

An appeal

- by -

Abco Building Maintenance Ltd.

- 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: John M. Orr

FILE No.: 2003/025

DATE OF DECISION: June 16, 2003

DECISION

OVERVIEW

This is the third decision issued in relation to an appeal by Abco Building Maintenance Ltd. (“Abco”) pursuant to section 112 of the *Employment Standards Act* (“the *Act*”) from a Determination dated May 3, 2002 by the Director of Employment Standards (“the Director”).

Abco operated a building maintenance business and employed Paul and Kuljit Rai (“the Rais”) to perform maintenance services on a number of buildings. A dispute arose over the alleged failure to pay overtime. There were some other issues in relation to compensation for length of service, vacation and statutory holiday pay which were not involved in the appeal.

Throughout the proceedings it was evident that overtime had not been properly calculated and that some wages were owed to both Paul and Kuljit Rai. The dispute was centered on the basis for that entitlement and the method of calculation.

The appeal was heard on August 30 and October 7, 2002 and a decision was issued October 16, 2002 in which the matter was referred back to the Director. The Director’s delegate sought clarification in relation to the reference back and when written submissions could not clarify the matter the hearing was reconvened on March 11, 2003 to hear further submissions from the parties.

The issue that was causing some difficulty related to the sequence of work that was being performed by the Rais. The contracts required the Rais to maintain a series of premises for certain contracted sums of money. These contracts were referred to in the first decision as “runs”. The Director’s delegate found that the parties were not *ad idem* about what constituted each run. Following the reconvened hearing the delegate felt satisfied that he understood the issue and the matter was again referred back to him to complete the calculations of overtime owing.

The delegate has now completed the calculations in accordance with the findings of the two decisions previously issued. He has submitted his report to this adjudicator and the parties have been given the opportunity to make any final written submissions. The Tribunal decided that this matter could be concluded based on written submissions and that any further oral hearing was not required to complete this matter.

FACTS AND ANALYSIS

In the first decision in this matter, issued following an oral hearing, I found that there was very little disagreement between the parties as to the factual underpinnings of this somewhat unusual employment contract.

I found that while the contract was unusual it met or exceeded all the minimum requirements of the *Act*. I found that the employment contract provided that Paul and Kuljit Rai agreed to provide maintenance service to a number of buildings. I found that the parties agreed in advance as to the appropriate number of hours required to do the work. If the work were completed in fewer hours the Rai’s would still receive the full contracted wage amount. It was stipulated that no amount of work should be done that exceeded the contracted hours.

I concluded that it was specifically agreed that no extra payment would be made over and above the contracted amount and that the Rais could not incur overtime wages without the consent or acquiescence

of the employer. I found that the Rais were to be paid on the basis of certain “runs” that had been submitted in evidence and that where the contracted amounts for each “run” of buildings inherently exceeded the 40 hours per week they should have attracted the overtime provisions of the legislation. I gave one example where one “run” called for 65 hours per week. And therefore, twenty-five hours should have been paid at the overtime rates. But, I concluded that no time in excess of the 65 hours should be paid.

During the first hearing it became apparent that the Abco bookkeeper had applied a formula that effectively paid the inherent overtime at straight time and not at the overtime rates. This was contrary to the legislation. It was clear that some wages were indeed owing to the Rais. The inherent overtime for each of the Rai’s was only paid at straight time and not at overtime rates and I concluded that this matter should be referred back to the Director in order to complete the calculation of wages owing based on the nature of the evidence presented at the original hearing.

Following the referral back it seems that there was some further disagreement as to what work constituted a “run” as described in my decision. The parties attended for a further hearing in front of me to establish what was intended as a “run”. Following submissions and hearing from the delegate I clarified that the “run” was the schedule of work setout in Appendix “B” to the Determination. The Director’s delegate confirmed that he would now be able to calculate the wages owing in accordance with the terms of the original decision.

The delegate has now submitted his recalculation of the wages owing based on the findings of the first and second decisions issued by this adjudicator. He calculates that Paul Rai is entitled to \$3,816.83 and Kuljit Rai is entitled to \$3,360.48.

Abco has not disputed the amount as calculated by the delegate. However, the Rais disagree with the findings. They concede that the arithmetic may be correct but they continue to dispute the issue of overtime owing over and above the contracted amounts. This issue was addressed in full at the original hearing and in the first decision and it would not be appropriate to re-visit that issue at this stage in the proceedings.

Accordingly, I conclude that the determination dated May 3, 2002 should be varied to find that Abco is liable to pay to Paul Rai the sum of \$3,816.83 and to pay Kuljit Rai the sum of \$3,360.48.

ORDER

Pursuant to section 115 of the *Act* I order that the Determination dated May 3, 2002 is varied to find that Abco Building Maintenance Ltd. is liable to pay wages to Paul Rai in the amount of \$3,816.83 and to Kuljit Rai in the amount of \$3,360.48 together with interest as provided in the *Act*.

John M. Orr
Adjudicator
Employment Standards Tribunal