Employment Standards TRIBUNAL

An appeal

- by -

Brian Ritchie
(the “Employee”)

- 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

ADJUDICATOR: W. Grant Sheard

FILE No.: 2001/14

DATE OF HEARING: April 9, 2001

DATE OF DECISION: April 26, 2001

DECISION

APPEARANCES:

Brian Ritchie	on his own behalf (and assisted by Julian Bissette)
Colleen Johnston	on behalf of Firepro Systems Ltd.

OVERVIEW

This is an appeal by Brian Ritchie (the "Employee"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on December 10, 2000. In this appeal the Employee claims that wages are owed to him by Firepro Systems Ltd. (the "Employer") for overtime wages under section 40 of the *Act*.

In the Determination rendered by the Director's delegate (the "Delegate") the parties had divided success. On the one hand, the Delegate found that payments recorded on certain paychecks as "advances" were advances against wages rather than for a living out allowance (and, as such, properly deducted from the final pay due to the Employee after the Employee voluntarily terminated his employment). On the other hand, the Delegate found that nonetheless, the Employer had contravened the *Act* and ordered it to pay the Employee wages, vacation pay, and interest totaling $451.78.

ISSUE

1) Has the Employer acted fraudulently?

2) Has the Employee been paid all the overtime or other wages due to him?

ARGUMENT

The Employee's Position

The Employee says that various advances paid to him were for a living out allowance, not wages, and so they are not properly deducted from the final wages payable to him. The Employee says he had no need of advances on wages to assist him with moving expenses as he had $70,000.00 in savings at the time and he produced financial statements as evidence of his savings.

In addition, he asserts that the Employer has committed fraud as follows:

1. crossing out notations on two pay stubs where the Employer had initially recorded numbers of "banked hours",

2. the amount of wages paid to him combined with those ordered by the Delegate to be paid to him do not correspond to the amounts recorded by the Employer as paid to him in his T4 slips,

3. providing inaccurate time cards.

The Employee further says that he is owed for 57 hours of banked time and 24 hours for his last 3 days on the job, all at the rate of $22.00 per hour for a total due of $1,782.00. The Employee also says that a living out allowance was to be paid at between $50.00 to $100.00 per day and he has not been paid the full amount due for such an allowance either.

The Employer's Position

The Employer says that, when the Employee terminated his employment, the Employee owed the Employer $3,525.00 for advances against wages which had been paid to him at his request to assist him with personal moving expenses and that this amount was properly deducted from the final payment due to him. Furthermore, the Employer says that it was agreed that the Employee would be and was paid $50.00 to $65.00 per day for a living out allowance. The Employer says that corroboration of its assertions that advances were for wages and regarding the amount of the living out allowance are found in notations on the documents filed. The Employer emphatically denies any fraudulent act on its part.

The Delegate's Position

Although the Delegate did not appear at the hearing of this matter, in a written submission dated January 23, 2001 and filed, the Delegate notes that the onus is on the appellant to prove that the determination is in error. The Delegate says that the Employee has not raised any compelling arguments to demonstrate any such error in the determination and the appeal should be dismissed accordingly.

THE FACTS

The Employee was employed by this Employer from April 17, 1999 to April 11, 2000. He was paid between $20.00 and $25.00 per hour depending on the job. The Employee gave evidence that he was also paid a living out allowance ("LOA") of $50.00 to $100.00 per day depending on the job. The Employer says that the LOA was $50.00 to $65.00 per day. The Employer says that the Employee began to receive advances of wages to assist him with a move to Penticton and that he terminated his employment just a few days after he made that move and the Employer

had indicated it would begin to recover the advances which had been paid to him. The Employee says he had significant savings and had no need for such advances - he says these payments were made against LOA, not wages. The Delegate found that $27,266.12 was paid to the Employee in wages; of this amount $23,741.12 was paid as "payroll" and $3,525.00 as "advances".

THE ANALYSIS

Fraud

The Employee's assertion that the Employer has committed fraud is based on: 1) the fact that the Employer crossed out notations on two pay stubs, 2) the amount actually paid and the amount ordered paid by the Delegate doesn't correspond to the amounts reported in T4 slips, and 3) an assertion that the Employer submitted inaccurate time cards. The Employee has expressed further suspicion of fraud because the Employer has submitted photocopies of documents rather than originals. The Employee points to a number of irregularities in the Employer's material as further support for this assertion and to demonstrate a lack of credibility or reliability on the part of the Employer.

The Employee notes that a cheque dated September 1, 1999 in the amount of $1,000.00 was paid entirely for a bonus, notwithstanding that the cheque says on it that it is payable for "$500.00 bonus $500.00 advance". Although the Employee says this was paid 6 months before his move and he would have had no need for an advance at that time, the fact is the recorded (written) evidence supports the Employer's position that it was payroll for both bonus and advance.

The Employee alleged during the hearing that he did not receive two cheques, both dated March 17, 2000 for $83.00 and $500.00 respectively. However, on being shown copies of the Employer's bank statements where the corresponding cheque numbers demonstrated that the cheques were cashed and copies of the returned cheques bearing the Employee's endorsement, the Employee acknowledged that he was in error and that he had in fact received these cheques afterall.

The Employee says that he was to be paid $50.00 to $100.00 per day living out allowance (LOA) while the Employer says it was only $50.00 to $65.00 per day. The Employer has produced cheques dated January 7, 21, and 24, 2000 and February 4 and 18, 2000 where the actual LOA rate of $50.00 or $65.00 is written on the cheque itself. The Employee, however, is not able to produce any document supporting his claim that the LOA was $100.00 per day on some jobs.

There was evidence that the Employer had crossed out notations of "banked time" and the amounts of such time on pay stubs dated March 3 and 31, 2000. The Employee says the first (which remains legible) was for 27 hours banked time and the second was for a cumulative total of 57 hours (though the writing obliterated here is rendered totally illegible). The Employer's represenative acknowledges that these notations were crossed off, but explains this by saying that when she received faxed notes from the Employee of the hours worked she recorded the regular

hours on an "Employee Earnings" card which was filed and wrote the "banked" or overtime directly onto a pay stub with a corresponding pay cheque. The Employer's representative says she later crossed off the first notation on her copy after the cheque was issued so she'd know it was paid. She then erroneously wrote the same banked time on the next pay stub at the end of March and crossed it off before issuing the pay stub and cheque when she realised that she had already paid the Employee for that banked time on the March 3, 2000 cheque.

Regarding the wages paid by the Employer and the amount ordered to be paid by the Delegate not adding up to the same figure in the T4 slips issued to the Employee, the Employer's representative says that this may be due to statutory deductions.

During the hearing the Employee also raised concern for a cheque and a money order, both dated January 7, 2000, in the same amount being issued to the Employee. However, he was satisfied with the Employer's explanation given in the hearing that this was due to the Employer depositing the money order directly to his account and creating, but not delivering the cheque to him, simply to record the wages paid in payroll for bookkeeping purposes. Similarly on July 14 and 19, 1999 there was a bank draft and a cheque written to the Employee for the same amount, but only the bank draft was delivered or paid to him.

It has been held by this Tribunal in *Insulpro Industries Inc. and Insulpro (Hub City) Ltd.*, BCEST #403/98 p.9 that the test to be applied where there is an assertion of fraud is as follows:

> "The evidence must point clearly to the conclusion that the process was tainted to such a degree that to allow the Determination to stand would be an affront to fundamental principles of justice that underlie a reasonable person's sense of decency and fair play (see R v. Conway, [1989] 1 S.C.R. 1659 at 1667)."

In the present case, there is simply no clear evidence to support the Employee's assertion that the Employer has acted fraudulently. In fact, in some instances, as in the examples above, where their evidence is at odds, the written records support the Employer's assertions, not the Employee's. In other instances the Employee has come around to accepting the Employer's explanation. In the remaining instances, the Employer has offered plausible explanations. There is no evidence which would clearly point to a conclusion that the process was tainted to such a degree as required by the test set out in *Insulpro* referred to above.

Has the Employee been paid for all wages, overtime or otherwise?

The onus is on the Employee as appellant to demonstrate, on a balance of probabilities, that the Delegate's Determination was made in error. The Employee has not identified any clear error in the material of the Employer or the Wage Calculation Details of the Delegate. Accordingly, I find that the Employee has not met the onus upon him to demonstrate an error in the Determination on a balance of probabilities.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated December 10, 2000 and filed under number ER#: 100851, be confirmed.

W. GRANT SHEARD

W. Grant Sheard
Adjudicator
Employment Standards Tribunal