

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Syncon Investments Ltd.
("Syncon")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Niki Buchan

FILE NO.: 96/649

DATE OF HEARING: February 24, 1997

DATE OF DECISION: May 1, 1997

DECISION

APPEARANCES

Allan W. Sproule	For Syncon
Dale Sproule	For Syncon
Michael Taylor	For the Director
William Scott Delong	For Himself

OVERVIEW

This is an appeal by Syncon Investments Ltd. (“Syncon”) of Determination No. CDET 004263, dated October 9, 1996 that determines that an amount in the sum of \$ 477.77 is payable to William Scott Delong (“Delong”) for regular wages, overtime, statutory holiday pay, annual vacation pay and the cost of cleaning and maintaining the uniform he was required to wear.

Syncon argues that the Determination is based on inaccurate facts set out in the Complaint. It requested an oral hearing and a repeal of the Determination. Also, it requests a withdrawal of the order to pay interest on moneys it does not owe.

PRELIMINARY ISSUE

Mr. Taylor, delegate for the Director of Employment Standards (the “Director”), brought a preliminary objection to the hearing of this appeal. He has just been informed of a recently published Decision of this Tribunal, *Kaiser Stables*, BC EST No. D058/97. He argues that it finds that if an employer chooses not to deal with an officer on the investigation it should not have an appeal to the Tribunal. Also, he referred me to *Tri-West Ltd.*, BC EST No. D268/96. He had not read the cases but provided copies to Syncon and to me. I heard brief argument from the parties.

Mr. Taylor states that he received the Complaint on May 9, 1996. He wrote to Syncon on August 6, 1996 notifying the company of the complaint. There was no response to the letter; therefore, a Demand for Employee Records was issued on September 11, 1996. He received confirmation that the certified mailing of that demand was received. There was no response within the time limit set and the Determination was issued on October 9, 1996. He argues that this appeal should not be allowed to proceed because the appellant did not cooperate with the investigator.

Syncon responds that rules cannot be changed in the middle of the case. It is not fair. The company followed instructions of procedure from the Tribunal. It was told that it had a right to appeal the Determination. At no time was it informed that the right to appeal could be withdrawn. Syncon argues that I should follow the guidelines set out in the notification that there was a right to appeal.

I decided to hear the evidence and arguments then to decide this preliminary issue prior to making a decision on the appeal of the Determination before me.

ISSUES TO BE DECIDED

Whether Syncon owes Delong for:

- unpaid wages and overtime claimed on January 31, 1996,
- statutory holiday pay for November 11, 1995,
- annual vacation pay for the full period of his employment, and
- the cost of cleaning and maintaining his uniform?

FACTS

1. Delong was hired by Syncon as a cook for the George and Dragon restaurant on September 28, 1995.
2. He was not paid statutory holiday pay for November 11, 1995. He did not work the November 11, 12, 13 or 15 shifts assigned.
3. Delong withdrew his claim for overtime hours for January 31, 1996.
4. He was paid for 5.75 hours work on January 31, 1996.
5. The date, January 31, 1996, as stated in the reason schedule is an error. It should have been an unknown date in February.
6. He was paid for a 7 hour shift on January 29, 1996 that he did not work although he signed in and out for it. He was allowed to work another unknown date in February, to make up that time.
7. The vacation calculation in the Determination is incorrect because the wrong date of hire was used in the calculation. The parties agreed that \$ 199.20 is the amount owing.
8. There was no requirement for Delong to wear special clothing.

ANALYSIS

I have considered the cases referred to me and the arguments of the parties on the preliminary objection. It is the pattern established in the previous cases that the Tribunal will not allow an employer who refuses to participate in the Director's investigation to file an appeal on the merits of the Determination. An appeal under Section 112 of the "Act" is not a complete re-examination of the Complaint: It is an appeal to determine whether the Determination is correct in the context of the facts and the statutory requirements. In this instance, parts of the Determination are in error. For this reason the preliminary objection that the appeal not be heard is denied.

The first issue of the appeal deals with a disputed date, January 31, 1996 set out in the Determination as a date no payment was paid for regular wages. The payroll records reveal that he worked 5.75 hours on January 31, 1996 and that he was paid for those hours. Delong admits that he did not work overtime hours on January 31, 1996 as claimed. He withdrew his claim for overtime hours.

The employer gave evidence that Delong was paid for time he did not work on January 29, 1995. He signed in and out on the time sheet for that work. Delong counters that when this was brought to his attention he was given a day to work in February to make up for that time. I have been unable to determine whether there was other time in February that was worked and unpaid. The Director's delegate says he changed the date on the complaint form to January 31, 1996 during a telephone conversation with Delong. It had originally stated February. Delong's evidence is that he worked another day in February as well as the makeup day but he cannot remember the exact dates.

Syncon has no record of time worked by Delong in February. The director's delegate argues that the employer has no records of employment in February. He says that no inference should be made that the employee is wrong. I am satisfied that the January date is an error. I am unable to determine whether another date was worked. In this case, I do not think the determination that Syncon owes Delong \$64.00 for one day of regular wages is an unreasonable one. The investigator had only information given to him by the employee since the employer had not provided a response during the investigation.

On the second issue of whether statutory holiday is owing one must consider the requirements of Section 44 of the *Act*:

S.44. "*After 30 calendar days of employment, an employer must either*
(a) give an employee a day off with pay on each statutory holiday,
or
(b) comply with Section 46."

Syncon's argument that he did not work that day is irrelevant. He met the requirements of Section 44 and is owed the amount set out in the determination. The investigator made a reasonable decision.

The third issue of annual vacation pay owing was resolved by the parties. It was agreed that the amount owing is \$ 119.20. The calculation in the Determination is incorrect because the wrong date of hire was used to make the calculation. The Determination will be varied to correct the amount owing.

The last issue to be resolved is over a claim for cleaning and maintaining a uniform Delong claims he was required to wear. After listening to lengthy evidence on this issue, Delong stated he made the claim because he thought it was the law. I am satisfied that there was no evidence to support that a special uniform was required. To validate a claim for care of a uniform it must fit within the requirement to wear a uniform under Section 25 of the *Act*. This claim does not meet the requirements. It is a frivolous claim and should not be awarded. The Determination will be varied to cancel the amount awarded.

I confirm the Determination that regular wages in the amount of \$64.00 and statutory holiday pay in the amount of \$ 40.00 are owing to Delong. The Determination will be varied to adjust annual holiday payment to reflect the agreed amount of \$ 119.20 that is owing. Payments for overtime wages in the amount of \$ 18.00 and special cleaning allowance in the amount of \$ 128.00 are cancelled. Interest is to be recalculated to reflect the changes to the amounts in the Determination.

ORDER

In summary, I order under Section 115 of the *Act*, the Determination No. CDET 004263 be varied as follows:

1. Regular Wage for one day in the amount of \$64.00 is confirmed,
2. Statutory holiday pay in the amount of \$40.00 is confirmed,
3. Overtime wages in the amount of \$18.00 is cancelled,
4. Annual holiday is to be paid in the amount of \$119.20,
5. Special cleaning allowance in the amount of \$128.00 is cancelled, and
6. Interest is to be adjusted to reflect these changes.

The adjusted amount is payable together with whatever interest may have accrued since the date of issuance pursuant to Section 88 of the *Act*.



Niki Buchan
Adjudicator
Employment Standards Tribunal