



An appeal

- by -

Intech Electric Inc.
("Intech")

- 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: April D. Katz

FILE No.: 2003A/109

DATE OF DECISION: July 3, 2003



DECISION

OVERVIEW

Shelden Hieb (“Hieb”) was an apprentice with Intech Electric Inc. (“Intech”) from October 2000 to February 2002 when he left due to a shortage of work. After leaving Intech, Hieb filed a complaint with the Director of Employment Standards (“Director”) that he was not properly paid for overtime worked and length of service. Intech disputed the claim on the basis that Hieb worked hours that were not approved by Intech and chose to leave when part time work was offered to him. The Director’s delegate found that Hieb had left Intech after work was offered to him and found that he was not entitled to compensation for length of service. After reviewing the time sheets provided by Intech the Director’s Delegate concluded Hieb was entitled to overtime pay of \$5208.34 plus interest. Intech filed this appeal on the grounds that the Director failed to observe the principles of natural justice in making the Determination.

The appeal proceeded by way of written submissions from the Appellant. The Respondent did not make any submissions and Director’s Delegate indicated that the Determination would speak for itself. The Delegate provided a copy of the documentation from the investigation file.

ISSUE

The first issue to be decided is if the Director failed to observe the principles of natural justice in making the Determination as alleged in the appeal.

If the Director failed to observe the principles of natural justice then the appeal the appellant states that the Director erred in concluding that Hieb was owed overtime wages for unapproved overtime worked.

ARGUMENTS

Intech argues that Hieb wanted as many hours as possible and that Intech did not require him to work on many sites he worked for pure apprenticeship experience. Intech argues that it accommodated Hieb’s need to fill in time after he was dropped off at the work site or before he was picked up by his ride. Intech argues that it was motivated by Hieb’s expressed desire for more hours to work. Intech argues that it did not schedule overtime for Hieb but that it allowed him to work at his convenience and that it generated unapproved overtime.

Hieb did not make any written submissions.

The Director’s Delegate chose to rely on the findings in the Determination and submitted the file record of correspondence.

FACTS

The essential facts are not in dispute. Hieb worked as an electrical apprentice for Intech from October 1, 2000 to February 16, 2002. Hieb was paid \$14.50 per hour straight time for hours worked with the



exception of April 14, 2001 and November 16, 2001 when he was paid overtime. Hieb was paid bi-weekly. The Intech records show that in most bi-weekly pay periods Hieb worked in excess of 80 hours.

Hieb wanted to work as many hours as possible and was working at another job full time when he started working for Intech. He willingly worked longer hours. He would make himself busy and would stay at the job site longer than asked and work until his ride was available to drive him home. Sometimes he started earlier than necessary because his ride dropped him at the work site earlier than necessary. Intech loaned Hieb a vehicle to use to reduce his dependency on others for rides to the site and travelling from one site to another. Hieb brought the vehicle in on Sundays and washed it and other vehicles needing washing and loaded them with supplies for the week of work ahead.

When Hieb worked for shifts that were less than the 4 hours required under section 34 of the *Employment Standards Act* (“Act”) Hieb would not be paid for a four hours shift but for the hours he actually submitted on his time sheets as worked.

Hieb submitted time sheets for his work and about 40% of them were signed as ‘approved’ by someone at Intech. He was paid straight time for all the hours he showed as having worked on his time sheets. Intech’s written policy was to pay for meal breaks if the employee worked 8 hours. Hieb worked for at least 8 hours most days and was paid for meal break time and coffee break time.

When the workload slowed and only part time work was available in February 2002, Hieb found alternative full time work. He did not accept the offer of work from Intech during the first 30 days after he was laid off.

The parties differ on the facts in a couple of areas. Hieb’s evidence about the Sunday vehicle washing was that he was asked to do it by Intech. Hieb’s position is that he would not have come in on Sundays if it was not expected. Intech states that Hieb chose to come in to wash the vehicle and restock it and he was not instructed to do so or expected to come in on Sundays. From Intech’s perspective the work on Sundays was strictly voluntary.

Intech’s evidence is that there was no need for Hieb to work overtime except on the two occasions when he was paid for overtime work. Intech did not believe they were obligated to pay for overtime worked if the employee created the overtime hours by being slow. Intech did not know they had to pay Hieb for overtime if it took him longer when he was learning a task or was filling in time waiting for a ride. Intech’s witness stated that he told Hieb that he was to stop work after 8 hours a day and 40 hours a week except when Intech specifically asked him to work overtime on April 14, 2001 and November 16, 2001. Intech’s position is that it did not approve the overtime claimed by Hieb and if Intech knew Hieb wanted to be paid overtime they would have prevented the overtime from accruing.

Intech’s position is that they never scheduled Hieb to work for less than 4 hours but when he volunteered to work and came in without instructions to do so he created less than a four hour shift. Intech’s position is that Hieb came to work sites where he was not needed on occasion to gain experience for his apprenticeship hours. Hieb would not have been asked to work if overtime would have resulted on these occasions.

Intech takes the position that they advanced Hieb \$600 in wages that he still owes. The Director’s Delegate found that the T4 showed this payment to be a bonus paid and not as wages.



LAW AND ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

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

Intech relies on the second ground of appeal, that the director failed to observe the principles of natural justice in making the Determination.

The principles of natural justice are, in essence, procedural rights that ensure parties a right to present their evidence and be heard by an independent decision maker. Intech has the right to know what allegations were made by Hieb and that Intech has the right to respond. Nothing in Intech's written submission suggests that it was not aware of the complaint, the deadlines for submitting evidence or was denied the opportunity to respond to Hieb's evidence.

There is no evidence of a denial of natural justice in the material filed with this appeal. Intech has submitted a four-page letter attached to the appeal and a two paged witness statement. None of the information in these documents suggests a denial of natural justice.

Further, the record from the file supports the conclusion that Intech had full and ample opportunity to raise all the issues with the Director before the Determination was issued. The file shows that the Delegate wrote to Intech and Hieb on September 6, 2002 setting out Hieb's position to Intech and Intech's position to Hieb. The letter to Intech asked for copies of daily hours worked from October 1, 2000 to February 16, 2002, details of wages paid and any additional relevant information. The Delegate prompted Intech on September 20, 2002 and granted more time for Intech to collect the records from its accountant. Intech wrote to the Delegate on October 11, 2002 and the letter was forwarded to Hieb seeking clarification of his position on Intech's statements. On January 16, 2003 the Delegate wrote to Intech setting out the preliminary findings and seeking input and possible settlement before making a Determination. The Determination adopting the preliminary findings was issued on March 5, 2003.

If there had been a denial of natural justice, the onus is on an appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the submissions from the appellant must demonstrate some error in the Determination, either in the facts accepted, the factual conclusions reached or in the Director's analysis of the applicable law.

The arguments made in the written submissions were also raised with the Director and dealt with in the Determination. The fact remains that while Intech did not intend for Hieb to work overtime, Intech knew Hieb regularly worked overtime from his time sheets. Intech paid Hieb for the hours worked at straight time and never denied Hieb payment for unauthorized overtime. There was a continuing expectation on Hieb's part that if he worked he would be paid. Intech knew on a bi-weekly basis that Hieb worked Sundays for less than 4 hours. Intech did nothing to correct the contravention of section 34 of the *Employment Standards Act*.



I accept that had Intech known of the consequences of the failure to correct the work pattern established, it would have stopped Hieb from working overtime hours, attending sites when he was not needed and working on Sundays. The facts are that section 40 of the *Act* requires Intech to pay overtime when it is worked, whether it has approved the overtime or not. The fact that Intech allowed the pattern to continue throughout Hieb's employment period in ignorance is not relevant to the application of section 40 to this situation.

I find no evidence that the Director erred in concluding that the overtime was owed.

Intech states that Hieb owes Intech \$600 for money paid as advance wages. There is no evidence to support this conclusion. I find no error in the Director's conclusion that this was paid as a bonus.

Intech states that it did not need Hieb to clean the vehicles at an extraordinary cost. This practice of Hieb working Sundays was repeated and Hieb was paid. There is no evidence that Intech took any steps to tell Hieb to stop the practice. I cannot find any basis for concluding that the Director erred in finding that Hieb was entitled to 4 hours pay for the work he did on Sundays.

The Delegate relied on Intech's records to conclude that Hieb was not paid overtime worked and for 4 hour shifts on days when he worked less than 4 hours. These records were available to Intech at anytime. If Intech wished to change the status quo it could have done so at any time.

CONCLUSION

The appeal does not disclose any evidence to support a finding that Intech was denied natural justice in presenting its evidence to the Director. I therefore deny the appeal on these grounds.

Based on the evidence on the merits I find that there is no evidence of an error on the part of the Director in reaching the conclusions in the Determination. Intech's appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, the Determination dated March 5, 2003 is confirmed. Intech Electric Inc. must pay Sheldon Hieb \$5208.34 plus interest pursuant to Section 88 of the *Employment Standards Act*.

April D. Katz
Adjudicator
Employment Standards Tribunal