

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 -

RAP-ID Paper Vancouver Ltd.
("RAP-ID")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/179

DATE OF HEARING June 25, 1996

DATE OF DECISION: July 16, 1996

DECISION

APPEARANCES

Gillian L. Gardiner on behalf of RAP-ID Paper Vancouver Ltd.
Keith Johnson on behalf of Director of Employment Standards
Sharon Charbonneau on behalf of Director of Employment Standards
Tracey Whitehead in person

OVERVIEW

This is an appeal by RAP-ID Paper Vancouver Ltd. (“RAP-ID”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 001161 which was issued by a delegate of the Director of Employment Standards on February 13, 1996.

The Determination found that RAP-ID owed overtime wages to Tracey Whitehead (“Whitehead”) based on hours he worked between June, 1994 and April, 1995.

A hearing was held on June 25, 1996 at which time evidence was given under oath.

RAP-ID has two grounds of appeal. The first ground is that a decision was made by a delegate of the Director prior to the enactment of the current *Act* and, therefore, the Director had no authority to issue the Determination. The second ground of appeal is that the amount payable under the Determination is incorrect.

At the hearing I heard evidence and arguments from the parties concerning RAP-ID’s first ground of appeal, but did not make a decision at that time. This decision sets out my reasons for rejecting RAP-ID’s first ground of appeal (that the Director had no authority to issue the Determination) as well as my decision on the second ground for appeal.

ISSUES TO BE DECIDED

There are two issues to be decided:

- (I) Was a decision made by a delegate of the Director under the *Employment Standards Act* [S.B.C. CH. 10 1980] (the “former Act”)?
- (ii) If not, is the amount of wages payable under the Determination correct?

Was a decision made on September 28, 1995 ?

FACTS

Whitehead was employed by RAP-ID as a truck driver from June 1, 1994 to April 28, 1995. RAP-ID, a wholesale distributor of paper and janitorial paper products, has been operating in Vancouver for the past three years. Under the terms of an employment agreement (Ex #10), Whitehead was paid \$2,500.00 per month and overtime hours were paid at the rate of \$20.00 per hour. RAP-ID allows drivers to choose between this monthly salary arrangement or to be paid \$11.00 per hour.

Whitehead submitted a complaint to the Employment Standards Branch on June 7, 1995 (Ex #6).

Following telephone discussions about the complaint, the Director's delegate faxed to Doug Phillips (RAP-ID Vancouver Branch Manager) on September 28, 1995 a calculation of wages owing to Whitehead (Ex #1). The fax cover sheet indicated it was "For Your Review" and requested "Reply ASAP". The fax cover sheet requested Phillips to "...please call with any question or comments." Those calculations showed \$165.95 as the amount of total wages owing to Whitehead.

RAP-ID issued a cheque (\$165.95 gross) payable to Whitehead on October 13, 1995 (Ex #2) and delivered it to the Employment Standards Branch office in Surrey, B.C.

Phillips gave evidence that he understood the complaint to be resolved when RAP-ID paid the \$165.95 to Whitehead. He testified that in his telephone conversation with the Director's delegate on September 28, 1995 he asked "Is this it ?" and "what's the next step ?" Phillips testified that in reply to those questions he was told that "...the cheque goes to Whitehead.." and "...goes to review if not accepted by Whitehead."

Sharon Charbonneau testified that, at the time of her discussions with Phillips in September, 1995 she had not yet spoken to Whitehead about his complaint. She also testified that the calculation of the wages owing (\$165.95) were based on her assumption that all relevant records were in hand. Charbonneau testified that she was ill and not at work during the first two or three weeks of October, 1995. Her evidence was that she did not make a decision nor a Determination concerning Whitehead's complaint because she was transferred to another Branch office in January, 1996.

On December 12, 1995 the Director's delegate wrote to Phillips (Ex #3) to explain several points:

- Based on the records provided by RAP-ID, "...it appeared that the wages owing amounted to \$165.95";
- "I advised you at the time that I hoped that this would resolve the complaint ;"
- In a telephone conversation on October 20, 1995, Whitehead did not accept that he was owed \$165.95 and suggested "daily trip sheets" would accurately determine wages owing ;
- Whitehead's record of hours worked were used to recalculate "possible wages owing as pre Section 40 of the *Employment Standards Act*" ;
- Whitehead's records and new calculations were enclosed for review ;
- The new *Act* applies to this complaint as there was no decision prior to November 1, 1995 ;
- Wages payable to Whitehead, according to his records, amount to \$5,226.45.

Phillips did not respond to the letter from the Director's delegate.

Charbonneau testified that her last contact with RAP-ID was when she left a telephone message on January 24, 1996 requesting Phillips to return her call.

On January 31, 1996 a delegate of the Director sent a "Demand For Employer Records": to RAP-ID requiring it to disclose produce and deliver employment records for Tracey Whitehead on or before February 12, 1996.

The Determination was issued on February 13, 1996.

ANALYSIS

Counsel for RAP-ID raised an objection concerning the Tribunal's jurisdiction to hear this appeal and argued that a decision was made by the Director's delegate in October, 1995. For that reason, any "appeal" would be by way of a review under Section 84 of the former *Act*, and the Determination is a nullity.

Counsel for the Director argues that no decision was made under the former *Act*, and the first (and only) decision made concerning Whitehead's complaint was the Determination dated February 13, 1996.

Section 128(3) of the current *Act* states:

If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.

From my review of the evidence I find that the Director's delegate did not make a "decision" in October, 1995 concerning Whitehead's complaint. I find it significant that the calculations sent by fax to Phillips on September 28, 1995 were marked "For Your Review" and requested questions or comments be made to the delegate "ASAP." I also note that the December 12th letter (Ex #4) makes it clear that it **appeared** to the delegate that the wages owing amounted to (\$165.95) based solely on records provided by RAP-ID. While I accept Phillip's evidence that he understood the complaint was resolved by payment of \$165.95 to Whitehead, he agreed under cross examination that the first paragraph of the December 12th letter was accurate when it stated:

RE: T.J. WHITEHEAD
EMPLOYMENT STANDARDS COMPLAINT

As you may recall, we had discussions regarding a wage complaint from the above-named individual who is claiming that he is owed overtime. I requested all of the relevant records regarding this claim. Based on the records that you faxed to me, it appeared that the wages owing amounted to \$165.95. You forwarded a cheque in the amount for me to disburse to Mr. Whitehead on October 16, 1995, and I advised you at that time that I hoped that this would resolve the complaint.

For all these reasons I conclude that a decision was not made under the former *Act* and, therefore, I reject RAP-ID's first ground of appeal.

What Wages are Owed?

The Determination showed the total amount of wages payable by RAP-ID as \$5,666.85. RAP-ID argues that this amount is incorrect for two reasons:

(i) the hourly wage rate used by the Director's delegate is wrong; and

(ii) the Determination includes an amount of \$215.70 for vacation pay in error.

(i) *Hourly Wage Rate*

The Calculation Schedule attached to the Determination uses an hourly wage rate of \$14.42 per hour to calculate the wages owed to Whitehead. This wage rate was derived by the Director’s delegate on the following basis:

Monthly Amount	x	12 months	=	Annual Amount
\$2,500.00	x	12	=	\$30,000.00
Annual Amount	÷	52 weeks	=	Weekly Amount
\$30,000.00	÷	52	=	\$576.92
Weekly Amount	÷	40 hours	=	Hourly Wage Rate
\$576.92	÷	40	=	\$14.42

RAP-ID argues that the hourly wage rate (\$14.42) used by the Director’s delegate is wrong. RAP-ID argues that the hourly wage rate used to calculate wages owing to Whitehead should be \$11.00/hour or, alternatively, \$12.14/hour based on the following:

\$2,500.00/month	x	12	=	\$30,000.00/year
\$30,000.00	÷	52 weeks	=	\$576.92/week
\$576.92	÷	5 days	=	\$115.38/day
\$115.38	÷	9.5 hours	=	\$12.14/hour

RAP-ID argues that Whitehead worked 9.5 hours per day on average (7:00 a.m. to 5:00 p.m. with 1/2 hour for lunch) and was paid \$20.00 for all hours worked after 5:00 p.m.

Whitehead gave evidence that he started work at 7:00 a.m. every day (Mon-Fri) for a salary of \$2,500.00 per month. He also stated that he received overtime wages (\$20.00/hr.) if he worked after 5:00 p.m. His daily hours were recorded each day on a “Trip Sheet” which was submitted daily. These daily hours were summarized on a “monthly time sheet.” (Ex #8) Whitehead’s evidence was that he compared these monthly time sheets against his own record of hours worked (maintained by him on a calendar) and that the monthly time sheets would then be adjusted as necessary. He also gave evidence that he did not always take a lunch break although no lunch breaks are recorded on his calendar.

Whitehead’s “Daily Trip Sheets” were not available because, according to Phillips’ evidence, they were destroyed every 2 or 3 months. In Phillips’ opinion, the “Daily Trip Sheets” were delivery documents rather than payroll records.

I find that the “Monthly Time Sheets” are the best evidence of the hours worked by Whitehead.

The relevant part of Section 1 of the *Act* states that “regular wage” means:

- (d) *if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee’s normal or average weekly hours of work...*

The evidence shows that Whitehead’s “normal or average weekly hours of work” amounted to 47 1/2 hours per week (7:00 a.m. to 5:00 p.m. with 1/2 hour break each day, Monday - Friday). Thus, his regular wage should be \$12.15, calculated as follows:

$$\$2,500.00 \times 12 \div (52 \times 47 \frac{1}{2}) = \$12.15 \text{ per hour.}$$

Using this hourly wage rate, no wages are owed to Whitehead because the evidence shows that his monthly salary paid him for his regular hours of work and he was paid overtime wages at \$20.00 per hour for all the overtime hours he worked.

(ii) Vacation Pay Calculation

The Director’s delegate agreed in her submission that the Determination showed an incorrect amount for vacation pay payable and the Determination should be reduced by \$215.70 to correct that error.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination be cancelled.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:nc