

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 -

Omineca Redi-Mix Ltd.
("Omineca")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE No.: 97/130

DATE OF DECISION: April 23, 1997

DECISION

OVERVIEW

This is an appeal by Omineca Redi-Mix Ltd. (“Omineca”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination letter issued by a delegate of the Director of Employment Standards (the “Director”) on February 10, 1997. In this appeal, Omineca claims that the delegate of the Director incorrectly determined that overtime wages in the amount of \$6,800.26 plus interest were owed to the complainant, Donald Hynd (“Hynd”).

ISSUE TO BE DECIDED

Does Omineca owe wages to Hynd for overtime hours worked?

FACTS

Hynd was employed as a truck driver and mechanic by Omineca from May 4, 1994 to June 4, 1996.

Hynd’s rate of pay was \$12.00 per hour from May 4 to July 9, 1994 and thereafter the rate of pay was \$14.00 per hour.

With some minor exceptions, Hynd was not paid overtime rates of pay for overtime hours worked.

The payroll records provided by Omineca indicate that Hynd was **paid** the following amounts in the **24 month period commencing June 4, 1994**:

1994	\$23,484.24	includes vacation pay
1995	\$38,409.20	includes vacation pay
1996	<u>\$10,155.60</u>	includes vacation pay
TOTAL	\$72,049.04	

SUBMISSIONS OF THE PARTIES

In their submission accompanying the appeal, Omineca states that:

- Hynd was informed prior to being hired that there would be no overtime paid;
- Hynd owes Omineca for personal purchases made on the company accounts;
- Hynd owes Omineca for personal telephone calls made on the company phone;

- Hynd attempted to open a “fraudulent” claim with the Worker’s Compensation Board.

Omineca further submits that the costs incurred by Omineca for research, travel expenses, office supplies, legal advice and time spent in dealing with Hynd’s complaint, a total of \$10,489.94 should be considered as an offset from any money owing to Hynd.

Omineca further submits that there should be no interest charged as the delegate of the Director took from June 1996 to February 10, 1997 to get her determination together.

Omineca finally submits that the delegate of the Director erred in the calculation of the amount of wages owing.

The delegate of the Director calculated that Hynd had earned \$81,495.96 and Omineca had paid \$74,911.20 during the period in question.

ANALYSIS

Section 40 of the *Act* sets forth the requirement to pay overtime rates of pay for overtime hours worked. Section 40 provides:

Overtime wages for employees not on a flexible work schedule

40. (1) *An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under Section 37 or 38*

(a) 1 1/2 times the employee’s regular wage for the time over 8 hours, and

(b) double the employee’s regular wage for any time over 11 hours.

(2) *An employer must pay an employee who works over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38*

(a) 1 1/2 times the employee’s regular wage for any time over 40 hours, and

(b) double the employee’s regular wage for any time over 48 hours.

(3) *For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.*

(4) *If a week contains a statutory holiday that is given to an employee in accordance with Part 5,*

(a) the reference to hours in subsection (2) (a) and (b) are reduced by 8 hours for each statutory holiday in the week, and

(b) the hours the employee works on the statutory holiday are not counted when calculating when calculating the employee's overtime for that week.

Section 4 of the Act provides that:

Requirements of this Act cannot be waived

4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

Pursuant to the provisions of Section 4 as set forth above, the position taken by Omineca that Hynd knew and accepted that no overtime would be paid is **of no effect** as no person may 'contract out' of the provisions of the Act.

Hynd is clearly entitled to be paid overtime rates of pay for overtime hours worked pursuant to the provisions of Section 40 of the Act.

Upon reviewing the payroll records provided, I am satisfied that calculation errors were made by the delegate of the Director in determining the amount of wages owed to Hynd.

With respect to specific dates, I am satisfied that:

- Hynd only worked 9 hours on each of September 28, 29, 1994;
- Hynd did not work on October 10, 1994;
- Hynd only worked 1 hour on November 11, 1994;
- Hynd worked 19 hours on December 18, 1994;
- Hynd worked 9.5 hours on April 4, 1995;
- Hynd did not work on May 22, 1995;
- Hynd did not work on December 25, 1995;
- Hynd did not work on January 1, 1996.

I am further satisfied that the payroll records provided by Omineca are correct for the remaining days of the period in question.

I have therefore recalculated the wages earned, paid and owing for the period in question as follows:

Total Wages Earned	\$81,272.36
Total Wages Paid	<u>\$72,049.04</u>
Wages Owing	\$ 9,223.32
+ 4% Vacation Pay	<u>\$ 368.93</u>
Total Wages Owing	\$ 9,592.25

The delegate of the Director erred in considering the total amount of wages paid for 1994 as the amount shown on Hynd's 1994 T-4 slip when, in fact, some of those earnings were for a period of time **outside** of the 24 month recovery period permitted under the *Act*.

Hynd is therefore owed wages in the amount of **\$9,592.25**.

The matter of personal purchases by Hynd and the costs alleged to have been incurred by Omineca in pursuing this appeal must be considered in light of the provisions of Sections 21 and 22 of the *Act* which state:

Deductions

- 21. (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. (emphasis added)*

The costs incurred by Omineca in pursuing this appeal are considered to be "employer's business costs" and pursuant to the provisions of Section 21 (2), as set forth above, may not be deducted from wages owing to Hynd.

Assignments

22. (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 pension or superannuation or other plan, if the amounts 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).*
- (2) *The director may authorize an assignment of wages for a purpose that the director considers is for the employee's benefit.*
- (3) *An employer must honour an assignment of wages authorized by a collective agreement.*
- (4) *An employer may honour an employee's written assignment of wages to meet a credit obligation. (emphasis added)*

There was no evidence provided of any **written** authorization from Hynd to permit Omineca to deduct any of the personal purchases alleged to have been made by Hynd, therefore, any such deduction would be contrary to the provisions of Section 22.

With respect to the allegations by Omineca that Hynd attempted to open a "fraudulent" claim with the WCB, that matter is not within the jurisdiction of this tribunal.

With respect to Omineca's submission in regard to the interest applied to the wages determined to be owing, the tribunal has no discretion to relieve any person from the payment of interest pursuant to Section 88 (1) of the *Act* which provides:

Payment of interest

88. (1) *If an employer fails to pay wages or another amount to an employee, **the employer must pay interest** at the prescribed rate on the wages or other amount from the earlier of*

(a) the date the employment terminates, and

(b) the date a complaint about the wages or other amount is delivered to the director to the date of payment. (emphasis added)

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination letter dated February 10, 1997 be varied to be in the amount of **\$9,592.25** plus interest pursuant to Section 88.

Hans Suhr
Adjudicator
Employment Standards Tribunal