

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

BCA Industrial Controls (1995) Ltd.
("BCA")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/165

DATE OF HEARING: June 9, 1997

DATE OF DECISION: June 19, 1997

DECISION

APPEARANCES

Mike O'Connor	on behalf of BCA Industrial Controls (1995) Ltd.
Ion Semeniuc	on his own behalf

OVERVIEW

This is an appeal by BCA Industrial Controls (1995) Ltd. (“BCA”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination which was issued on March 3, 1997 by a delegate of the Director of Employment Standards (the “Director”). The Determination requires BCA to pay Ion Semeniuc (“Semeniuc”) vacation pay, overtime wages and interest totalling \$2,104.61. BCA’s appeal seeks to have the Determination cancelled as it argues that no wages are owed to Semeniuc.

A hearing was held on June 9, 1997 at which time evidence was given under oath by James Yap and Ion Semeniuc.

ISSUES TO BE DECIDED

There are two issues to be decided in this appeal:

1. Does BCA owe vacation pay to Semeniuc?
2. Does BCA owe overtime wages to Semeniuc?

FACTS

Mr. Semeniuc was employed as an engineering draftsman from September 28, 1995 to October 7, 1996 at a salary of \$36,000 per annum with three week’s vacation. His regular hours of work were 8:00 a.m. to 4:30 p.m. (i.e. 40 hours per week). In his complaint dated October 18, 1996, Semeniuc claimed that he was owed overtime wages, vacation pay and compensation for length of service. The Director’s delegate concluded that Mr. Semeniuc was not entitled to compensation under Section 63(3)(c) of the *Act*,

but he also concluded that BCA was required to pay the following amounts to Semeniuc:

	\$	\$
1995 Vacation pay		457.85
1996 Vacation pay	1,686.47	
less amount paid	969.23	
		717.24
Overtime (48.35 hrs.)	836.94	
6 % Vacation pay	50.22	
		887.16
Interest		42.36
Total amount payable		2,104.61

BCA appealed the Determination. Mr. Semeniuc did not file an appeal.

Mr. Mike O'Connor, president of BCA, gave the following reasons for this appeal:

“...(Mr. Semeniuc) knew he had to have any overtime approved by his supervisor, James Yap. On the day he quit, he submitted a lengthy list of overtime worked which James or I had never seen before and had no knowledge of. (Mr. Semeniuc) was never asked to work overtime as outlined on this sheet. It is unreasonable to expect an employer to be responsible for some list of hours kept by an employee, never discussed, never presented and never authorized. We did not ask (him) to work this overtime, and, in fact (he) was given considerable time off with pay to deal with his significant personal problems. James sat right beside (him) and knew his workload from hour to hour.

Mr. James Yap (Manager, Production and Engineering) testified at the hearing that overtime must be approved or authorized. He also testified that he requested Semeniuc to work on one Saturday to ensure that a particular project was completed. Other than that occasion, Yap testified, he did not approve any overtime for Semeniuc and none was claimed by him prior to his last day of employment. However, under cross examination, Yap testified that Semeniuc had worked on more than one week-end, but “...it was on his own accord” and to compensate for that he was granted time off to attend to personal matters on several occasions. Yap was unsure of how often such work occurred.

Mr. Semeniuc testified that he kept a record on his computer of any overtime hours which he worked. Those records were given to the Director’s delegate during his investigation of the complaint and were disclosed to BCA. Semeniuc’s records, which contain several addition errors, show that he worked 98.35 overtime hours during his employment at BCA. They also show that he received 8 days vacation (with pay) from February 8, 1996 to February 19, 1996 inclusive.

Mr. Semeniuc testified that Mr. Yap and he were the only two employees in BCA's Engineering Department. He also testified that he was given a key to the office to permit him access to the building on week-ends. Under cross-examination, he testified that Yap told him many times to keep his work up-to-date, but would not allow him to begin working before 8:00 a.m. As a result, Semeniuc testified, he would work overtime at the end of the day or on week-ends (which he found more convenient due to his family commitments).

The Director's delegate states in the Determination that BCA "has no records of the vacation time taken by Mr. Semeniuc or of the amount of vacation pay paid to him for the year ending December, 1995." He also noted that BCA does not have a record of the hours worked each day and, therefore, he relied on Semeniuc's records to calculate the amount of wages owing by BCA.

BCA submitted various payroll records and related documents in support of its argument that it does not owe any wages to Mr. Semeniuc.

ANALYSIS

Section 1(1) of the *Act* defines an "employee" as including "a person an employer allows, **directly or indirectly**, to perform work normally performed by an employee (emphasis added).

Section 35 of the *Act* requires an employer to pay overtime wages if "...the employer requires or, **directly or indirectly**, allows an employee to work" more than 8 hours a day or 40 hours a week (emphasis added).

The significance of the phrase "directly or indirectly", as it appears in Section 1(1) and Section 35 leads me to conclude that the responsibility rests with the employer to control when an employee works and to record those hours daily. That is, if an employer does not wish employees to work overtime hours, he must not only order them not to work overtime, but must also supervise and record their hours of work to ensure that no overtime hours are worked.

In this appeal, the inadequacy of BCA's payroll records required the Director's delegate to rely on Mr. Semeniuc's records since they were the only records vis-à-vis overtime hours which were made available during the investigation of the complaint. The evidence which I heard and the written submissions which I have reviewed lead me to find that it was reasonable for the Director's delegate to rely on those records.

It is evident from a cursory review of Mr. Semeniuc's records that his 8-day vacation period in February, 1996 was included in those records and had the effect of reducing the cumulative total of overtime hours which he recorded as having worked. His vacation period covered 8 working days (i.e. 64 work hours), but his records indicate that the cumulative total was reduced by 60 hours (not 64 hours). This is only one of several arithmetic errors in Mr. Semeniuc's records. I find that the total number of overtime hours which he worked amounted to 98.35 hours.

When I review all of the oral and documentary evidence in this appeal, I am lead to the following analysis:

“Wages” Earned:

		\$
September, 1995 (2 days)	2 x 138.48	276.96
October - December, 1995	3 x 3,000.00	9,000.00
January - September, 1996	9 x 3,000.00	27,000.00
October, 1996 (5 days)	5 x 138.48	692.40
less 8 vacation days	8 x 138.48	<u><1,107.84></u>
		35,861.52
6 % vacation pay	6 % of 35,861.52	2,151.68
Overtime wages	\$17.31x 98.35 x 1.5	2,553.65
6 % vacation pay	6 % of 2,553.65	<u>153.22</u>
Total “wages” earned		40,720.07

“Wages” Paid:

1995 Gross Earnings	
(per COMCHEQ “payroll clearing account” reconciliation)	9,010.28
1996 Gross Earnings	
(per COMCHEQ “Payroll Register” - October 18, 1996)	<u>29,077.02</u>
Total “wages” paid ***	38,087.30

*** **Note:** This amount includes the following amounts paid to Mr. Semeniuc in his final pay cheque, from which the usual statutory deductions were made:

Regular wage (2 days)	\$207.70
Overtime	\$207.70
Vacation pay	<u>\$969.23</u>
	\$1,384.63

The difference between wages earned (\$40,720.07) and wages paid (\$38,087.30) amounts to \$2,632.77.

ORDER

I order, under Section 115 of the *Act*, that the Determination be varied to show that BCA is required to pay wages totalling \$2,632.77 plus interest in accordance with Section 88 of the *Act*.

Geoffrey Crampton
Chair
Employment Standards Tribunal

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