



An appeal

- by -

Karl Wilson
(the "Appellant")

- 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: E. Casey McCabe

FILE No.: 2000/846

DATE OF DECISION: May 16, 2001

DECISION

SUBMISSIONS

Daniel Burns	for the employer
Karl Wilson	for himself
Sharon Cott	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Karl Wilson from a Determination dated November 20, 2000. That Determination found that there was not enough evidence to prove that the employer owed Mr. Wilson for 409.5 banked overtime hours.

ISSUE(S) TO BE DECIDED

1. Is there enough evidence to show Mr. Wilson is owed 409.5 hours in overtime?

FACTS

Steelhead Society Habitat Restoration Corporation (the “employer”) is a non-profit company in the business of providing habitat restoration services for Forest Renewal British Columbia. Mr. Wilson was a biologist employed by the employer from September 1997 to December 3, 1999. Mr. Wilson’s complaint was decided at the same time as the complaints of three other employees all of whom ceased employment with the employer in early December 1999. Only Mr. Wilson’s case is before me.

The employer could not provide any time sheets regarding Mr. Wilson’s claim for overtime. Such time sheets were the responsibility of Doug McCorquodale who was the operation manager for the employer from January 4, 1999 to December 3, 1999. The Director’s Delegate interviewed Mr. McCorquodale, who supported Mr. Wilson’s position, but did not disclose any records of the time sheets during the investigation.

In support of Mr. Wilson’s position, Mr. McCorquodale submitted undated memos to the Board of Directors stating that Mr. Wilson had 409.5 hours of accumulated banked overtime. The memo was signed by Mr. Wilson, Mr. McCorquodale and Karen Blimkie, who was the financial manager for the employer from March 1988 to December 3, 1999. There was also a signature which Mr. McCorquodale identified as that of Peter Hyndman, a member of the Board of Directors.

Mr. McCorquodale also submitted voided and unsigned cheques. The cheque for Mr. Wilson was for \$8,562.65 based on 409.5 banked hours. In addition, Mr. Wilson provided a journal made by him for the period May 4, 1999 to November 15, 1999, which outline a record of days worked.

The Delegate determined that the evidence in support of the employee's complaint over banked overtime, including Mr. Wilson's, was not sufficient to enable her to conclude that the complainants were owed any overtime. The Delegate therefore dismissed the complaint.

Mr. Wilson appealed this decision on December 13, 2000 and on February 19, 2001 provided a copy of a ledger that he states was used by Mr. McCorquodale to determine the amount of overtime Mr. Wilson had worked.

ANALYSIS

The first issue to be decided is how much, if any, reliance should be placed on the copy of the ledger provided by Mr. Wilson on February 19, 2001. The Tribunal has a long-standing policy of rejecting evidence that should have been brought to the attention of the Delegate during the investigation. As was stated in *Re Tri-West Tractor Ltd*, BCEST #D268/96, a party is not allowed to sit in the weeds and wait until after the Determination is made before bringing forward relevant evidence. While that case dealt with the action of an employer the principle also applies to an employee.

The policy reasons behind this approach are well established. The investigation performed by the Delegate is meant to allow a speedy and final resolution of the complaint. In order for this to be accomplished both parties must provide all relevant material in their possession to the Delegate so that the decision is made after a consideration of all the facts. The Tribunal itself is not meant to replace the Delegate's functions or conclusions. Rather, the Tribunal acts as an appeal body to ensure that no factual or legal error is made by the Delegate based on the material available during the investigation. *Re Alstad Brothers Logging Ltd.*, BCEST #D143/99.

A clear exception to the above policy will occur when the material submitted after the issuance of the Determination was not in the control of the party and could not reasonably have been submitted during the investigation. Mr. Wilson did submit additional records as part of his appeal. These records were submitted on February 19, 2001 after the Determination had been issued dismissing his claim for the pay for the overtime hours. I have little doubt that these records were not in the control of Mr. Wilson during the relevant period. All the parties agree that Mr. McCorquodale would be the person with control of these records. However, while it is apparent that Mr. Wilson did not have control of these records, it is clear on the face of the Determination that Mr. McCorquodale was helping Mr. Wilson in the complaint and should have disclosed this information during the course of the investigation. Mr. Wilson provides no reasons why Mr. McCorquodale withheld these records nor has he explained why he was not able to get these records from Mr. McCorquodale earlier.

Without these sheets Mr. Wilson's appeal is based primarily on the fact that he should not be penalized for the employer's inability to find the time sheets showing the overtime worked. The only evidence shown to the Delegate supported the complainant's position. The Delegate rejected this evidence as unsubstantiated and unreliable. While it is open for the Tribunal to rely on other forms of evidence when payroll records are non-existent (Re Rodrigue, Bcest #D600/97), where there is no evidence that can be used to calculate, or even determine whether overtime was worked, the employee's claim for overtime will fail. (Re Knister, Bcest #D516/97).

In regards to Mr. Wilson's journal the Delegate determined that the hours written in the journal showed either total hours, time away from the house or no times at all. Furthermore, the journal may have included meal breaks and travel time. The Delegate was unable from this record to determine Mr. Wilson's actual hours of work. There is nothing before me to indicate that the Delegate erred in this finding.

The complainant further argues that the fact that cheques were made out for overtime payments but were voided before being signed by the CEO is indicative that the claims were valid. The Delegate, after her investigation, was not prepared to draw the inference that the overtime had been worked but not paid. I will not disturb that conclusion based on the evidence and argument submitted on appeal.

Finally, the complainant relied on evidence of a memo which was signed by Mr. Wilson, Mr. McCorquodale, Ms. Blimkie, and one other. The Delegate rejected this memo due to the fact that there was no basis to establish when the hours were actually worked and whether any of the hours had been taken in time off. The Delegate examined and considered this evidence as part of her investigation. Based on the material and submissions before me I will not overturn that conclusion.

ORDER

The Determination dated November 20, 2000 is confirmed.

E. CASEY MCCABE

**E. Casey McCabe
Adjudicator
Employment Standards Tribunal**