments. He says the employer did not find it was necessary to do so, and because he did not feel one was necessary, he did not pursue the matter.

18. In a further reply, Mr. Magno submitted the pay stubs of his witness as “proof on my claim that New Vision never wanted to show work hours in pay stubs...”. I do not find it necessary to consider this information as I agree with the delegate’s conclusion that, at most, the stubs corroborate the fact that New Vision did not display hours of work on its pay stubs. They do not provide evidence in support of Mr. Magno’s overtime claim.
19. New Vision seeks to have the determination confirmed. It submits that all of the evidence supports a finding that Mr. Magno has been paid in full for all his hours of work and that there is no basis for his argument that he has not been paid overtime wages.

### ANALYSIS

20. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law
  - the director failed to observe the principles of natural justice in making the determination; or
  - evidence has become available that was not available at the time the determination was being made
21. The burden of establishing the grounds for an appeal rests with an Appellant. A disagreement with the result, in and of itself, is not a ground of appeal. Mr. Magno must show clear and convincing reasons why the Tribunal should interfere with the delegate’s decision on one of the three stated grounds of appeal. Mr. Magno disagrees with the result, arguing that the delegate was wrong to find that he had not discharged his burden of proof.
22. The delegate assessed the credibility of the parties as well as the reliability of their evidence. The credibility assessment is within the mandate of the delegate and absent any evidence that would persuade me that his decision is irrational or perverse, I am unable to interfere with his conclusion on this issue.
23. The delegate weighed all of the evidence and came to a reasoned conclusion. While Mr. Magno disputes his conclusion, I find no basis to conclude that it is wrong in law. He correctly placed the burden of proving the claim on Mr. Magno. He had evidence from both parties before him which he found was not entirely reliable. Ultimately, after considering all of the evidence, he concluded that Mr. Magno had not discharged his burden of proof. I find no basis to interfere with this conclusion.
24. I also do not find that the delegate failed to observe the principles of natural justice. The delegate sought information from both parties and offered to hold a conference call to ensure that all submissions had been made. The employer’s decision not to participate in that call is not proof that the delegate preferred the employer’s evidence over Mr. Magno’s. It was part of the investigative process and nothing turns on the employer’s decision not to make final submissions.
25. The appeal is dismissed.

**ORDER**

26. I Order, pursuant to Section 115 of the *Act*, that the May 20, 2009, report of the delegate, following a referral back, be confirmed and that the Determination, dated September 19, 2008, is varied to show that Mr. Magno is not owed overtime wages.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**