

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 -

Eric Peter Heemskerk
("Heemskerk")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Genevieve Eden

FILE NO.: 96/726

DATE OF HEARING: March 26, 1997

DATE OF DECISION: March 27, 1997

DECISION

APPEARANCES

Eric Peter Heemskerk on his own behalf

David Oliver on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Eric Peter Heemskerk ("Heemskerk") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against Determination #CDET 004675 issued by the Director of Employment Standards on November 14, 1996. The Director's delegate found that the employer, S & M Cycle Ltd. ("S & M") had not violated the *Act*. In this appeal, Heemskerk claims he did not receive full compensation for hours worked

A hearing was held in Victoria on March 26, 1997. The day before the hearing, Kelly Flynn ("Flynn"), President of S & M, advised the Tribunal he would not be attending the hearing. The hearing proceeded in his absence. David Oliver ("Oliver") appeared for the Director of Employment Standards; Eric Ronse ("Ronse"), who issued the Determination, was unable to attend the hearing for medical reasons.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether wages are owing to Heemskerk.

FACTS

Heemskerk was employed by S & M as a Motorcycle Mechanic from May 18 to 28, 1996. He filed a complaint under the *Act* on June 13, 1996 alleging unpaid wages for hours worked. The dispute centers on the accuracy of the records submitted by the parties. Flynn submitted work orders prepared for each customer which show a breakdown of charges for parts versus labour. Flynn maintains that the work orders correspond to the vehicles Heemskerk worked on; these work orders total 30.75 hours for labour which is what Heemskerk was paid. Heemskerk submitted his version of work performed as well as the amount of time spent on each activity on each day worked; these records total 60 hours. Heemskerk is claiming payment for 29 1/4 hours.

In rendering his Determination, the Director's delegate concluded that the evidence of the employer was preferable to that submitted by the complainant. Ronse had contacted one of the customers and was able to ascertain that the amount charged to the customer was consistent with the work order. The Determination states that Heemskerk's records "appear to have been written after the termination of employment".

EVIDENCE

Heemskerk testified that he maintained a record of activities performed and hours worked on a daily basis and that, almost every day, Flynn and he would review this record to confirm the hours to be charged to the customer. Heemskerk maintained that there had been no disagreement between Flynn and he regarding the number of hours worked, rather Flynn had advised him, both in person and over the phone, that he was cutting back the hours he would be paid because he was not satisfied with his work.

Heemskerk further maintained that, when he was dismissed from S & M, Flynn did not have Heemskerk's records and, accordingly, didn't know how many hours to charge and had to make a calculated guess for labour costs when preparing the work orders. He noted that six of the work orders in contention were dated after May 28, 1996, his last day of employment. Heemskerk reviewed each entry on his record of activities performed noting discrepancies between these and the work orders submitted by Flynn. Heemskerk's records identify the vehicles he worked on and not the names of the customers. Flynn's work orders reflect customer names and vehicle worked on, but do not identify the mechanic.

Heemskerk submitted that eight work orders either did not reflect the actual time worked on the particular vehicle by Heemskerk or were not work orders corresponding to vehicles he worked on. For example, one of the work orders for a customer identified as "Todd" showed two hours charged for labour for a vehicle Heemskerk claimed he never worked on. Heemskerk asserted that he knew of the vehicle owned by Todd which was a model CB900F, while the vehicle he worked on had been a CB900 Custom model. Another work order for "Shepherd" showed fewer repairs than that listed on Heemskerk's records.

In response to Ronse's assertion that his hours of work records appeared to have been written after termination of his employment, Heemskerk submitted a letter from a Certified Master Graphoanalyst. In the graphoanalyst's opinion, the notation "FZ - TY - Tire Over" on Heemskerk's records was sufficiently similar to the handwriting on the work orders which Heemskerk testified were completed by Flynn. Heemskerk submitted that this was proof that his records had been completed before his termination since the notation on his records was made by Flynn and, accordingly, this showed Flynn had reviewed his hour of work records at the time of completion.

Both Heemskerk and Flynn submitted letters from customers and others regarding past association with both Heemskerk and Flynn. None of these individuals were called as witnesses. A note submitted by Flynn signed by "Todd MacDonald" stated that his vehicle was worked on by Heemskerk and that he was charged two hours for labour by S & M. In reply, Heemskerk reiterated that he never worked on Todd's vehicle and that Todd was a close friend of Flynn's.

ARGUMENTS

Heemskerk argued that he had established his record of hours and activities performed were completed prior to his termination of employment. Flynn's notation on these records revealed

his knowledge of these records. That this notation was made by Flynn was confirmed by the graphoanalyst as she stated it matched the handwriting on the work orders Heemskerk maintained were completed by Flynn.

Oliver noted it was unfortunate the employer did not attend the hearing to give evidence. He stated that Ronse based his Determination on the information he had at the time. He maintained that it appeared the employer deducted hours from wages owing Heemskerk due to what it considered to be unsatisfactory workmanship which is not permitted under the *Act*.

ANALYSIS

Section 28 of the *Act* requires an employer to keep payroll records for each employee to include, inter alia, the hours worked by the employee on each day. No such records were submitted by the employer. Work orders submitted by the employer do not identify the mechanic that worked on a particular vehicle. In the absence of daily hours of work records kept by the employer, and Heemskerk's sworn testimony that his own records were reviewed by Flynn and that there was no disagreement regarding hours worked, I find it appropriate to consider Heemskerk's records in determining that wages are owing. There is no evidence to persuade me that Heemskerk's records were written after termination of employment.

Further, in the absence of sworn evidence to the contrary, I accept Heemskerk's evidence that Flynn advised him he would be cutting back the hours he would be paid because he was dissatisfied with his work. Section 21 of the *Act* prohibits the withholding or deduction of an employee's wages for any purpose.

The difficulty with the employer's evidence is that no one was present at the hearing to give direct evidence under oath or affirmation and have this evidence tested under cross-examination. I had an opportunity to observe Heemskerk giving evidence and responding to cross-examination. He was forthright in his testimony and his statements were consistent throughout the hearing.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination #CDET 004675 be cancelled and that S & M pay Heemskerk the amount of \$526.50 plus vacation pay and interest in an amount calculated by the Director.

Genevieve Eden
Adjudicator
Employment Standards Tribunal