

An appeal

- by -

Beta Enterprises Ltd. operating as BlackSheep Pub
(“Beta”)

- 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: Norma Edelman

FILE No.: 2002/14

DATE OF DECISION: March 18, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") by Beta Enterprises Ltd. operating as BlackSheep Pub ("Beta") against a Determination issued by a delegate of the Director of Employment Standards on December 21, 2001. The delegate found that Beta owed Keith Clark ("Clark") wages in the amount of \$719.95. Beta appealed the Determination on the basis that the delegate's calculations are incorrect.

ISSUE TO BE DECIDED

Does Beta owe Clark wages in the amount of \$719.95?

FACTS AND ANALYSIS

Clark commenced work for Beta as a cook on July 2, 2000. He was dismissed on August 15, 2001.

Clark filed a complaint at the Employment Standards Branch claiming that he was owed overtime wages and compensation for length of service.

The delegate found that Clark was not entitled to compensation for length of service as he was dismissed for just cause, but he was entitled to overtime wages in the amount of \$719.95, including interest and vacation pay. The delegate stated that payroll records supplied by Beta confirmed that Clark was paid straight time for all hours worked. The payroll records showed only the total hours worked in a biweekly pay period; days worked and hours per day were not provided and daily overtime could not be calculated. The delegate determined that all hours worked in excess of 80 in a biweekly pay period should have been paid at time and one-half rather than at straight time. He found that Clark was owed 163.5 hours at half the straight time rate as he had already received straight time.

Beta appealed the Determination on the basis that the delegate's calculations did not account for statutory holiday hours which were included in some of the pay periods and these hours should be deducted from the overtime owed; Clark was accidentally overpaid on certain occasions and these hours should also be deducted; and the delegate made some errors calculating the hours worked by Clark. With its appeal, Beta included various time cards for Clark and some payroll summary sheets.

Both the delegate and Clark were invited to reply to the appeal.

Apparently the delegate who issued the Determination is no longer with the Employment Standards Branch and as a result a different delegate replied to the appeal. She said the daily timecards provided by Beta were not provided to the previous delegate and normally this would cause her to argue that the employer should not be allowed to submit new evidence on appeal. However, given the previous delegate did not require the production of the daily hours records in the form of a Demand for Employer Records, she submits the matter should be referred back for a re-calculation of Clarks' actual entitlement since it appears there are calculation errors. For example, the previous delegate ignored double time in his calculations. She said if the Tribunal referred the matter back, Beta would be required to provide all time cards, including a breakdown of the exact total hours worked each day so she could properly calculate what wages were owed to Clark. She also stated that if the Tribunal decided not to refer the matter back, then it should increase the Determination to reflect that double time is owed after 48 hours of work per week.

In his reply to the appeal, Clark states that the previous delegate based his calculations on the time cards that recorded all hours worked per pay period; statutory holidays do not appear on the time cards unless the day was worked; there are no over calculation errors; and he was never paid more than 8 hours pay per statutory holiday.

From the information on file, I am not satisfied I can establish with any accuracy the amount of wages owed to Clark. I agree with the delegate that in these circumstances it is appropriate to refer this matter back to her to establish the exact wages owed to Clark. It is not for the Tribunal as an appellate body to investigate the complaint. That is the responsibility of the delegate. The previous delegate has made errors in his calculations. The additional information provided by the employer on the appeal may assist in establishing what wages are owed to Clark. As well, the current delegate may find it necessary to request further information from the parties in order to make a finding on this matter.

ORDER

I order pursuant to Section 115 of the Act that the Determination be referred back to the delegate for further investigation regarding Clark's entitlement to wages.

Norma Edelman
Adjudicator
Employment Standards Tribunal