

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-

Christopher M. Wilson operating Emcee Yard & Garden
("Emcee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 1998/819

DATE OF DECISION: May 11, 1999

DECISION

This is a decision based on written submissions by Christopher Wilson for Emcee Yard & Garden, and G. Omstead for the Director of Employment Standards. This decision is to quantum only, the issue of liability having been previously decided (Decision BC EST# D062/99).

OVERVIEW

This is an appeal by Christopher Wilson operating Emcee Yard & Garden ("Emcee"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination as to quantum by the Director of Employment Standards ("the Director") issued February 23, 1999. In an earlier Determination, the Director found that Emcee contravened Sections 40, 45, 46, 58 and 63 of the Act in failing to pay Marco Vickers ("Vickers") overtime wages and compensation in lieu of notice. In BC EST#D102/99, I upheld the issue of liability, and referred the issue back to the Director for recalculation of the amount owing.

Following the recalculation, the Director determined that the sum of \$851.06 was owing for statutory holidays and overtime plus interest.

ISSUE TO BE DECIDED

Whether the Director correctly determined the amount of wages owing to Vickers.

FACTS

Vickers worked for Emcee as a gardener from March 16, 1998 until August 4, 1998. He worked 8.25 hours per day, and was paid a salary of \$1500.00 per month. The Director's delegate found that Vickers was owed wages in the amount of \$10,607.76, and vacation pay of \$424.31. He was actually paid \$10,290.00, leaving a balance of \$742.07. The Director's delegate determined that Vickers was entitled to a further amount of \$441.17 as compensation in lieu of notice. From that balance, an equivalent of four days wages was deducted, (wages for the week of August 17 to 21) for a total amount owing of \$830.15.

ARGUMENT

Emcee contends that Vickers was only to be paid for 2 1/4 hours on September 15. Wilson also argued that Vickers did not work on August 3, a fact he recalls based on a house warming party he had that weekend. I note this differs from his submission on the original appeal.

Wilson also argues that the Director erred in attributing 8 1/4 hours of overtime for September 7, when Vickers in fact took the week off.

ANALYSIS

As noted previously, the burden of establishing that the Determination is incorrect rests with an Appellant. Emcee failed to maintain records as required under the Act. It is not a response to say that an employee knew what his hours were and how much he was getting paid. That information must be made available in a form which complies with the Act. In the absence of proper records, or an agreement by the employee, the Director is left to determine the hours of work based on the best evidence. In this case, having reviewed the information, the Director's delegate took into account Wilson's submissions that Vickers did not work May 18 or July 1, and has not included those dates in the calculations.

Wilson originally submitted that Vickers worked on August 3, and that day was included in the calculation. The subsequent submission on quantum claims that he did not. Wilson apologizes for the confusion, but provides no documentation in support of his position. This evidence is insufficient to persuade me that the Director's delegate failed to make his determination based on the best evidence, or that the Determination is incorrect.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination, dated February 23, 1999 be confirmed in the amount of \$851.06, together with whatever interest that have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

C. L. Roberts
Adjudicator
Employment Standards Tribunal