

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

Dwayne Stewart and Phil Goddard  
operating as Pacific R.I.M. Services  
("Pacific")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 98/743

**DATE OF HEARING:** March 5, 1999

**DATE OF DECISION:** March 23, 1999

**DECISION**

**APPEARANCES**

Phillip J. Goddard Dwayne W. Stewart	on behalf of Pacific
Mark Williamson	on his own behalf
Barry G. Doell	on his own behalf

**OVERVIEW**

This is an appeal by Dwayne Stewart and Phil Goddard operating as Pacific R.I.M. Services (“Pacific”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination which was issued by a delegate of the Director of Employment Standards (the “Director”) on October 29, 1998.

The Determination requires Pacific to pay the sum of \$6,989.33 on account of unpaid “wages” (including interest accrued to the date of the Determination) to two former employees, Barry Doell and Mark Williamson.

Pacific’s appeal acknowledges that it did not pay overtime wages and some statutory holiday pay as required by the *Act*, but it submits that the Determination is incorrect in that it fails to take into account certain monies paid to Mr. Doell and Mr. Williamson.

A hearing was held at the Tribunal’s offices on March 5, 1999 at which time evidence was given under oath. Mr. Doell did not respond as required when the Tribunal disclosed Pacific’s appeal documents to him. At the hearing Mr. Doell advised the Tribunal that he wished the appeal to be decided solely on the basis of the Determination and Pacific’s written submissions to the Tribunal. The appeal in respect of the wage amounts owed to Mr. Williamson included both written and oral submissions.

**ISSUES TO BE DECIDED**

The issue to be decided in this appeal is whether the Director erred, in law or in fact, by determining that certain payments made by Pacific to Mssrs Williamson and Doell were not payments of “wages” for the purposes of the *Act*.

**FACTS AND ANALYSIS**

Pacific is a general contractor and is involved primarily in ‘commercial’ construction projects. Both Mr. Doell and Mr. Williamson were employed by Pacific as carpenter assistants. Doell was employed from August 11, 1997 to April 1, 1998. Williamson was employed from June 17, 1997 to May 18, 1998. Both employees made a complaint under the *Act* in which they alleged that they were not paid overtime wages in accordance with the *Act*. Williamson also complained that he was not paid statutory holiday pay correctly.

The Director found that the time sheets provided to her by Pacific were an accurate record of the daily hours worked by Doell and Williamson. She used those records to calculate the amount of wages earned by the two employees during their employment with Pacific and included the following “summary of outstanding wages” for each employee:

**Barry Doell**

Wages earned Aug. 11/97 - April 1/98 per overtime calculation	\$21,028.75
Statutory holiday pay adjustment	<u>\$422.50</u>
	\$21,451.25
 Vacation pay entitlement 4% x 21,451.25	 <u>\$858.05</u>
	\$22,309.30
Less wages paid per payroll records	<u>\$18,255.42</u>
	\$4053.88
Interest for the period April 8 - October 29/98	<u>\$149.60</u>
 <b>Total Wages payable</b>	 <b><u>\$4,203.48</u></b>

**Mark Williamson**

Wages earned June 17/97 - May 18/98 per overtime calculation	\$32,672.33
Statutory holiday pay adjustment	<u>\$958.50</u>
	\$33,630.83
 Vacation pay entitlement 4% x 33,630.83	 <u>\$1345.23</u>
Total wage entitlement	\$34,976.06
 Less wages paid per payroll records plus \$2000.00 paid after termination	 <u>\$32,267.50</u>
	\$2708.56
Interest for the period May 25 - October 29/98	<u>\$77.29</u>
 <b>Total Wages payable</b>	 <b><u>\$2785.85</u></b>

These summaries were prepared on the basis of the following findings of the fact by Director:

- Doell's wages rate was \$12.00/hour and increased to \$13.00/hour. Williamson's wage rate was \$13.00/hour initially and increased to \$14.50/hour. There is no dispute that both employees were paid at these hourly wage rates;
- Pacific's payroll records "...accurately reflect the amount of wages paid to Doell and Williamson;
- Other monies that may have been paid to Doell and Williamson are not wages and are, therefore, not relevant .... An exception to this is the \$2000.00 paid to Williamson in June, 1998 towards his overtime wages;
- According to the employers' records, all wages have been paid to Doell and Williamson at straight-time; and
- With the exception of the day of with 8 hours pay given to Doell and Williamson for Christmas Day 1997, no statutory holiday pay was paid. Some work was performed on some holidays for which regular rates of pay were paid.

The central point of Pacific's appeal is that it made payments to Doell and Williamson which the Director found not to be "wage" payments and, therefore, were not included in calculating the wage amounts owing to the former employees. Pacific also submits that the purpose of its appeal is "...to ensure only the correct amount of money is paid to these former employees...(and)...to ensure that loans and other advances made to Mr. Williamson and Mr. Doell are considered in any final payment that they receive." In particular, Pacific disputes the finding made by the Director that:

The employer is not entitled to pay for things such as vehicle repairs, meals, gas, etc. and to offset this cost against the amount of wage to be paid to the employee. (Determination, page 3)

While Pacific acknowledges that to be a correct interpretation of the *Act* (see in particular, Sections 20 and 21), it submits that "...all items paid to them, with the given exception of meals, was known to be a loan, advance or other repayable item." Pacific submitted copies of numerous cheques which it issued to Mssrs. Williams and Doell "outside of the payroll...(which)...did not have statutory deductions taken off due to their nature as that of a loan or advance." (sic)

Before turning to the specific payments made by Pacific to each of the employees I will set out the relevant provisions from Sections 21 and 22 of the *Act*.

## 21. Deductions

- 1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
- 2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
- 3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

## 22. Assignments

- (1) An employer must honour an employee's written assignment of wages
  - (a) to a trade union in accordance with the Labour Relations Code;
  - (b) to a charitable or other organization, or a pension or superannuation or other plan, if the amounts assigned are deductible for income tax purposes under the Income Tax Act (Canada),
  - (c) to a person to whom the employee is required under a maintenance order, as defined in the Family Maintenance Enforcement Act, to pay maintenance,
  - (d) to an insurance company for insurance or medical or dental coverage, and
  - (e) for a purpose authorized under subsection (2)...
- (4) An employer may honour an employee's written assignment of wages to meet a credit obligation.

In making this decision, I am also mindful of the legal principle, *contra proferentem*, which stands for the proposition that an ambiguous provision in a contract is to be construed against the person who prepares and selects the language of that contract. In the facts of this appeal, there are many documents (cheques and credit card receipts) on which Pacific seeks to rely to establish that the Director erred in the Determination. Where such documents are ambiguous on their face and there is no clear evidence to overcome or remove that ambiguity, I cannot rely on such documents to find that the Director erred. Two other factors also influenced my decision. Pacific did not include in the employees' statement of earnings the amounts paid to keep them "outside of the normal payroll system" and offers no compelling explanation for not submitting to the Director (during her investigation of the complaints and prior to issuing the determination) the documents it now submits show that wage payments were made to Mssrs. Williamson and Doell.

Finally, before commenting on each employees' entitlements, I should note that, as the appellant, Pacific bears the onus of establishing that the Director made an error in the Determination. If the evidence adduced and submissions made by Pacific do not establish, on the balance of probabilities, that the Director erred then I must confirm the Determination.

*Mark Williamson*

Pacific acknowledges that, based on the owe calculations made by the Director, it would owe Mark Williamson \$2,785.85. However, it submits that the Director erred by not considering several payments, which were not processed through Pacific's payroll, which it made to Mr. Williamson. Those payments were:

<b>Cheque#:</b>	<b>Date:</b>	<b>Amount:</b>
<b>5400</b>	<b>6/3/98</b>	<b>\$116.00</b>

The memo portion of the cheque states: "Wages". Pacific offers no explanation for issuing this cheque other than Mr. Williamson's complaint (I note that 8 hours @\$14.50 equals \$116.00). Mr. Williamson acknowledges receipt of this cheque for wages.

<b>4224</b>	<b>11/28/97</b>	<b>\$300.00</b>
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This cheque is identified as a "Christmas Bonus" although Pacific argues it was made in lieu of paying overtime wages.

<b>2470</b>	<b>Feb 8/98</b>	<b>\$300.00</b>
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No explanation appears on the face of cheque. Pacific says it was to recognize overtime hours worked. Mr. Williamson testified it was to reimburse him for fencing materials he provided for a project at 4634 East Hasting Street.

<b>2420</b>	<b>Oct 3/97</b>	<b>\$400.00</b>
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Mr. Williamson acknowledges receipt of this cheque. No explanation appears on the face of the cheque which was issued 'in the field' to Mr. Williamson at his request. No explanation offered by Pacific for this payment.

<b>2397</b>	<b>Aug 13/97</b>	<b>\$80.00</b>
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No explanation on cheque. Pacific offers no reason for making this payment 'in the field' Mr. Williamson is unsure why this payment was made is was possibly a reimbursement for materials.

<b>-</b>	<b>Mar 17/98</b>	<b>\$353.09</b>
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Amount charged on Pacific's credit card for repairs performed on Mr. Williamson's truck by Taylorwood Automotive Ltd. The total amount

of repairs was \$438.11 and the difference was deducted from payroll cheques. Mr. Williamson provided copies of payroll records to show that \$437.00 had been deducted from wages for this matter. Pacific acknowledges that its appeal should be amended to reflect this.

- **Nov 7/97** **\$715.24**

Amount charged on Pacific's credit card for repairs performed on Mr. Williamson's truck by KalTire. Mr. Williamson testified that he entered into a verbal agreement in Nov/97 with Phil Goddard that Pacific would pay for these repairs in lieu of a vehicle allowance. He argues that, unlike the Taylorwood Automotive invoice, Pacific made no deductions for this credit card purchase.

My review of the oral and documentary evidence which is before me leads me to find that the Determination should be varied to show wages owing to Mr. Williamson in the amount of \$2,592.56 plus interest accrued in accordance with Section 88 of the *Act*. My reason this findings are as follows:

- Cheque #5400 (\$116.00) constituted a payment of "wages: to Mr. Williamson;
- Cheque #4224 (\$300.00) is not a payment of "wages" as there is no evidence to establish that the payment was made for "work", or as "... an incentive and relates to hours of work, production or efficiency" (see: Section 1(1) of the *Act*);
- Cheque #2470(\$300.00) is not a payment of "wages" as I accept Mr. Williamson's uncontroverted evidence that this payment reimbursed him for fencing materials which he provided to Pacific;
- Cheque #2420 (\$400.00) and Cheque #2397 (\$80.00) were not denoted as wage payments (unlike cheque #5400), and Pacific offers no conclusive evidence which would allow me to find that the Director erred in determining these amounts were not "wages";
- Pacific acknowledges that \$437.00 was recovered from Mr. Williamson, through payroll deductions, to recover the cost of repairs on his truck by Taylorwood Automotive; and
- the payment of \$715.24 made by Pacific to KalTire was not "wages" as it was a payment of an allowance it expense under the terms of a verbal agreement and, therefore, does not fall within the statutory definition of "wages" [see: Section 1(1) of the *Act*].

*Barry Doell*

Mr. Doell did not respond, as requested, when the Tribunal disclosed to him a copy of Pacific's appeal submission. Pacific submits that the documents attached to its appeal (copies of cheques and credit card receipts) amount to "... more than \$7,849.00." Those amounts, it submits, were paid to him "...for overtime and other payments...(and)...were not included in his payroll records so as to minimize the bi-weekly tax bill that he was to receive."

Mr. Doell attended the hearing on March 5, 1999 and informed the Tribunal that he preferred to rely on the findings made in the Determination and had no reply to Pacific's written submissions.

My review of the documents on which Pacific relies leads me to conclude as follows:

- Cheque #4014 dated 9/4/97 in the amount of \$85.00 is identified as a "bonus for installation of floor tile." This is a "wage" amount as it was paid "...as incentive and relates to hours of work, production or efficiency" (see: Section 1(1) of the *Act*).
- Each of the four credit card receipts show that the purchases made by Mr. Doell were items such as gas or pizza. These items are not "wage" amounts.
- Cheque #2585 dated December 19, 1997 in the amount of \$233.13 is marked as expenses on its face.
- Cheque #4223 dated November 28, 1997 in the amount of \$300.00 is identified as a "Christmas Bonus". This is not a "wage" amount as it was paid at the employer's discretion.
- Cheque #2448 dated December 17, 1997 in the amount of \$1,000.00 has a line drawn across its face which appears to cancel it and is not clear whether it was, in fact, presented for payment.
- None of the other 18 cheques (in varying amounts from \$27.36 to \$1,551.00) indicate for what purpose they were issued.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination be varied, for the reasons given above, to show "wages" owing to Mark Williamson in the amount of \$2,592.56 and "wages" owing to Barry Doell in the amount of \$3,968.88. Interest will be added to these amounts under Section 88 of the *Act*.

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**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**

GC:sa