

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-

S & A Enterprises (1994) Inc.

("S & A")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/217

DATE OF HEARING: June 19th, 1997

DATE OF DECISION: June 30th, 1997

DECISION

APPEARANCES

Bruce C.E. Russell for S & A Enterprises (1994) Inc.

Asdullah Omar-Ali on his own behalf

OVERVIEW

This is an appeal brought by S & A Enterprises (1994) Inc. (“S & A” or the “Employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on March 10th, 1997 under file number 011-495. S & A operates two motor vehicle service stations, both located in Burnaby, B.C., under the “Mohawk” trade name. The two stations operate under the firm names, “Cascades Mohawk” and “Holdom Mohawk”, respectively. The respondent employee, Asdullah Omar-Ali (“Omar-Ali”), worked at both service stations as an attendant.

The Director determined that S & A owed its former employees, Ms. Kimberley J. Nelson and Mr. Omar-Ali, certain monies under the *Act*. The present appeal deals with Mr. Omar-Ali’s claim. The Director found that S & A owed Omar-Ali wages on account of unpaid overtime, statutory holiday pay and further overtime pay owed by reason section 36 of the *Act*. The Employer does not deny that Omar-Ali worked the hours in question; rather, the Employer says that such hours were worked pursuant to a separate and independent contract of employment.

The appeal was heard at the Tribunal’s offices in Vancouver, B.C. on June 19th, 1997 at which time I heard submissions from the employer’s legal counsel, and a very brief submission from Mr. Omar-Ali. The Director did not appear at the appeal hearing.

FACTS

In essence, the Employer’s position may be summarized as follows. Due to the volume of work at the two service stations, the employer was planning to hire a new employee, most likely on a part-time basis. The Employer did not intend to offer the additional hours to Omar-Ali, or any other current employee, as it wished to avoid having to pay overtime rates. According to the Employer, Omar-Ali, who wished to increase his earnings, approached the employer and proposed to work the additional hours on a “straight-time” basis (*i.e.*, at his regular hourly rate). According to the employer, Omar-Ali:

“...agreed there was a separate employment agreement over and outside of Mr. Ali’s usual employment arrangement. Mr. Ali expressly agreed this work was not part of his regular employment nor was it overtime. Mr. Ali was not required to do the work and his attendance or performance was wholly voluntary and separate from his employment agreement on different terms. In other words, Mr. Ali, at his request took the place of a second part-time employee.” (see Employer’s Notice of Appeal, dated and filed April 2nd, 1997)

ANALYSIS

Although Mr. Omar-Ali says that he did not voluntarily agree to work extra hours at “straight-time” rates, I find that I need not draw any firm conclusion on this particular factual issue. Even taking the Employer’s position at face value (that is, assuming Omar-Ali agreed to work the extra hours on a “straight-time” basis), I must nonetheless conclude that the employer’s appeal cannot succeed.

Section 4 of the *Act* prohibits any “contracting out” by a non-unionized employee from the minimum terms and conditions of employment set out in the *Act*. In the case under appeal, the Employer has simply sought to do the very thing that section 4 proscribes. I cannot accept the Employer’s submission that an employer and an employee can create two separate contracts of employment within a single employment relationship, both of which contracts must be separately analyzed for purposes of the *Act*.

While undertaking services on behalf of S & A, Omar-Ali was at all times engaged in “work” in exchange for “wages” on behalf of a named “employer” as these three terms are defined in section 1 of the *Act*. As such, he was entitled to be paid in accordance with the provisions of the *Act*, including the provisions relating to overtime pay and statutory holidays.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated March 10th, 1997 and filed under number 011-495, be confirmed with respect to Omar-Ali as issued in the amount of \$2,526.68 together with interest to be calculated in accordance with section 88 of the *Act*.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal