Employment Standards TRIBUNAL

An appeal

- by -

Skyline Plumbing, Heating & Gas Fitting Ltd.
("Skyline")

- 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.: 2001/804

DATE OF HEARING: April 23, 2002

DATE OF DECISION: June 17, 2002

DECISION

APPEARANCES:

R. Deol and Harjit Soni	appearing for the employer
Amarjit Garcha	appearing for himself
Amita Sharma	interpreter for Mr. Garcha

OVERVIEW

This is an appeal by Skyline Plumbing, Heating and Gas Fitting Ltd. (the employer) pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination dated October 29, 2001 which found the employer liable for overtime wages, statutory holiday pay and annual vacation pay in the amount of $10,316.00 plus interest.

ISSUE

Is the complainant entitled to the overtime pay, vacation pay and pay for statutory holidays that was awarded in the Determination?

FACTS

The employer is a mechanical contractor involved in residential construction projects in the Lower Mainland of British Columbia. At the relevant time Mr. Amarjit Garcha (the "Complainant") was an apprentice plumber. He commenced employment with this employer on August 25, 1999 and was terminated on May 10, 2001.

The Determination stated that a Joint Compliance Team which is composed of investigators from the Employment Standards Branch, Canada Customs and Revenue Agency and Human Resources and Development Canada visited one of the employer's work sites on March 28, 2001 as part of a random site visitation program. Employees were interviewed and the complainant was one of those who gave a statement to the investigators. One purpose of such visits is to inform workers of their employment rights, particularly rights under the *Employment Standards Act*, and to investigate whether there is compliance with the *Act*.

On or about May 9, 2001 the complainant contacted the Director's Delegate, who was one of the investigators, to ask if the Employment Standards Branch (Branch) would be following up on the site visit.

The Determination indicates that a file had been opened based on the investigation at the work site. The Determination also states that the complainant was advised at the time that the normal practice is to contact the employer to ascertain whether the allegations of breaches of the *Act* had any basis. If there

were grounds to support an allegation of a breach the employer would be asked to correct the matter. However, the Director's Delegate stated in the Determination that he told the complainant that if he launched a complaint the Branch would be obliged to examine the allegation for a period going back two years. The complainant called again on May 14, 2001 to inform the Delegate that he had been terminated. He came in later that day to file his complaint.

The fundamental dispute in this matter is the applicable wage rate for the period of employment. The complainant alleges, and the Determination found, that his wage rate was $10.00 per hour for 1999, $11.00 per hour for 2000 and $12.00 per hour for 2001. The employer's position is that the wage rate was $9.61 for 1999, $10.58 for 2000 and $11.54 for 2001. If the 4% holiday pay is added to the sums that the employer states were the base wage rate the respective wage rates come to the same round figure that the complainant states he was being paid. As Mr. Deol succinctly stated in his submission the case is about what "was agreed by the employer and the employee" when the complainant was hired and given raises in subsequent years.

Mr. Soni testified for the employer. He testified that he had been in the plumbing business for approximately 14 years. He testified that although the complainant's most recent term of employment began on August 25, 1999 he first hired the complainant in December 1995.

Mr. Soni testified that each time he hired a new employee he would tell him that there were no fancy application forms and what the employee's wages would be. He testified that he told Mr. Garcha in August 1999 that his wages would be $9.61 per hour plus vacation pay. He testified that it was the employer's policy to give an employee a wage rate that included a base rate and vacation pay which worked out to a round number. On top of that employees would receive statutory holiday pay for the respective days. He stated that he has followed this policy for the fourteen years that he has been in business. He testified that he told the complainant of this policy and that statutory holiday and overtime pay would be on top of the rounded figure.

Mr. Soni testified that he estimated he had employed over two hundred persons in his fourteen years of business and that he had only one previous complaint, about ten years ago, which was resolved in his favour.

Mr. Soni testified that he kept daily logs and diaries which included itemization of the jobs that he attended and which jobs the respective employees would be assigned to. He stated that the employer monitors the duties of the employees on a daily basis. He further testified that the employer telephones each employee in the morning to tell that employee where to report and what to do. He stated that the employer does not normally check start times but that the employer would rely on the employees or the owner to state when the employee arrived at the job site.

In order to explain his system Mr. Soni drew the Tribunal's attention to entries in his January 2000 day timer. He testified that he had his day timers for the year 2000 and 2001 but was unable to locate his 1999 diary.

Mr. Soni also testified about the Demand for Payroll Records that had been made by the Director's Delegate. He testified that the Director's Delegate had asked him for payroll records and to explain how they were completed. Mr. Soni testified that he explained to the Delegate that he kept a daily log for each employee on which the employer would work out the regular hours with the over time. He testified that the employer would then calculate total pay and write that on a piece of paper. The employer would then

calculate the statutory deductions by hand and work backward to get the figures for Revenue Canada. He states that a week or so later if he had the time he would enter those figures in a ledger.

Mr. Soni drew the Tribunal's attention to the payroll registry for January 2000 which were documents that were submitted during the investigation stage. Mr. Soni pointed out how the employer kept its payroll records including how, in that particular month, the employer arrived at 168 hours worked for the complainant. He then pointed out that the hours multiplied by $10.68 obtained a figure of $1,777.00 and that the employer would round up. He then stated that the overtime hours were calculated at 1.5 times for a figure of $619.00 rounded up. He stated that vacation pay at 4% was also calculated at the time to arrive at a figure of $2,491.84 which was rounded down to $2,491.50. From this the statutory deductions were taken to arrive at a net pay of $1,893.71.

Mr. Soni confirmed that the pay stubs that were issued to the complainant over the course of his employment did not contain the information required under Section 28 of the *Act*. More particularly they did not contain an itemization of the total hours worked or the number of hours that were at regular pay or the number of hours at overtime pay. He stated that since the investigation, and having had this matter drawn to his attention by the complainant, the employer had changed its system and was now using a computer program to generate the information.

Mr. Soni testified that prior to making the changes that he had been keeping the time records for each employee in the same manner. He said that his records included a name, address and telephone list but that a date of birth was kept separately in the computer and not on the pay registry. He stated that the date of employment and the wage rate is found in the register but that the hours worked each day were not entered daily in the register. He stated that a daily log was kept which was transferred to the register at the end of the month or when time allowed. He stated that gross and net wages were kept in the register as well as holiday pay and deductions. He stated that the holiday pay, which he viewed as the equivalent to annual vacation, was paid in each pay period and so therefore nothing was shown in the pay register as holiday pay for annual vacation.

I digress at this point to state that one of the issues raised in the Determination was whether the complainant had been dismissed because an investigation was being made under the *Act*. Both parties gave evidence on the matter. The Director's Delegate found that the evidence on this point was inconclusive and therefore he could not determine whether Section 83, which governs mistreatment or dismissal due to investigation or complaint under the *Act*, had been breached. The complainant did not appeal this finding. However, Mr. Soni testified that a few months prior to the complainant filing his complainant the employer had quite a few complaints from owners and real estate agents that the complainant would not act immediately if they asked him to do something. Mr. Soni testified that these real estate agents and owners were really the boss and that they had complained that the complainant was not listening to them. He told of one instance where the complainant was informed of a water leak in a finished suite but that the complainant did not attend to it. Subsequently another plumber turned the water on in the suite at the main tap which caused some damage. Mr. Soni testified that he had no choice but to let the complainant go. The incident occurred a few days prior to the complaint being filed.

Mr. Soni testified that he had had hundreds of employees working for him the previous fourteen years with no problems. He testified that he was very disappointed when he heard that Mr. Garcha had filed his complaint. He felt that he had helped Mr. Garcha obtain a temporary work permit in this country and that he had trusted Mr. Garcha with company vehicles, cell phones and that he had rehired him in 1999 after his 1997 lay off.

I make note at this point that the complainant, Mr. Garcha, was not represented by counsel. He did give his evidence through an interpreter. He was afforded the opportunity to cross-examine Mr. Soni who was represented by counsel, and Mr. Garcha did put his version of the termination events to Mr. Soni. Mr. Garcha stated that there was no problem with a water leak but that Mr. Soni had asked him why he talked to the Labour Board. Mr. Garcha put to Mr. Soni, that he, (Mr. Soni), had asked why he (Mr. Garcha) had spoken to the Labour Board, that Mr. Garcha would spoil it for the others and that is why he (Mr. Soni) was terminating him. Mr. Garcha then asked Mr. Soni why, if there was a problem with leaking water, was he the only one that was terminated when the other plumber, who was a certified journeyman, and who was also responsible for that job, wasn't fired.

Mr. Soni responded that it was Mr. Garcha who had the company vehicle and that it was Mr. Garcha who had received the instruction about what to do in the unit. He stated that the journeyman plumber didn't know what to do and that he would go from one job to another whereas the complainant would come and go at different times. Mr. Soni then went on to explain that he had in his view acted as a responsible employer when in December 2000, Mr. Garcha, due to a language problem, was asked by the City of Surrey to be removed from a work site because he was not a qualified plumber. Mr. Soni said that as a result of this he had encouraged Mr. Garcha to register with the apprenticeship board but that he kept him on working at other jobs. He felt that because he had given Mr. Garcha a truck that he had instilled a trust in Mr. Garcha that gave Mr. Garcha a greater responsibility on the jobs.

I do not feel that Mr. Soni adequately answered the question put to him by Mr. Garcha. It is hard to accept that a journeyman plumber wouldn't know what to do in units that are similar to other units in the same complex. The issue concerning the City of Surrey had happened in the previous year.

Mr. Garcha testified on his own behalf. He stated that he was not told what the benefits would be when he was hired. He was only told that his pay would be $10.00 per hour. He stated that whatever hours he worked he wrote on his calendar and that the crews regularly worked six days a week. The calendar that he referred to was his own personal calendar. He testified that he would write down hours daily and submit those to the employer monthly. He testified that his pay stubs would show an hourly rate and gross pay minus deductions. The pay stubs never showed the number of hours worked or the overtime hours or vacation or statutory holiday pay. He testified that the calendars, which were in evidence were in his writing and that he made the entries each day that he worked after he came home. He further testified that he was happy working at Skyline and that he was very disappointed that he was terminated because he felt that he had worked honestly and liked working for this employer.

Mr. Deol conducted a thorough cross-examination of Mr. Garcha. Mr. Deol asked the complainant if he was told at the point of hiring whether vacation pay was included on his pay. Mr. Garcha said no that it wasn't. Mr. Deol then referred to a passage in the Determination at page 3 and suggested that the complainant had told the Director's Delegate on March 28 that his hourly rate "included all benefits" which Mr. Deol suggested was meant to cover vacation pay as part of his hourly wage. The complainant stated that he had not told that to anybody. Mr. Deol then referred to a letter in the file dated December 2001 and referred to paragraph 5 of that letter. He put it to Mr. Garcha that Mr. Soni had mentioned to him at the time of hiring in 1995 and in 1999 that his benefits, including vacation pay were included in his hourly rate. Mr. Garcha denied that. Mr. Garcha then testified that he had been told that his hourly rate would be $10.00 per hour and not $9.61.

Under further cross-examination Mr. Garcha testified that after speaking with the investigators on March 28, 2001 he spoke to Mr. Soni the following day. Mr. Garcha testified that Mr. Soni said that he could

not pay this because the company did not have a policy that would allow him to pay those benefits. Mr. Deol put the proposition to Mr. Garcha that his testimony was a fabrication and that what Mr. Soni had said was that Skyline has a policy of paying overtime statutory holiday and vacation pay on each cheque. Mr. Garcha replied that he had not been given such a policy in writing.

Mr. Deol further questioned the complainant on the timing of his complaints. He drew to the complainant's attention the fact that he had contacted the Branch on May 9 but had not come into file a formal complaint until May 14. Mr. Deol suggested that it had taken five days for the complainant to file his complaint because he required that time to prepare the calendars to substantiate his claim. The complainant denied that he had done so. He then explained how he kept his calendars and that the entries on the calendars were made daily. The complainant denied that he would report the hours worked the day before in the morning conversations with Mr. Soni. He stated that the hours were given on a monthly basis. He reiterated that whatever he wrote in the calendar is what he would report to the employer as his hours.

The Panel asked Mr. Garcha why he did not make a complaint to the branch earlier since he had been working for the employer at the time of the complaint for approximately 20 months. Mr. Garcha responded that whatever hours he was working he was being paid for regularly and that he did not know that he was entitled to the overtime, vacation pay and statutory holiday pay benefits.

ANALYSIS

Mr. Deol argues that the nub of the case focuses on what was agreed to by Mr. Soni and Mr. Garcha at the time of hire. He argues that the evidence establishes that the wage rate of $10.00 per hour included the 4% holiday pay. He argues that Mr. Soni gave detailed evidence including the procedures that he followed and explained the entries in his daily logs and the payroll registry.

The employer argues that the Delegate wrongly discounted the employee's records in favour of the employee's calendars. He argues that there should be no presumption that employee records are accurate simply because the employer has not kept records (*Michnick* BC EST # D006/02). He further argues that an inference should be drawn that the complainant's delay in filing a complaint implies that the complainant knew that there were no irregularities in his rate of pay or the calculation of overtime and statutory holidays. The employer's counsel emphasizes that the complainant made no effort between March 28 and May 9 to complain either to Skyline or the Branch about the irregularities in his pay. Counsel asks the Tribunal to infer from this behaviour that the complainant knew his pay was being calculated properly.

Mr. Deol refers to page 4 of the Determination and stated that if the Tribunal accepts that if the employer has established through its records in evidence that the hourly rate was $9.61 then the conclusion to be drawn is that Mr. Garcha is being paid all that he is entitled to receive. He further argues that the Tribunal should overturn the findings of the director's delegate that the complainant's records were more credible than those presented by the employer. He states that the Tribunal should draw the inference that Mr. Garcha concocted his records between the May 9 conversation with the director's delegate and the May 14 filing of the complaint.

Counsel further argues that his client produced the payroll records as demanded by the director's delegate and that the records clearly show the manner in which the payments were made particularly with respect to statutory holiday pay. He argues that his client also explained why the writing style and ink used in

recording the ledgers were the same. Counsel further submitted that the employer maintained payroll records that substantially complied with Section 28. He argues that the director's delegate failed to properly compare and analyse the hours recorded by the complainant on his calendar with the daily diary and the payroll ledger of the employer. He argues that the payroll ledger clearly shows that statutory holidays had been paid.

Mr. Garcha reiterated that his calendar records were kept daily and correctly. He further argued that the pay stubs did not contain the proper information and that he was not getting his benefits under the law.

The burden of proof is on the appellant to show on the balance of probabilities that the Determination is wrong (Re. *World Project Management Inc. et al* [1997] BC EST # D134/97). The Tribunal is not a forum for second guessing conclusions in a Determination. The appellant must show some factual or legal error has been made and that error must arise either from the material on file or the Determination itself. (*Alstad Brothers Logging Ltd.* BC EST # D143/99).

I am not prepared in this case to overturn the findings in the Determination for the following reasons. Firstly, I had the opportunity of assessing the *viva voce* evidence of Mr. Soni and Mr. Garcha. Mr. Deol ably and thoroughly cross-examined Mr. Garcha. I find Mr. Garcha's testimony unshaken on cross-examination. I accept that his calendars were kept on a daily basis and that they accurately reflect the days and hours of work. They appear to be in the same handwriting, made with different pens or pencil and with annotations on some days.

This case reflects a fundamental problem that often arises in disputes regarding hours of work, overtime pay, vacation pay and statutory holiday pay. Unfortunately, and all too often, these cases arises out of the fact that the employer has not kept particularized records as required under Section 27 and 28 of the *Act*. I do not accept that the employer's records substantially complied with the Section 28 requirements. The language in the sections is mandatory, the employer "must" keep records of certain information. I am encouraged that the employer has changed its methods as a result of this incident but unfortunately it is of no help to him with respect to Mr. Garcha's complaint.

Secondly, I do not accept that the employer made it clear to Mr. Garcha at the point of hire that his rounded up hourly rate included the 4% vacation pay. The *Act* under Section 53(2) requires that any agreement that vacation pay be paid on each cheque to be in writing or required pursuant to a collective agreement. The employer did not reduce to writing the agreement to pay holiday pay on each cheque and I find that fatal to its argument.

Thirdly, I accept Mr. Garcha's explanation that he was not aware of his rights as the reason that he did not complain prior to March 28 2001. I further find that the period of time between March 28 and the next contact with the Employment Standards Branch on May 9, 2001 as not being sufficient to substantiate an inference that Mr. Garcha knew he was being paid properly. Section 74 (3) of the *Act* contemplates a six month time period for a complainant to file a complaint once he is aware that his employer has breached the *Act*. Finally, I comment on the nature of the employer's evidence. I had the opportunity to view the original ledger and I have the same observations as the Directors' Delegate. That is, the entries seem to be in the same colour pen for the entire month and for more than one month. The employer explains this by stating that he only made the entries monthly and that he would use the same pen from month to month. He also testified that he was a very busy man providing estimates, job costings and bidding work. I am not prepared to accept that explanation as being sufficient to overturn the findings of the Determination.

I turn now to the case law that was submitted by counsel for the employer. Counsel referred to *Gordon Hofer*, BC EST # D538/97 for the proposition that the Tribunal does not necessarily accept an employee's records in each case where there is a conflict with the employer's records. However, the Hoffer case acknowledged that the appropriate test to apply in circumstances where the employer has failed to keep records which comply with Section 28 and the employee has submitted records of hours of work that are contrary to the employer's ascertions is the "best evidence rule". In this case I have stated why I prefer Mr. Garcha's records which were kept daily over the employer's records which were not. Furthermore, in the Hoffer case Mr. Hoffer candidly admitted that the records that he kept of daily logs were not accurate. Counsel for the employer also relied on *Wendy Michnick* B.C.E.S.T. No. D006/02 for the proposition that the director is not bound to accept records of a complainant where the employer's records are deficient or not existent. However, the Michnick case stands for the proposition that the records of a complainant "must withstand scrutiny on their own terms." (at page 6). There could be no presumption of the correctness of a complaint's record simply because the employer failed to keep records. As stated previously I have accepted Mr. Garcha's records on the basis that he kept them daily and reported his hours to the employer on a monthly basis.

Finally, I wish to comment on the evidence offered by Mr. Soni and Mr. Garcha regarding his termination. I recognize that Mr. Garcha has not appealed the finding. The Determination stated that the evidence was inconclusive under Section 83 and therefore the Director's Delegate was not able to determine if the Section had been breached. However, I feel that I owe a comment on this aspect of the evidence in view of the fact that both parties addressed the issue. I am not as convinced as the Director's Delegate that the evidence on the point is inclusive. The timing of the termination, (shortly after the employer learned of the complaint), the fact that the complainant was an apprentice who was working under a journeyman, the fact that the damage appears to be minimal and that no discipline was imposed on the journeyman would tend to make me disagree with the Delegate's conclusion that the evidence is insufficient. However, as stated earlier, that issue is not under appeal.

I return to the issue of onus. The onus is on the appellant to show that the Determination was wrong. I find in this case that the employer's explanations at the hearing are the same explanations that were given to the Director's Delegate. The arguments on appeal, although made through counsel, were the same arguments that were made to the Delegate. Although Mr. Deol ably and thoroughly presented his client's case I find that the employer has not discharged the onus on it to show the Determination is wrong.

ORDER

The Order dated November 13, 2001 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal