

An appeal

- by -

Canwest Glassland Inc.
("Canwest")

- 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: Lorne D. Collingwood

FILE No.: 2002/588

DATE OF HEARING: February 26, 2003

DATE OF DECISION: March 11, 2003

DECISION

APPEARANCES:

George Wilson

For Canwest Glassland

OVERVIEW

Canwest Glassland Inc. (which I will refer to as “Canwest” and “the employer”) appeals, pursuant to section 112 of the *Employment Standards Act* (“the Act”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 6, 2002. Canwest in that Determination is ordered to pay Pradeep Kumar \$1,298.41 in overtime pay plus interest.

The employer, on appeal, claims that Mr. Kumar did not work as set out in his time sheets and the Determination. The employer complains that the time sheets are not credible, that only 47.25 hours of overtime were worked by the employee, and that Mr. Kumar is entitled to \$401.63 in overtime pay plus interest, not \$1,298.41 plus interest.

An oral hearing was held in this case. Only the employer attended the hearing. In fact, nothing at all has been heard from the employee in this case.

The appeal is in order and so I proceeded to hear the employer. The appeal is that the employee and his time sheets are not credible. Hearing as I have from the employer and not the employee, I am led to believe, nothing to the contrary, that the time sheets are probably not an accurate account of lunch breaks or hours worked. That leads me to vary the Determination.

ISSUES

The question in this case is, How many hours of overtime did the employee work? Underlying that question is a matter of credibility, the credibility of the employee’s time sheets. According to the employer, the time sheets are an inaccurate account of overtime because the employee did not account for lunch breaks: The employee is entitled to \$401.63 plus interest, not \$1,298.41 plus interest [(47.25 hours x .5) x \$17 = \$401.63].

The Determination was issued before November 30, 2002. And the appeal was filed before November 30, 2002. It is for me to decide, therefore, whether it is or is not shown that the Determination ought to be varied or a matter or matters referred back to the Director for reason of an error or errors in fact or law.

FACTS

Canwest is in the business of manufacturing and installing windows and other glass products.

Pradeep Kumar was one of Canwest’s glaziers. The employment ran from October 16, 1989 to April 3, 2001. Kumar worked both in the employer’s shop and on construction sites.

The Determination is based on time sheets that the employee submitted to the employer. Kumar was paid on the basis of those time sheets, and according to the time sheets, Kumar frequently worked without a proper lunch break and a considerable amount of overtime as a result.

The delegate relies on the employee's time sheets because the employee was paid on the basis of his time sheets, there is no other record of work, and the time sheets have the employee taking a lunch break on some days but not on all days. The delegate goes on to say that "there is no evidence to indicate that Mr. Kumar was not working through his break or that he took a break and did not record it" and "there is no evidence to indicate the employer's records or the time sheets are inaccurate".

The employer has consistently claimed that the employee's time sheets are incorrect if not fraudulent. The employer, on appeal, complains that it was not until the delegate's investigation that it was discovered what the employee was doing. It is the testimony of George Wilson that it is company policy that employees take a half hour lunch break and that the employee took a lunch break just like everyone else at Canwest, which is to say, a half hour lunch break each and every day. I must accept that as fact, no evidence to the contrary.

Wilson tells me that the employee brought his lunch to work each and every day and that there was no reason why he could not break for lunch. Wilson tells me that Kumar is not known as guy who almost never took a lunch break but as a guy who brought really interesting lunches and shared them with his fellow workers. I must accept that as fact, no evidence to the contrary.

I am shown time sheets for another glazier, said to be a typical employee, who worked in the shop and on construction sites like Mr. Kumar. That employee consistently took a lunch break.

Wilson tells me that the employee often worked in the shop and that the time sheets are inconsistent with that in that the shop is always closed for lunch so that everyone is able to take a lunch break. I accept that, nothing to the contrary.

The employer produces the employee's time sheets for January of the year 2000. On one of those time sheets (the time sheet for January 7, 2000) the employee wrote "lunch" yet he claimed pay for the lunch period. Another time sheet, the record for January 31, 2000, claims that the employee did not break for lunch even though the record indicates that the employee worked in the shop that day.

The employer, on appeal, notes that the employee's time sheets would lead one to believe that the employee was never late for work. Wilson testifies, however, that the employee was in fact late for work on several occasions. I accept that as fact, nothing to the contrary, and conclude that the employee's time sheets are at least incorrect in that they fail to show that the employee was late.

ANALYSIS

This case turns on credibility, the credibility of the employee and his time sheets.

Deciding what is credible is usually a rather difficult task for there are many factors to consider. The manner of a witness is of some interest (Is the witness clear, forthright and convincing or evasive and uncertain?) but of greater importance are factors like the ability of the witness to recall details; the consistency of what is said; reasonableness of story; the presence or absence of bias, interest or other

motive; and capacity to know. As the Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 354, B.C.C.A., has said, the essential task is to decide what is most likely true given the circumstances.

“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

In this case, however, the employee has had absolutely nothing to say. The employer’s portrayal of the facts is in no way contradicted. The time sheets are inconsistent with the evidence that is before me. I am therefore led to prefer the employer’s version of events and believe that the employee’s time sheets are probably not an accurate account of lunch breaks or hours worked.

The delegate in the Determination makes much of Bcest No. D208/00, a decision to award overtime pay in a case where an employee was required to be available for work during lunch breaks and there was a contractual entitlement to be paid for lunch breaks. I fail to see what that has to do with this case. The employee was not required to be available for work during lunch breaks, nor is there a contractual entitlement to be paid for lunch breaks.

The Determination refers to Bcest No. D415/97, a case where employees were paid for lunch breaks for a period, then not paid. That is distinguished from the case at hand. I am not shown that this is a case where the employer knowingly paid for lunch breaks.

The appeal is that the Determination should be for \$401.63 plus interest. The Determination is so varied.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated November 6, 2002 be varied. It is not \$1,402.03 that the employer must pay Pradeep Kumar but \$401.63 plus any interest which is due for reason of section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal