

An appeal

- by -

Doug Webster

- 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

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2004A/155

**DATE OF DECISION:** October 26, 2004

## DECISION

### SUBMISSIONS

Doug Webster	on his own behalf
Ted Mitchell	on behalf of the Director of Employment Standards
Bradley Hara, Hara & Company	on behalf of Curtis Lumber Co. Ltd.

### OVERVIEW

This is an appeal by Doug Webster, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued July 27, 2004.

Mr. Webster complained that Curtis Lumber Co. Ltd. ("Curtis Lumber") had failed to pay him regular wages including a bonus, overtime wages and annual vacation pay.

Following an investigation into Mr. Webster's complaint, the delegate determined that Curtis Lumber contravened Sections 21 and 27 of the *Employment Standards Act* in making unauthorized deductions from Mr. Webster's pay and failing to provide him with a wage statement for the period January 16 to 31, 2001. The delegate found that Mr. Webster was entitled to wages of \$2,412.67 in respect of those unauthorized deductions. The delegate found that Mr. Webster was not entitled to bonus payments or vacation pay, and that he was not entitled to overtime wages because he was a manger, as defined in the Act.

The delegate determined that Mr. Webster was entitled to payment in the total amount of \$2,823.20, including interest.

Mr. Webster contends that the delegate erred in law, and failed to observe the principles of natural justice in making the Determination.

Mr. Webster did not seek an oral hearing, and I am satisfied that this matter can be decided based on the written submissions of the parties.

### FACTS

Mr. Webster worked for Curtis Lumber, a lumber and building supply business, from May 6, 1996 until January 31, 2001. Mr. Webster identified his position as "contractor salesman manager", but contended that he was not a manager as defined in the Act.

As part of his complaint, Mr. Webster contended that a hand-written notation on a December 15, 2000 pay stub confirmed that a bonus was to be paid. Mr. Webster also argued that he was entitled to overtime payment of between \$40,000 and \$50,000 for the period January 31, 1999 to January 31, 2001.

Finally, Mr. Webster argued that he was entitled to an unspecified amount of vacation for the period May 1, 2000 to January 31, 2001.

Curtis Lumber contended that there was no established employee bonus program; rather, any bonus payments were discretionary based on the success of the business and the employer's satisfaction with the employee. Curtis Lumber denied that anyone from the employer made handwritten notations on Mr. Webster's pay stub regarding a bonus.

Curtis Lumber identified Mr. Webster's position as "Export Manager", indicating that he was solely responsible for all day to day operation and activities of the export division, including supervision of employees, authorizing and approving overtime work and wages for that work, total control over product pricing and customer relations, directing tasks, staffing, and expenditure approval.

The delegate found no evidence of specific employer standards or performance goals required to be achieved in order that employees could qualify to receive a bonus, and concluded that, since the payment of a bonus was entirely at the employer's discretion, bonus payments were not wages within the meaning of the Act. The delegate also found no evidence that Mr. Webster was entitled to a bonus payment.

The delegate found that Curtis Lumber had applied Mr. Webster's final pay, plus his car allowance, into Mr. Webster's employee account, which was used by employees for charging purchases made from the employer's business. The delegate found that, in the absence of Mr. Webster's authorization to make any deductions from his pay, this practise contravened section 21 of the Act, and awarded Mr. Webster wages plus his car allowance.

The delegate found that Curtis Lumber had not provided Mr. Webster with a wage statement for his final pay period, contrary to section 27 of the Act.

The delegate also found that Mr. Webster was a manager, as defined in the *Employment Standards Regulation* in effect during the relevant period. The delegate concluded that, because Mr. Webster was a manager during that period, he was not entitled to overtime wages.

Finally, the delegate determined that Mr. Webster had been paid vacation pay for the period May 2000 to January 31, 2001.

## ISSUES

1. Did the delegate err in law in concluding that Mr. Webster was not entitled to a bonus?
2. Did the delegate err in law in concluding that Mr. Webster was a manager and thus not entitled to overtime pay?
3. Did the delegate fail to observe the principles of natural justice?

## ARGUMENT

Mr. Webster outlined a number of “concerns” with the Determination.

Mr. Webster says that his bonus structure was unique, was not “performance based”, and was acknowledged by Mr. Kask, the principal of Curtis Lumber, on his pay stub.

Mr. Webster also contended that he was a salesman rather than a manager, and that his business card identifying him as an “Export Manager” was strictly for marketing purposes. He says his primary duties were to sell product, and that he could not set prices on his own. Mr. Webster repeated earlier arguments made to the delegate in a letter dated July 22, 2001, in this respect.

Mr. Webster did not dispute the delegate’s decision with respect to annual vacation.

The delegate submitted that there was no conclusive evidence on which he could find an agreement between Curtis Lumber and Mr. Webster regarding his bonus, or that the bonus was not performance based.

The delegate further submits that the employer’s description of Mr. Webster’s job duties was found to be credibly detailed, and that while Mr. Webster’s response to the employer’s submission was disputatious, it did not include a cogent alternate description of his job responsibilities. Further, the delegate says he had no record of hours from either party on Mr. Webster’s hours of work, based primarily on the apparent understanding of the parties throughout the employment relationship that Mr. Webster was compensated for all hours worked. He also noted that Mr. Webster had never previously asked about compensation for overtime wages, the establishment of a time bank to time off with pay, or any other arrangement that suggested an entitlement to overtime prior to the end of the relationship.

Curtis Lumber contended that Mr. Webster had not demonstrated that the delegate failed to observe principles of natural justice. It submitted that Mr. Webster had the opportunity to respond to Curtis Lumber’s submission in response to his complaint, as well as a final opportunity to provide any additional information, which he declined to do.

Curtis Lumber also submits that Mr. Webster did not identify any error made by the delegate either in the interpretation of the Act or in law. Rather, Curtis Lumber says, Mr. Webster simply disagrees with the decision. It says Mr. Webster does not offer any evidence to substantiate his entitlement to a bonus, or any independent evidence disputing Curtis Lumber’s identification of his job duties.

Curtis Lumber seeks to have the appeal dismissed.

In reply, Mr. Webster submitted his pay stub and other documentation which, he argues supports a conclusion that the writing on the stub corresponds with Mr. Kask’s “‘unique’ style” of handwriting. He says that Mr. Kask’s denial that the writing was his constituted a lie.

Mr. Webster also contended that he had a direct manager at his place of work who made all the major decisions, and that the delegate erred in concluding that he was a manager.

## ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination;  
or
- (c) evidence has become available that was not available at the time the determination was being made

### **Errors of Law**

As the Tribunal has stated on many occasions, an appeal is not an opportunity to re-argue a case. Mr. Webster appears to disagree with the Determination without setting out any evidence or basis for this ground of appeal. I have no jurisdiction to re-weigh the evidence before the delegate simply because Mr. Webster says it is wrong. He must provide persuasive evidence that the conclusion reached by the delegate is unsupported by the material before him.

I am unable to find that Mr. Webster has discharged the burden of establishing that the delegate made a “palpable and overriding error” based on the evidence before him. I am unable to find that the delegate erred in declining to conclude that Mr. Kask made the notations on Mr. Webster’s pay stub, as he asserts. Mr. Kask denied that allegation, and Mr. Webster has not provided sufficient evidence to enable the delegate to arrive at any other conclusion. Suggesting that Mr. Kask is a liar is not a basis for me to conclude the delegate erred in law.

Similarly, the delegate concluded, on balance, that Mr. Webster was a manager, and thus not entitled to overtime wages. I find that this conclusion was supportable on the evidence before him. Mr. Webster was provided with the employer’s response to his allegations, and he provided no independent evidence, either before the delegate or on appeal, to refute the employer’s response. Merely repeating these arguments is also not a sufficient basis for me to find an error of law.

I find no basis for this ground of appeal.

### **Natural Justice**

Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. Mr. Webster does not say how he was denied a fair hearing and nothing in his appeal documentation supports this allegation. Parties alleging a denial of a fair hearing must provide some evidence in support of that allegation. (see *Dusty Investments Inc. dba Honda North BC EST #D043/99*)

In light of the absence of any evidence that Mr. Webster was not given a fair opportunity to make his claim, and respond to the submissions of the employer, I conclude there is no basis for this ground of appeal.

**ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination, dated July 27, 2004, be confirmed in the amount of \$2,823.20 plus whatever interest may have accrued since the date of issuance.

---

**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**