

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 -

Jane Kitsul and Henry Huisman operating as Evergreen Interior Display
(“ Evergreen ”)

- and by -

Pamela Fulton
(“ Fulton ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: **C.L. Roberts**

FILE Nos.: 2000/114, 2000/122

DATE OF HEARING: April 25, 2000

DATE OF DECISION: May 2, 2000

DECISION

APPEARANCES

| | |
|--------------------------------|-------------------|
| For the Director | No one appeared |
| For Evergreen Interior Display | No one appeared |
| For Pamela Fulton | On her own behalf |

OVERVIEW

This are appeals by Pamela Fulton ("Fulton") and by Jane C. Kitsul and Henry Huisman operating as Evergreen Interior Display - Vic ("Evergreen"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination issued by the Director of Employment Standards ("the Director") February 3, 2000. The Director's delegate found that Evergreen owed Pamela Fulton ("Fulton") \$1,205.78 in unpaid wages, statutory holiday pay, vacation pay and interest.

ISSUE TO BE DECIDED

Evergreen's ground of appeal is that the Director erred in determining that Fulton was entitled to payment of wages, statutory wages and vacation pay. It alleged that the decision was based on incomplete records and misinformation.

Fulton's ground of appeal is that the Director erred in determining the amount of wages.

As Evergreen's representative failed to appear in support of its ground of appeal, I have dismissed the appeal in that respect.

FACTS

Evergreen operates a plant sales and maintenance business. Fulton worked for Evergreen as a plant technician from March 24, 1997 to November 10, 1997.

Fulton filed a complaint with the Director, contending that she had not been paid wages, annual vacation pay, statutory holiday pay and expenses. During the investigation of the complaint, the delegate requested Fulton's daily time and payroll records. Evergreen provided copies of T4 slips and some of the payroll register. It also provided copies of some cheques issued to Fulton. It did not provide any record of daily hours worked.

Fulton provided the delegate with a calendar on which she claimed she had recorded her hours of work.

Following a review of the information provided, the delegate denied the claim for expenses, determining that there was no jurisdiction under the *Act* to do so. He further determined that Fulton was owed gross wages in the amount of \$9,620.91. While the delegate also concluded that Fulton had worked a number of days which fell below the minimum daily pay requirement, he found a number of inconsistencies in the evidence and he was unable to determine how many

extra hours Fulton might have worked. Because there was insufficient evidence on this aspect of the claim, it was denied.

The delegate determined that Fulton was also entitled to statutory holiday pay for those holidays between March and November 1997.

ARGUMENT

Fulton contends, as I understand it, that it was unreasonable for the Director's delegate to reject all of her records because of the minor inconsistencies. She argues that her calendar represents the best evidence, and that in the absence of any evidence of the employer, her claim that she worked 114 hours for which she was not paid ought to be allowed. She acknowledged that although there were some errors in recording the information, those errors had been rectified.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has been met.

The Tribunal has determined that the test to be applied in circumstances such as this is "the best evidence rule." In *Hofer v. Director of Employment Standards* (BC EST #D542), the Tribunal said:

In the absence of proper records which comply with the requirements of Section 28 of the *Act*, it is reasonable for the Tribunal (or the Director's delegate) to consider employees' records or their oral evidence concerning their hours of work. These records or oral evidence must then be evaluated against the employer's incomplete records to determine the employees' entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate may accept the employees' records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable. Under those circumstances, if an employer appeals a determination, it would bear the onus to establish that it was unreasonable for the Director's delegate to rely on the employees' records (or evidence) and to establish that they were unreliable.

Further, the Tribunal stated

Thus, in my opinion, the appropriate test to apply in such circumstances is the "the best evidence rule". That is, the Director's delegate must make a reasoned decision, based on a evaluation of all the records and evidence which is available, to determine what is the best evidence of the number of hours actually worked by the employee.

In rejecting the claim for extra hours, the delegate stated that "the records provided couldn't establish **clear evidence** what if any hours should be paid on this issue." (my emphasis)

I find that the delegate applied an incorrect test. The employer has an obligation to comply with

the *Act*. Where it does not do so, there is no burden on an employee to provide "clear evidence" of what is owed. The delegate does not reject Fulton's assertions that she worked 5 hours on a number of Fridays. Given that, the delegate must review her evidence and make a "reasoned decision" to arrive at an amount owing.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated February 3, 2000, be varied as follows:

I refer the determination of the claim in respect of the extra 5 hours per day back to the Director for reconsideration. I direct that the Director apply a reasoned decision test to determine whether any amount is owing on an expeditious basis.

The amount owing must be paid together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

C.L. Roberts
Adjudicator
Employment Standards Tribunal