

An appeal

- by -

Margaret Wilkie  
("Wilkie")

- 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:** M. Gwendolynne Taylor

**FILE No.:** 2003A/48

**DATE OF DECISION:** May 27, 2003

## DECISION

This decision is based on written submissions presented by Margaret Wilkie (“Wilkie”) and the Director of Employment Standards.

### OVERVIEW

This is an appeal by Wilkie from a Determination of the Director dated December 27, 2002, concerning a complaint she filed against a former employer, Black Watch Security Ltd. (“the employer”). The Director’s delegate undertook an investigation and found that Victor Olsen and Mary Olsen, operating as Black Watch Investigations & Security Services Ltd. and Black Watch Security Ltd. (“the employer”) owed Wilkie compensation for unpaid wages, an unauthorized deduction, and interest, in the total amount of \$5,207.24. The delegate found that the employer also owed compensation for uniform maintenance but stated Wilkie had not substantiated a dollar figure.

Wilkie appealed the Determination on the grounds that the Director breached principles of natural justice and that new evidence has become available. Specifically, Wilkie argued that the Director did not communicate with her prior to making the determination and, therefore, did not afford her an opportunity to make full submissions and did not take into consideration additional information that she would have provided.

### ISSUE

Has Wilkie demonstrated that the Director breached the principles of administrative justice by failing to afford her an opportunity to properly present her case?

### FACTS

Wilkie worked for the employer from August 15, 1998 to June 28, 2001, as a security guard at the rate of \$8.00 per hour. She filed a complaint with the Director on July 19, 2001, indicating she was owed back wages, statutory holiday pay, deductions from wages and compensation for serving court documents. In documents accompanying her complaint, she also questioned whether she should be compensated for using her own vehicle and cell phone and for uniform maintenance.

On August 21, 2001 the Director sent a notice of the complaint to the employer. On October 9, 2001, the Director made a Demand for Employer Records, which the Director sent again on December 17, 2001. In the Determination, the delegate noted that in response to the Demand the employer produced some incomplete records but otherwise did not comment on Wilkie’s allegations. On May 8, 2002, the delegate wrote to the employer providing a copy of the wage calculations and offering an opportunity to make submissions.

From the Determination and from the record provided with the appeal, I cannot discern which ‘incomplete records’ were provided by the employer. Part of Wilkie’s original complaint was that the employer’s record keeping was haphazard. The records she provided may be similar to the ones provided by the employer, but I cannot tell that from the record. My other observation about the record is that there does not appear to be any correspondence from the Director to Wilkie. There is no indication that Wilkie

was copied on the delegate's May 8, 2002 letter to the employer, nor that the delegate gave her an opportunity to review the calculations. From Wilkie's statements in the appeal, it is apparent she was not provided with either of those.

The delegate has not indicated in the Determination how he arrived at the wage calculation. However, he attached sheets of wage calculation summaries. He also attached a couple of copies of T4 slips and it seems that he took the wages on those documents as being the total wages Wilkie received.

The delegate found that the employer had not complied with section 17- semi-monthly payment of wages, section 18 – payment of wages following termination, and section 27 – requirement to provide statements with wage payments. Additionally, the delegate found the employer contravened section 21 by requiring Wilkie to pay for vehicle repairs. The delegate found that Wilkie was not entitled to compensation for expenses incurred using her personal vehicle because that did not fall within the definition of “wages.” The delegate found that the employer contravened section 25 by not covering the cost of special clothing, the uniform. However, the delegate did not award compensation because “there is no evidence submitted to identify an amount.” The Director assessed a zero dollar penalty against the employer which could have an effect on future contraventions.

## **ARGUMENT**

Wilkie submitted that she found the Director's Kelowna office difficult to deal with from the start. However, she acknowledged that the employer was not easy to deal with and understood that the Director's office would have had difficulties. She also acknowledged that there was a change in legislation in 2002 which the Director's staff had to deal with.

Wilkie noted that the delegate missed an August 2000 timesheet, that there is no explanation of how the delegate calculated the wages figures, and that the delegate was in error if he relied on the T4s for a statement of her income because some of that would have applied to previous years. She submitted that she was not asked to provide proof or a statement of the costs of uniform maintenance, personal vehicle use or cell phone use. She had included a claim for serving court documents, but this was not addressed by the delegate.

In summary, Wilkie stated that if she had been provided with the calculations or notified that more information was needed before the Determination was issued, she could have dealt with these issues without the need of an appeal. She provided some additional information and calculations and commented on the delegate's calculation sheets. Ideally, she would like the Tribunal to finalize this case by varying the Determination.

Wilkie asked whether it is possible to publish the names of the employer so that other employees will not have the same experience. She also referred to the Guide to the Employment Standards Act to suggest that the Director might require the employer to post a bond or letters of credit. I leave these issues for her to discuss directly with the Director's office.

In response to the appeal, the delegate submitted that the matters in dispute involve consideration of the evidence submitted, but no legal challenge to the Director's policy, practice or procedures.

The employer did not respond to the appeal or make any submissions to the Tribunal.

## ANALYSIS

The Director conducted an investigation into Wilkie's complaint, rather than conduct a hearing. It is apparent that the delegate based his Determination on the evidence Wilkie submitted initially, plus whatever response there was from the employer, without seeking additional information from Wilkie. There is nothing in the record or on the face of the Determination to indicate that the delegate discussed his views of the various aspects of the case with Wilkie.

Although an investigation is different from holding a hearing, there is still a requirement that the Director abide by principles of natural justice, or administrative or procedural fairness as it more commonly referred. The main principle is that a party must be given an opportunity to know the case that needs to met or, in other words, what they need to prove or disprove. In this instance, it is apparent that the delegate afforded the employer the ability to know the case – the delegate's view of the wage calculations evidence – but did not afford the same to Wilkie. There is no indication that the delegate provided Wilkie with a copy of the employer's submission, although it appears he provided the employer with Wilkie's evidence. The delegate did not afford Wilkie the opportunity to produce records or statements concerning the uniform maintenance.

If the delegate had given Wilkie the opportunity to know his view of her claim in advance of issuing the Determination, she could have pointed out that the delegate missed items of her claim – service of documents and cell phone usage, and she could have made additional submissions on her claim for her personal vehicle. Additionally, she could have caught the missing statement, indicated why she thinks it is not appropriate to base her income on the T4 slips, and provided evidence for the uniform maintenance. The delegate would then have had a more complete set of evidence and submissions on which to base the determination.

In my view, the delegate clearly breached the principles of administrative ('natural') justice by failing to afford Wilkie the opportunity to make submissions during the investigation. In particular, I find that the delegate erred in not providing Wilkie a copy of the wage calculations in advance, although they were provided to the employer, and in not discussing with her the fact that she needed to submit additional evidence. The delegate also erred by not addressing all of the items included in the initial claim.

Given the length of time since Wilkie filed her complaint with the Director, I am loathe to send this case back to the Director to address the issues raised in the appeal. However, I have reviewed the record and find that I would not be able to determine what parts of Wilkie's evidence have already been considered. I too am not able to comprehend how the delegate arrived at the wage calculation for wages owing or paid or how he weighed the evidence of both parties. Unfortunately for Wilkie, I find that I must refer this back to the Director. By referring this back I am indicating that the Director is bound to consider Wilkie's claims. I am not indicating that Wilkie is entitled to additional compensation for each of those issues, as that is for the Director to decide.

**ORDER**

Pursuant to section 114 of the *Act*, I refer the Determination issued December 27, 2002, back to the Director for further investigation and consideration of the totality of Wilkie's claim.

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**M. Gwendolynne Taylor**  
**Adjudicator**  
**Employment Standards Tribunal**