

An appeal

- by -

Eco-concepts Ecological Services Ltd.
("Eco-concepts")

- 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: Mark Thompson

FILE No.: 2003A/100

DATE OF DECISION: July 8, 2003

DECISION

OVERVIEW

This is an appeal by Eco-concepts Ecological Services Ltd. (“Eco-concepts”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination issued by a delegate of the Director of Employment Standards on February 25, 2003. The Determination found that Eco-concepts owed a former employee, Tanya Zender (“Zender”), a total of \$2,023.24 for unpaid wages and annual vacation pay, plus interest. The Determination found that Eco-concepts had not paid Zender regular wages for some work done and that overtime had been banked at straight time rates. Statutory holiday pay also was due for time worked but not paid. Eco-systems appealed on the grounds that Zender had worked a flexible time schedule, which was not reflected in the delegate’s calculation of time worked, that some calculations in the Determination were incorrect, and that Zender had charged too many hours for reading a training manual. Zender argued that she did not have any agreement with Eco-concepts to work a flexible work schedule and had accurately recorded her hours worked and the time she spent training was appropriate to the tasks assigned. The Delegate pointed out that the calculations of time worked were based on Eco-concept’s payroll records, and that Eco-concepts had not availed itself of opportunities to challenge the calculations during his investigations, but had not presented evidence to support its appeal.

The Tribunal decided that an oral hearing was not required, and the appeal should be decided through written submissions.

ISSUES TO BE DECIDED

The issues to be decided in this case are whether Zender was paid in accord with the *Act* and if Eco-concept should be able to rely on certain evidence presented to the Tribunal.

FACTS

Zender worked for Eco-concept as a plant ecologist/wildlife biologist at the rate of \$12.00 per hour from December 11, 2000 to November 13, 2001. Eco-concepts is an environmental consulting firm. Sometime after the termination of her employment, Zender filed a complaint with the Employment Standards Branch (the “Branch”). In her complaint, Zender claimed that Eco-concepts had banked her overtime hours without her consent at straight time rates and then made deductions from the bank without her agreement. In addition, she argued that Eco-concepts had miscalculated her statutory holiday pay.

Eco-concepts, represented by Carol Thompson (“Thompson”) initially argued that Zender was a professional and not covered by the *Act*, but did not maintain that argument in its appeal. It further asserted that Zender had not properly accounted for lunch breaks and that time claimed for training was excessive.

The investigation of Zender’s complaint was delayed, at least in part by Eco-concepts’s lack of response to the delegate’s efforts to complete his investigation. The delegate wrote Thompson on January 15, 2003, pointing out that he had spoken to her on December 9, 2002 regarding Zender’s complaint. According to the delegate, Thompson stated that she wanted to review the calculations connected to the complaint, and that he should contact her again on December 12, 2002. The delegate left a message at

Eco-concepts on that date, but received no response, leading to the January 15 letter. That letter concluded that Eco-concepts accepted the preliminary calculations and gave it until January 23, 2003 to send a cheque for the amount due to Zender. Thompson wrote to the delegate by fax on January 17, 2003, asking for an extension of the deadline, as she was busy with a project and would not have the funds to pay Zender until the project was completed. The delegate wrote to Eco-concepts again on January 20, 2003 asking for a response and giving it until January 31, 2003 to provide additional information. On that date, Thompson sent the delegate a fax with changes to Zender's time sheets for four days and promised to fax additional changes. According to the delegate's submission, he made the adjustments in his calculations based on the January 31 fax, but Eco-concepts did not provide any additional information after that date, so he issued the Determination on February 25, 2003.

The Determination pointed out that when overtime is banked, Section 42(2) of the *Act* requires it to be banked at the appropriate rates. It further found that the "training" activities Zender undertook occurred under Thompson's direction and thus constituted "work" as defined in the *Act*. The calculation of amounts owed to Zender was based on Eco-concepts's records, as modified after Thompson provided information.

Eco-concepts's appeal was based on the existence of a "flex time" arrangement for Zender that was not acknowledged in the Determination, an over-payment of 4.45 hours in December, Zender's failure to mark lunch breaks on her time sheets, her training time and over estimation of time required to read a training manual.

Zender denied that she had agreed with Eco-concepts to work a non-standard workweek. She further pointed out that she had accounted for lunch breaks, when they occurred. Further, she stated that she had worked for Eco-concepts during any training periods, some of which were connected with her unwillingness to work alone in the field.

Eco-concepts filed a statement with the Tribunal on May 16, 2003. In it Thompson stated that Zender agreed to become proficient in some aspect of her work or Eco-concepts would hire a subcontractor. Zender agreed to work on her own time. She reiterated that Zender worked on a "flex time" schedule.

ANALYSIS

Section 112 (1) of the *Act* provides that a person affected by a determination may appeal to the Tribunal on one or more of the following grounds: that the director erred in law, the director failed to observe the principles of natural justice, and "evidence has become available that was not available at the time the determination was being made."

In this case, the appeal did not address either of the first two grounds for appeal. Moreover, Eco-concepts did not present any evidence to the Tribunal that was not available at the time the Determination was made. In particular, there was no evidence that any "flex time" agreement existed. Presumably, the appeal referred to an agreement to average hours of work provided under Section 37 of the *Act*. At the time Zender was employed at Eco-concepts, the *Employment Standards Regulation* required that a written letter signed by a majority of employees agreeing to a work schedule be filed with the Branch. Eco-concepts has not provided any such letter or agreement with Zender to the Branch. Zender denied that she agreed to an averaging of hours schedule. Moreover, her schedule did not reflect a regular pattern of work from Monday to Thursday.

In the appeal, Eco-concepts took issue with the calculation of Zender's hours of work on three days in December 2001. Any evidence on that point clearly was available during the investigation, and Eco-concepts had ample opportunity to present it to the delegate. The same is true of the lunch breaks. The delegate based his calculations on Eco-concepts's payroll records.

The definition of "work" in Section 1 of the *Act* covers all services performed for an employer. No basis exists in law for the position that if training can be used by another employer, the employee's current employer is not required to pay wages. Eco-concepts could have raised Zender's claim for hours worked on reading manuals when the work was done or during the investigation of her complaint. It did neither.

Section 112 of the *Act* is clear that the Tribunal is to receive appeals of determinations. It is not an investigative body to analyze new evidence. The Tribunal has stated its position on this principle many times. See *Kaiser Stables Ltd.*, BC EST #058/97. The allegations presented in support of the appeal in this case all refer to evidence available to Eco-concepts during the delegate's investigation and the Tribunal cannot rely on it in support of an appeal, without compelling reasons.

ORDER

For these reasons, the Determination of February 25, 2003 is confirmed, pursuant to Section 115 of the *Act*. Zender is to receive \$2,023.24, plus interest accruing under Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal