

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 -

Robert Glen Kirk operating as North American Magazine Services

(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE NO.: 2000/322

DATE OF DECISION: August 8, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Robert Glen Kirk, operating as North American Magazine Services (“Kirk”) from a Determination dated April 12, 2000. That Determination found Kirk liable for outstanding wages and compensation for length of service to the complainants for the amount of \$13,934.64. This Determination was later varied by letter dated May 29, 2000. The Director’s Delegate determined that the employer had breached sections 18, 40, 63 and 78 of the *Act*.

ISSUE(S) TO BE DECIDED

1. Was the Director’s finding of the amount of hours worked by the complainants correct?
2. What rate of pay should be used in calculating wages owed?

FACTS

Robert Kirk operated North American Magazine Services which was a telemarketing company that operated in Victoria, British Columbia. The company was in the business of selling magazine subscriptions mostly to the United States market. The company was in business from October 1999 to March 24, 2000. On the morning of March 24 Mr. Kirk phoned his manager, Stephen Larre. He informed Mr. Larre that the offices would be closed for two weeks and that he was sending the employees their pay cheques through Federal Express. These cheques did not arrive and the offices were not re-opened.

On that day Mr. Kirk had also phoned Murray Collins, an employee at the company, and asked him to go to the office to inform any employee reporting for work that the office would be closed for two weeks. Mr. Collins states that when he arrived at the office Mr. Kirk had “cleaned it out” and had taken personal possessions of the employees with him (e.g. phones, eye glasses).

Mr. Kirk, in his appeal, states that the employees’ hours and wage rates per hour “were for the most part lyed (sic) about to receive extorted money from myself.” Mr. Kirk has sent in three time sheets in support of his appeal and has done his own calculations to show what he thinks he owes his employees.

ANALYSIS

The Delegate determined the amount of hours worked from time sheets provided by the employer. Pursuant to submissions sent in by the employer the Delegate reviewed the amount of hours of the individual complainants and revised six of them. Three were revised down and three were revised up.

Mr. Kirk has sent in three time sheets which he has used to determine the amounts he owes the employees. In his calculations Mr. Kirk does not add in vacation pay or compensation pay for length of employment. The time sheets sent in are also found in the submissions by the Director; however, there are more time sheets included in the Director's submission. It is apparent from Mr. Kirk's submission that he is only accepting liability for a three week period of March 4 through 26, 2000. However, Mr. Kirk does not supply any pay stubs in support of the contention that he is not liable for wages outside this period. The onus is on Mr. Kirk to show why the calculations done by the Delegate are wrong. Without proof that the employees have been paid for the time worked outside the aforementioned period the decision of the Delegate must stand.

Mr. Kirk further states that the company only worked Monday to Friday and therefore any claimed hours for a Saturday were in error. The records supplied to the Delegate by Mr. Kirk clearly establish that the company did work some Saturdays i.e. December 4 and 8, 1999; January 22, 2000; and March 4, 2000. Mr. Kirk has not submitted any evidence that would contradict the Delegate's finding regarding hours worked on Saturdays.

In terms of the hourly rate for the employees there is some support for Mr. Kirk's position that the rate was \$8.00 per hour. However, the evidence makes it clear that this was not the rate that was expected by the employees. The advertisement in the Victoria Times-Colonist states that the rate of pay would be \$10.00 per hour. The employees were told that the \$8.00 per hour rate was 'net' instead of gross pay. For the purpose of calculating wages the normal rule is to use 'gross' rather than 'net' pay. Therefore I find that the determination by the Delegate of an hourly rate of \$10.00 per hour was the rate of pay negotiated by the employees with Mr. Kirk.

ORDER

The Determination dated April 12, 2000 as revised May 29, 2000 is confirmed. The Director's delegate has not given a grand total for the revised determination. The matter is remitted back to the delegate to define the individual amounts and the grand total, including interest to date, owed by this employer.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal