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 -

Dr Alan F. Cook Inc.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE No:	1999/2
DATE OF HEARING:	March 30, 1999
DATE OF DECISION:	April 8, 1999

DECISION

APPEARANCES

Ms Wendy Bernt	Counsel for Dr Alan F. Cook Inc
Kelly Dressler	On her own Behalf
Gerry Omstead	Delegate of the Director

OVERVIEW

This is an appeal by Dr Alan F. Cook Inc ("Cook Inc") pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination (File No. 089789) dated December 11, 1998 by the Director of Employment Standards (the "Director").

Dr Alan F. Cook ("Dr Cook") is the President and sole shareholder of Cook Inc. which employed Ms Kelly Dressler ("Dressler") as a receptionist and assistant from approximately October 01, 1996 to April 17, 1998 when she resigned. Ms Dressler claimed for a substantial amount of overtime pay owed to her and accumulated during her employment. There were also some other matters which have since been resolved.

The Director's delegate investigated and determined that Cook Inc owed Ms Dressler $5,506.54 in unpaid wages and overtime. Cook Inc has appealed on 5 grounds but the first four all relate to an issue relating to the availability of payroll records, matters arising from a review of the "original" records, and alleged inconsistencies in the Director's calculations. The fifth ground of appeal is that Ms Dressler was in fact paid for sick days, lunches, and personal time, which is not required by the *Act*, and that these amounts should be offset against any money found owed to Ms Dressler.

ISSUES TO BE DECIDED

The issues to be decided in this case are:

1. Should payroll records, not produced at the time of the investigation, be admitted on appeal?

2. If the records are admissible, were the Director's calculations in error ?

3. Even if the records are not admissible, are there errors and inconsistencies in the Director's calculations ?

4. Should amounts paid to Ms Dressler for sick days, lunches, and personal time be set-off against any amount found owing by Cook Inc to Ms Dressler ?

FACTS

Dr Cook is a physician licensed to practice medicine in the Province of British Columbia. His practice is incorporated under the name Dr Alan F. Cook Inc. of which he is the sole shareholder, director and President. Dr Cook has a busy family practice which is open for patients from 8:30 am to 5:30 pm.

In September 1997 Dr Cook hired Ms Dressler as his full time office medical assistant. Her duties included answering the phones, making and scheduling all appointments, all general office duties, and acting as the receptionist. The practice did not employ a bookkeeper and staff, including Ms Dressler, made entries in payroll bookkeeping ledgers. Dr Cook testified that Ms Dressler was an excellent worker in all these capacities.

Pay cheques were made by way of a personal style cheque with no "record portion" or remittance statement attached. Cook Inc did not comply with the requirements of section 27 of the *Act* which requires the employer to give the employee a written wage statement each pay period stating the hours worked, wage rate, overtime, deductions, and gross and net wages.

Cook Inc did not properly comply with section 28 of the *Act* which requires the employer to keep detailed payroll records. Dr Cook allowed the staff to make out the records and he simply signed the cheques. The records were not reviewed, checked or otherwise supervised by a bookkeeper or by Dr Cook himself.

Dr Cook testified that in December 1997 he did look at the books and became concerned about the amount of overtime he was paying to Ms Dressler. He agreed that she did work long hours but wanted to cut back on the cost. In February 1998 he says he discussed the hours with Ms Dressler and asked her not to work so much overtime. He testified that he told her she could work as many hours as she wanted at straight time but that he could not afford to pay time and a half. He says it was agreed that she would work 9 hours at straight time and any time after that would be paid as overtime (the *Act* states that overtime is payable after 8 hours). Dr Cook agreed to hire a student to cover some of the overtime hours.

In addition to her basic pay and overtime Ms Dressler testified that she was authorised to pay herself for one sick day per month and she did indeed have some health problems which resulted in her use of much of this time. Dr Cook did not seriously dispute that she was authorized to pay herself for such sick days but he claims that as they were a benefit over and above the minimums required by law that this sick pay should be off-set against any sums found owing to her.

Ms Dressler testified that she was paid for the whole working day even if breaks were taken for coffee or lunch. There was some dispute on whether lunches were taken as opposed to just coffee breaks but as these breaks were clearly discretionary I find as a fact that Ms Dressler was required to be available for work throughout the entire day.

Ms Dressler resigned from her employment as of April 17, 1998 and filed a complaint with the Employment standards Branch on April 20, 1998.

The Director's delegate contacted Dr Cook to provide payroll records. Dr Cook says that when he realised that he was subject of an investigation he read the *Act* for the first time. He says that he realised then that Ms Dressler was entitled to overtime after 8 hours but also noticed that some items he was paying were not required by the *Act* such as sick time, lunches, and extra statutory holidays.

Dr Cook then "recreated" a set of payroll records based on an 8 hour day and eliminating the benefits not required by the *Act* and delivered the recreated records to the delegate. He claims that he did not alter the gross pay amounts and he felt that these records were more fair.

For the appeal Dr Cook produced another set of payroll records which he said were the "originals". He testified that these originals were untouched by him except for one month when he did the entries himself.

Ms Dressler reviewed these records at the hearing and testified that they were not the original payroll records. She testified that some of the writing was hers but much was not and entries had been altered by someone to reflect that overtime had been paid when it was not. She testified that the book she had used started in 1997 but the one submitted contained both 1996 and 1997 entries. She testified that her entries were always done in pencil while much of this "original' record was entered in pen. She suggested that the book had been taken apart, altered and put back together again. She could not explain how some entries were hers while others were not.

Dr Cook agreed that even on his calculations Ms Dressler is owed $1,836.73 in unpaid overtime based on the fact that she had worked 9 hours before overtime instead of the 8 required by law.

ANALYSIS

Payroll Records:

The first and most fundamental issue in this appeal is what use, if any, should be made of the "original records" produced by the appellant for the purpose of this appeal. This Tribunal has set out certain principles on this subject in *Tri-West Tractor Ltd* BC EST #D268/96 and *Kaiser Stables Ltd* BC EST #D058/97.

These cases stand for the proposition that an employer who fails to cooperate with the investigation will not be allowed raise issues on appeal that were not presented to the investigator and an employer will not be allowed to produce new evidence on appeal that was withheld during the investigative stage. In *Bains Bros Demolition & Excavating Ltd* BC EST #D140/98 the Tribunal stated that it would not consider new evidence that could have been tendered at the investigative stage without a valid explanation for failure to tender the evidence at the investigative stage.

Counsel for Cook Inc referred me to the Tribunal's decision in *Re Poretsis* BC EST #D370/98 which states:

> *However, the failure to provide the evidence to the investigator is not an absolute bar to further production of evidence. In* Freemart Financial Services Inc.*, BC EST #D104/97 the Tribunal found that some degree of latitude may be allowed depending on the circumstances. There are many decisions of this Tribunal which follow the reasoning in* Tri-West Tractor Ltd *but almost all qualify the rule to some degree using such words as "generally" or "normally" new evidence will not be allowed at the appeal stage.*

This case is somewhat unique in that the payroll records submitted to the delegate were admittedly recreated from the originals to present to the delegate, what Dr Cook described as, a more fair picture of the employment history. He meant, of course, more fair to him. According to the Determination Dr Cook told the investigator that he had reworked the records and that he had misplaced the originals and that they were not available.

At the hearing it was evident that the original records were not misplaced and that they were available. In fact they were deliberately withheld from the investigator. Under these circumstances the records would not be admissible on the appeal. In *Re Poretsis* the employer had genuinely attempted to acquire certain records from a third party prior to the Determination and was not able to comply within the two weeks allowed by the investigator.

At the hearing I initially admitted the "original records" on a conditional basis subject to this ruling so that I could assess the relevance of the document. While it is clear that these records would not, and should not, normally be admitted, in this case I have decided to admit them for the purpose of assessing the accuracy of those records delivered to the investigator and in order to assess Ms Dressler's employment terms and conditions.

These records are only admitted in this case because of the very unusual circumstances and for the particular purposes stated above. This decision should not be considered as diminishing in any way those principles set out in the many decisions of this Tribunal following the *Tri-West Tractor* decision.

The Accuracy of The Delegates Calculations:

A study of the records produced by Dr Cook satisfy me of one certainty. That is that none of his records can be relied upon with any reasonable degree of accuracy unless corroborated by some other evidence.

I have considered the submission of counsel regarding inconsistencies in the quantum of the Determination but I am satisfied that the delegate has taken into account those matters raised by the appellant and that the calculations are as accurate as can be made based on the records provided.

Where an employer has failed to keep accurate records and is in breach of both sections 27 and 28 of the *Act* the evidence of the employee will be preferred. In this case the employer's "original records" clearly confirms that Ms Dressler worked an extensive number of overtime hours even

though these records are substantially unreliable as I accept Ms Dressler's evidence that even these are not in their original form.

The onus is on the appellant to satisfy me that the Determination is incorrect and in this case I am not satisfied that the appellant has met this onus.

Set-Off for Sick Time, Lunches, Statutory Holidays, and Personal Time:

The Appellant submits that because Ms Dressler was paid for certain matters over and above the minimums provided in the *Act* that these amounts should now be deducted from the amount found to be owing by Cook Inc to Ms Dressler.

I am satisfied on the evidence before me that the contract of employment between Cook Inc and Ms Dressler included that she was entitled to one day per month paid sick leave and that there was no overpayment in this regard. I am also satisfied that the extra holidays were paid by Dr Cook to his employees as part of the employment contract.

As mentioned earlier in this decision I am also satisfied that lunch and/or coffee breaks were given and taken on a discretionary basis and that Ms Dressler was required to be available for work throughout the day and that pursuant to section 33 of the *Act* such breaks must count as time worked by the employee.

I am not satisfied that there were any unauthorised absences from work for "personal time" that need to be considered as unpaid time. Because the employer is not able to establish the clear terms or limits of the employment contract and did not keep any record of such personal time I am not willing to consider whether or not there is anything to be deducted even if such deduction is lawful.

In light of my findings that Ms Dressler was entitled to those items, such as sick time, lunches, holidays and personal time, for which she was paid I do not have to address the issue as to whether these would have been deductible against wages owing to Ms Dressler.

Conclusion:

1. I admitted the payroll records under the exceptional circumstances of this case;

2. I find that the Director's calculations were not in error;

3. I find that there were no errors or inconsistencies in the Determination;

4. I find that Ms Dressler was rightly entitled to the paid sick-time, lunches, holidays, and personal time and that therefore there are no grounds upon which to set-off these amounts against wages owing to Ms Dressler.

ORDER

I order, under Section 115 of the *Act*, that the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal