

**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 -

West Coast Home & Truss Ltd.  
(" West Coast ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** David B. Stevenson

**FILE No.:** 2000/223 & 2000/277

**DATE OF DECISION:** July 7, 2000

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by West Coast Home & Truss Ltd. (“West Coast”) of a Determination that was issued on March 9, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that West Coast had contravened Part 3, Section 27, Part 4, Section 40 and Part 7, Section 58 of the *Act* in respect of the employment of Jasvir S. Hayer (“Hayer”) and ordered West Coast to cease contravening and to comply with the *Act* and to pay an amount of \$5380.93.

West Coast has also applied under Section 113 of the *Act* for a suspension of the effect of Determination.

In this appeal, West Coast disputes the factual conclusion in the Determination that Hayer was not paid vacation pay for 1999 and was not paid all overtime wages.

### ISSUES TO BE DECIDED

The issue in this case is whether West Coast has shown in its appeal that the Determination wrongly concluded that Hayer was entitled vacation pay for 1999 and to overtime pay in the amount calculated.

### FACTS

The Determination contains the following findings of fact:

The accountant for the business, Mohammed Jakir, confirms that daily time cards were kept, . . .

Attachment B1 to Mr. Jakir’s affidavit is copies of pay statements issued to the complainant for the period from April 1997 to March 1999. The statements have been made available to the complainant for his review.

The pay statements for the 97 to 99 period do not show vacation pay as having been paid.

The statements provided show a number of examples of where overtime is paid in unusual amounts. There are numerous examples of this . . .

A letter to the complainant dated January 6 1998 and was signed by the manager, Paramjit Sandhu, states that the complainant “normally works 95 to 100 hours biweekly”, . . .

The following analysis is found in the Determination under the heading “**Overtime**”:

The employer could not provide daily time records as required by the Act because they “disappeared under mysterious circumstances”. . . .

I have prepared my calculation of overtime owing by using the [Ministry wage calculation] program and the following methodology:

- using the employers record of prevailing rates in effect from time to time.
- using the employer’s record of gross wages paid for the two year period preceding date of termination.
- using a combination of the employer record of biweekly hours and the employee record of daily hours.
- using the ministry’s computer calculation program which compares the \$39,063.85 that was in fact paid against the \$41,425.75 that ought to have been paid leaving unpaid overtime of \$2,361.90 in the two year period preceding termination, . . .

A 35 page printout of the overtime calculation . . . was mailed to the employer on December 16 1999 for review and response on or before December 30 1999. . . .

The accountant for the business responded to the December 16 1999 letter to advise that he was reviewing the matter with his client and would advise soon as to his position.

No response was received by January 28 2000 so a further notice . . . was issued January 28 2000 setting February 1 2000 as a final deadline. To date no response has been given, no payment has been received.

In the appeal, West Coast contends that the “best available information was provided to the Director . . . but no consideration was given to the information provided”. West Coast also implies that its failure to provide the Director with employee time cards was related to a shareholder of West Coast, Mr. Sandhu, leaving the company. The appeal states:

Coincidental with Mr. Sandhu leaving the Company, a great deal of records have also disappeared, including the banking records and employee time cards which were being kept by Mr. Sandhu.

Finally, West Coast says the Director failed to recognize the circumstances of the relationship between Mr. Sandhu and Hayer and has just accepted Hayer’s information as correct.

The reply of the Director to the appeal reiterates that West Coast was sent a 35 page overtime calculation and a summary sheet showing the final calculation of wages and interest. The submission from the Director also notes that, “West Coast seeks by way of this appeal to put before you evidence already considered and rejected by the delegate”. No reply to this submission was filed by West Coast, although they were invited to do so by the Tribunal on May 5, 2000.

## ANALYSIS

An appeal under Section 112 of the *Act* is not simply another opportunity to submit the same material and arguments to the Tribunal as were submitted to the Director and argue for a different result.

In the context of this appeal, the Determination meets the statutory requirements of subsection 81(1) of the *Act*, setting out the reasons for the Determination, the amount to be paid and how that amount was calculated. West Coast has not addressed any of those matters in this appeal.

The main argument made by West Coast is that the Director failed to give any consideration to the information provided by West Coast. The Director was not bound to accept the material provided by West Coast and, in any event, there is no factual basis for that assertion. But even if it were so, the appeal does not show how that affected the correctness of the Determination. At a minimum, West Coast must demonstrate there is some reason why the Director should have relied on the information they provided in deciding whether Hayer was paid vacation pay for 1999 and paid all overtime wages owing. Simply saying the time cards “disappeared under mysterious circumstances” is not sufficient to give greater effect to the information that was provided by West Coast.

The Director has considerable latitude in deciding what information will be received and relied on when reaching a conclusion of fact in the context of an investigation. If West Coast is to successfully challenge that conclusion, the burden on them is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could have been made (see *Mykonos Taverna operating as the Achillion Restaurant*, BC EST #D576/98). There is nothing in the appeal that even remotely suggests the conclusions made by the Director were either unfair or unreasonable.

The Director provided West Coast with a 35 page printout of the overtime calculations and provided them with an opportunity to challenge those calculations and the conclusions implicit in them. No response was ever received, although West Coast was given more than enough time to do so. Presumably, no response was made because they had no basis, beyond what had already been given to the Director, for showing the calculations were wrong. They have done no better here. The appeal is dismissed.

Turning to the application to suspend the effect of the Determination, Section 113 of the *Act* allows the Tribunal, in appropriate circumstances, to suspend the effect of a Determination. Subsection 2 provides:

- (2) *The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either*
  - (a) *the total amount, if any, required to be paid under the determination, or*
  - (b) *a smaller amount that the tribunal considers adequate in the circumstances of the appeal.*

The application by West Coast cites two reasons for seeking a suspension. First, it notes the fact of an appeal and outlines its position on the appeal. Second, it states:

. . . the company is in financial constrain [sic] and collecting these funds will affect the daily business of the company.

A key factor in deciding whether to allow an application is a preliminary assessment of the merits of the appeal. I have found this appeal to be without merit. Nor do I accept that financial hardship is the sort of prejudice that is sufficient to justify an order under Section 113 of the *Act*. I agree with the comments of the Tribunal in *Tricom Services Inc.*, BC EST #D420/97, that:

. . . it is important to note that the legislature has provided, as a first proposition, that a suspension should only be ordered if the "total amount" of the determination is posted; a "smaller amount" should only be ordered if such lesser amount would be "adequate in the circumstances of the appeal". In my opinion, the "adequacy" of any proposed deposit must be evaluated not only from the perspective of the employer, but also from the perspective of any employees whose rights might be affected by a suspension order.

The application is denied.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated March 9, 2000 be confirmed in the amount of \$5380.93, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**