

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 -

Gilles Tanguay
("Tanguay")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Niki Buchan

FILE NO.: 97/23

DATE OF HEARING: April 24, 1997

DATE OF DECISION: May 8, 1997

DECISION

APPEARANCES

Gilles Tanguay	for Himself
Denis Beland	Observer and volunteer translator
Bill Fowler	Advocate for the Appellant
Kathleen Goodridge	for Bob's Janitorial Service
Wayne Goodridge	for Bob's Janitorial Service
Gerry Omstead	for the Director
Jean B. Quelevere	Translator

OVERVIEW

This is an appeal brought by Gilles Tanguay ("Tanguay"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against Determination dated December 20, 1996 and varied on January 6, 1997. The December 20, 1996 Determination concluded that Tanguay is entitled to \$230.37 in wages and interest. After that Determination was issued Bob's Janitorial Service submitted alarm reports indicating that the hours claimed by Tanguay should be reviewed. The delegate for the Director of Employment Standards (the "Director") compared the alarm reports and the time sheets. He determined that the alarm reports indicate that reduced hours were worked; therefore, he issued the Notice to Vary ordering that no wages are owing to Tanguay.

Tanguay argues that the Notice to Vary ignored a verbal agreement made 17 August 1996 that Tanguay was to be paid \$49.00 or \$7.00 per hour, for each occasion he cleaned between August 19, 1996 and October 3, 1996. He argues that vacation pay is outstanding and requests that a penalty under S. 29 be ordered against Bob's Janitorial Service.

It should be noted that the advocate for the appellant requested during the hearing that I take telephone evidence from a witness, Mr. Beauchamp, who was in Montreal. I refused this request on the grounds that there was no advance notice that he wanted to produce unsworn telephone evidence and we did not have the facilities to allow for cross-examination of the witness. The evidence could have been submitted by statutory declaration or with notice it might have been possible to make arrangements to receive such evidence.

ISSUES TO BE DECIDED

1. Whether the delegate of the Director wrongly determined that no wages are owing to Tanguay?
2. Whether vacation pay is outstanding?
3. Whether a penalty against Bob's Janitorial Service should be imposed?

FACTS

- Tanguay was hired by Bob’s Janitorial Service on May 6, 1996 as a janitor assigned to clean at the Medical Building. He worked with Denis Beauchamp (“Beauchamp”) and another employee.
- Approximately August 16, 1996, the other employee was removed from the schedule leaving Beauchamp and Tanguay to provide the service at the Medical Building. Their assigned hours were from 5:00 PM to 12:00 midnight.
- The time sheets from August 19, 1996 through October 3, 1997 indicate that Tanguay recorded 7 hours per shift. Tanguay admits that he did not work the full 7 hours per shift as recorded.
- Following a complaint from the Medical Building, Bob’s Janitorial Service notified Tanguay by letter, dated October 4, 1996, that it had come to their attention that he had been claiming for more hours than he had worked. As a result, they were claiming back surplus money paid in the amount of \$171.85. Also, he was reassigned to a different location to work under a different supervisor.
- His last day worked was October 3, 1997.
- Determination dated December 20, 1996 states “Gilles G. Tanguay alleged that the company failed to pay wages as per the *Employment Standards Act*. In particular he alleges that the company failed to pay regular wages for hours worked.”
- Reasons given in the Determination indicate that the company provided payroll records with respect to Tanguay’s employment. The calculations were completed and it was found that the company owed regular wages to Tanguay.
- Determination dated December 20, 1996 is based on the following calculations:

Total all wages	\$ 3643.96
Vacation pay	<u>145.75</u>
Total	3789.71
Wages paid	<u>3561.25</u>
Owed	228.26
Interest	<u>1.91</u>
Total owing	\$ 230.37

- After the Determination was issued the employer submitted alarm reports from the Medical Building that indicate reduced hours worked by Beauchamp and Tanguay.
- These reports show the time Beauchamp closed the building and set the alarm. No one else used the code entered by Beauchamp. Tanguay’s evidence was that he worked the same hours as Beauchamp.
- After receiving these reports the delegate of the Director recalculated the wages by comparing the time reports with the alarm reports to arrive at the number of hours worked. He then calculated the wage payment required plus vacation pay. The Notice to Vary dated January 6, 1997 is based on the following calculations:

Total all wages	\$ 3378.13
Vacation pay	<u>135.12</u>
Total	3513.25
Wages paid	<u>3561.25</u>
Overpaid	+ \$ 48.00

- He determined that Tanguay had been overpaid by \$ 48.00
- The Notice to Vary was issued with the new calculations and an order that no wages are owing to Tanguay.
- Kathleen Goodridge gave evidence that the company will write off the \$ 48.00 overpayment.

ANALYSIS

This appeal is a dispute about an alleged agreement over the amount of wages to be paid to Tanguay. Tanguay's direct evidence is that approximately August 17, 1996 he and Beauchamp reached a verbal agreement with Wayne Goodridge that they would each be paid \$ 49.00, or \$ 7.00 per hour, for each shift. His evidence is that there were only the three of them present at the meeting. He claims that Wayne Goodridge said he would pay for hours 5:00 PM to 11:00 PM plus one hour bonus as long as the work was well done. He says that this agreement was confirmed a few days later at a meeting between Beauchamp, Wayne Goodridge and himself.

Evidence from Kathleen Goodridge is that she was in attendance at the first meeting. She denies that such agreement was made. She states that Wayne Goodridge offered each of them 7 hours work per night at \$7.00 per hour and that they must stay the 7 hours. Further she says that there was never any discussion about bonus hours or leaving early. Wayne Goodridge denies a bonus agreement. He states that he hires many employees and cannot have numerous separate agreements.

There is obvious conflicting evidence over who attended at the first meeting and whether a bonus agreement was reached at either meeting.

Bill Fowler argues for Tanguay that the Notice to Vary is based solely on the record and no consideration is given to the second meeting between Beauchamp, Tanguay and Wayne Goodridge when the agreement to pay a bonus hour is alleged to have been completed. He maintains that the meaning of Section 17 of the Act is that the employer must pay all wages earned by an employee in a pay period. Since the agreement was to pay \$7.00 per hour for the 7 hour shift, the Employment Standards Branch should not intervene and the compensation should be allowed. He further argues that if Tanguay was paid for seven hours a shift then vacation pay is outstanding.

Bob's Janitorial Service representative submits that there is no dispute over paying for hours actually worked. The dispute is over payment for hours that Tanguay did not work. The alarm reports clearly indicate that Tanguay did not work the hours that he claimed and was paid.

The representative for the Director explained his reasons for issuing the Notice to Vary. He considered Section 17:

17. (1) *At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by an employee in a pay period.*
- (2) *Subsection (1) does not apply to*
 - (a) *overtime wages credited to an employee's wage bank,*
 - (b) *statutory holiday pay credited to an employee's time bank, or*
 - (c) *vacation pay.*

He notes the following definitions in the Act:

"regular wage" means (a) if an employee is paid by the hour, the hourly wage,

and

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

Taking the definitions and looking at the hours worked which are not disputed he ruled that Tanguay is not owed additional funds as wages. He argues that the Notice to Vary should be upheld because Tanguay was paid for the actual hours he worked. The alarm records show that he could not have worked the 7 hours per shift that he claimed.

The purpose of the *Act* is to ensure that employees receive at least basic standards of compensation and conditions of employment. The appeal process under Section 112 of the *Act* is not a complete re-examination of the complaint. In this case it is a process to determine whether the Notice to Vary is correct in the context of the facts and the statutory provisions.

The delegate of the Director reviewed his Determination, dated December 20, 1996, when it came to his attention that it was based on incorrect hours worked resulting in an order that regular wages and vacation pay were owing. Having determined that order to be faulty, he quite properly issued the Notice to Vary. The only evidence before this Tribunal that could result in a cancellation of the Notice to Vary is contradictory. It would be wrong to cancel the Notice to Vary on the conflicting evidence that there was an agreement to pay a bonus for time not worked. I find the documentary evidence of the alarm reports the compelling evidence to determine the amount of regular wages to which Tanguay is entitled. The delegate of the Director included vacation pay in his calculations and determined that Tanguay has already received the remuneration to which he is entitled. Since he has received at least the basic standards of compensation as required by the *Act*, I shall confirm the Notice to Vary.

The appellant has requested that a penalty be ordered against Bob's Janitorial Service under Section 29 of the *Regulation*. This appears to be a frivolous request. Section 115 of the *Act* limits the powers of an adjudicator to confirm, vary or cancel the Determination under appeal or to refer the matter back to the Director. While there may be an occasion when an adjudicator would refer a matter back with a recommendation for a penalty, this is not a suitable case for such action.

ORDER

In summary, I order under Section 115 of the *Act*, that the varied Determination dated January 6, 1997 be confirmed.

**Niki Buchan
Adjudicator
Employment Standards Tribunal**