

An appeal

- by -

AIA Software Consulting Ltd. operating as Solar Plus
("Solar Plus")

- 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: James Wolfgang

FILE No.: 2002/067

DATE OF HEARING: May 30, 2002

DATE OF DECISION: June 25, 2002

DECISION

APPEARANCES:

Gary Giles	on behalf of Solar Plus
David Wilson	on his own behalf
Beth Lyle	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by AIA Software Consulting Ltd. operating as Solar Plus (“Solar Plus”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued by the Director of Employment Standards (the “Director”) dated January 31, 2002. The Determination found Solar Plus had violated Sections 18(3), 28, 57, 58(3), 59(1), 62 and 63(2) of the *Act* and owed David Wilson (“Wilson”) \$1,981.75 for vacation pay, compensation for length of service and interest. I believe the reference is to 18(2) as there is no 18(3) in the *Act*.

There was no penalty assessed by the Branch.

Gary Giles (“Giles”), the owner of Solar Plus, appealed the Determination in a letter received by the Employment Standards Tribunal (the “Tribunal”) February 18, 2002. He claims the amount of money in the Determination should be “setoff”(sic) by the amount of money paid to Wilson as wages during times Wilson was away from work for a variety of reasons and continued to receive full pay.

A hearing was held in Duncan on May 30, 2002 and evidence was taken from the parties. During the appeal by Solar Plus the question of overtime worked by Wilson was raised.

An attempt to mediate the dispute was rejected by Giles.

ISSUE

Does Solar Plus owe Wilson money for vacation pay and compensation for length of service? Also, is any money owed Wilson for overtime worked?

THE FACTS AND ARGUMENT

Solar Plus primarily supplied alternative energy systems to customers. Wilson was employed as a fabricator from May 15, 2000 until August 10, 2001. Approximately 90% of the work performed by Wilson was done in the shop prefabricating installations for customers.

Solar Plus claims Wilson’s rate was \$12.00 per hour for a 35-hour workweek. Wilson contends he was only paid \$11.20 per hour as he worked a 37.5-hour week instead of the 35-hour week and his weekly pay was \$420.00.

At some point during the course of Wilson's employment, Solar Plus applied for and received a Federal Government wage subsidy. It is my understanding the Federal program paid Solar Plus 60% of Wilson's wages based on the \$12.00 per hour, 35-hour workweek scenario.

Solar Plus claims they had an agreement with Wilson covering vacation pay and overtime. They contend Wilson requested he not be paid vacation pay or overtime and that money be used to cover the time he was absent from work to ensure a regular paycheque.

Giles claims he had comprehensive records on his computer indicating Wilson took considerable time off work and his pay was not reduced. Solar Plus has prepared two summaries of time taken off by Wilson. The first, covering time off for general reasons, indicates Wilson took 197.75 hours off work while continuing to receive full pay. The second appears to cover leave for sickness or doctor's appointments and totals 144.25 hours off work for which Wilson was paid. This totals 342 hours off work with pay. Solar Plus, in their letter to the Tribunal dated March 27, 2002, state Wilson was issued a monthly statement showing the number of hours for which he was paid but had not worked.

According to the Determination, Giles also gave Wilson 75 hours of vacation during the first year of his employment.

Solar Plus became concerned with the amount of time Wilson was taking off and wrote him a letter dated January 26, 2001 indicating:

I am becoming increasingly concerned with the amount of time which you have taken off for various reasons, I realize some of the days you have taken off are out of your control, however our arrangement to use this banked time against projected overtime may not cover the hours which you have been paid for. Unfortunately it may become necessary to reduce your weekly pay to cover the deficit.

On August 10, 2001, Wilson was given a temporary layoff and was not recalled.

Giles acknowledges that when Wilson's employment was terminated the employer was obligated to pay severance and vacation pay. However Solar Plus seeks a "setoff" from the amount of wages "advanced" to Wilson.

Wilson contends the first discussion regarding vacation pay was after approximately one month of employment. At that time Giles stated he did not pay vacation pay. Giles said if he wanted vacation pay he would deduct 4% from his pay and give it to him at the end of the year. When Wilson said that was illegal Giles said "Tuff"(sic). Wilson denies there was any discussion or agreement with Solar Plus regarding banking overtime. He further denies he was away from work the amount of time indicated by Giles.

Wilson denies he took any time off for his wedding or for a honeymoon. He claims he did not take any vacation in the time he was employed He also contends the amount of time he was absent for court appearances is greatly exaggerated. He states he missed about three hours from work to attend court, not the 41.5 hours reported by Solar Plus. He submitted court records to confirm the dates he attended court.

Wilson does admit there were times Giles would close the business early when it was slow and tell him to go home. There was also a Christmas shutdown. Wilson claims he was told this was a practise at Solar

Plus and he would be paid for the time. The summary provided by Solar Plus indicates Wilson was off work on December 27, 28 and 29, 2000 on “Paid Time Off – Christmas”.

Wilson denies Giles gave him the warning letter of January 26, 2001. He claims the first time he saw the letter was when he received a copy of the appeal by Solar Plus to the Tribunal.

ANALYSIS

Whether the employment relationship with Wilson as proposed by Solar Plus is true or not the Act provides minimum benefits and rights and an employer and an employee cannot agree to lesser conditions.

There is no provision in the Act to allow “setoffs” for money paid to employees when they may not have worked the time. Solar Plus is seeking such a “setoff” against Wilson’s vacation pay and compensation in lieu of notice.

Section 58 of the Act only provides two methods for handling vacation pay. The first is to accumulate the proper percentage of an employee’s total wages and pay that out in accordance with Section 58(2)(a):

Vacation pay must be paid to an employee

- (a) at least 7 days before the beginning of the employee’s annual vacation, or pay it out in accordance with Section 58(2) (b):
- (b) on the employee’s scheduled pay days, if agreed by the employer and the employee.....

There is no provision to use that entitlement to recover monies that may have been paid for work not performed.

Giles claims he issued monthly statements to Wilson indicating the number of hours paid but not worked. No copies of those statements were provided to the Tribunal. If Giles kept such specific records I would think they should still be available. Instead Giles submitted what would appear to be a summary of time allegedly taken off by Wilson indicating the date, the number of hours taken off in ¼ hour increments and the reason for the time off. They are not shown as being prepared monthly.

Giles has made no reference to monthly statements being issued to Wilson indicating the amount of overtime or vacation pay earned to match up with the number of hours in which he was absent and received pay.

I have some difficulty with the information supplied by Solar Plus. All of the written material supplied to the Tribunal and Giles’ evidence at the hearing claim Wilson worked a 35-hour week and was paid \$12.00 per hour. In the summary supplied to the Tribunal indicating the amount of time Wilson was absent from work Giles shows 7.5 hours, not 7 hours, for each full day Wilson was absent. Also in his evidence to the delegate Giles indicates Wilson was given 75 hours of vacation in the first year. If true, that appears to indicate Wilson took two weeks of vacation at 37.5 hours per week. Wilson claimed he worked 37.5 hours per week however was only paid for 35. He therefore claims he was being paid \$11.20 per hour, not the \$12.00 claimed by Solar Plus. I believe the Federal subsidy that was paid Solar Plus for the one year commencing August 1, 2000 was based on a 35 hour week at \$12.00 per hour. The Federal plan paid 60% of the wages therefore they paid \$7.20 per hour. If, as Wilson claims, his actual rate was

\$11.20 because he worked 37.5 hours Solar Plus was only paying \$4.00 per hour instead of the \$4.80 they would have paid for a 35-hour week. That adds credibility to Wilson's version of his employment by Solar Plus.

It was common ground the workday started at 08:30 and ended at 16:00. It was also agreed the weekly rate was \$420.00. The difference being Solar Plus claim there was a ½ hour unpaid lunch break and Wilson claims they did not take a lunch break and ate while they continued to work. This is a significant point as the argument of the 35 hour week and the 37.5 hour week turns on whether there was an unpaid break or not. If Solar Plus is correct the \$12.00 per hour is the proper rate as the weekly rate was \$420.00. If Wilson is correct the \$420.00 per week divided by 37.5 equals \$11.20 per hour. All the representations by Solar Plus and the calculations of the Branch are based on a \$12.00 per hour basis. The evidence of Solar Plus weighs heavily in favour of a 7.5-hour day. It was Solar Plus' submission to the Tribunal the hours missed by Wilson when he was absent a full day were 7.5. This could not have been an error as the 7.5 hours are used 35 times when showing Wilson was absent. Either Wilson is being penalized an extra half hour for missing days or the actual work day as reported by Solar Plus is 7.5.

As Solar Plus claim they paid Wilson \$12.00 per hour he therefore should have been receiving \$450.00 per week rather than the \$420.00 he was paid. That amounts to approximately \$1,920.00 and that should more than pay Solar Plus for the paid time taken off by Wilson.

The delegate found no indication of vacation being taken by Wilson from the records of Solar Plus. There is also no evidence in the payroll records provided of overtime being paid.

Wilson denies ever receiving the warning letter dated January 26, 2001 and there is no indication on the letter showing he received it. The delegate also noted that letter was never supplied to the Branch during the investigation. As a result, little weight can be given to that evidence.

Solar Plus may have been concerned with Wilson being absent from work so frequently if their records are correct. In January, according to the material supplied by Solar Plus, Wilson missed a total of 54.5 hours during the month. That indicates an absence rate of 36% based on hours worked or 13 days out of a total of 22 when he was late, absent or left early which, if correct, should cause concern from an employer. The difficulty being there are no time sheets or other records indicating the actual hours worked.

Solar Plus has supplied a list of overtime they claim Wilson worked during 2001. It indicates a total of 78.125 hours between March 2, 2001 and April 9, 2001 calculated at the applicable overtime rate. I found what appear to be 2 errors in the amount calculated for March 3 and March 4. While it is possible, it would appear to be unusual for overtime to only be worked in a 5-week period during the 15 months Wilson was employed.

Section 42(1) of the *Act* requires a written request from an employee before an employer can establish a time bank for overtime. We have no evidence to indicate Wilson ever made such a request and therefore Solar Plus was without authority to withhold the payment of overtime to Wilson. The question of the overtime payable to Wilson is referred back to the Director to determine the proper amount owing.

Wilson was put on temporary layoff on August 10, 2001 and was not recalled. In accordance with Section 63 (5) his termination date is August 10, 2001. There is no provision in Section 63 of the *Act* for an employer to "setoff" money that may have been paid to an employee when no work was performed

against the liability for compensation for length of service. Under Section 63 Wilson is entitled to two weeks pay as compensation for length of service.

ORDER

In accordance with Section 115 of the *Act* I amend the Determination by the Director dated January 31, 2002. The compensation for length of service is confirmed however the vacation pay entitlement will vary depending on the outcome of the overtime calculation. As indicated above, the Determination is referred back to the Director to calculate the amount of overtime owed to Wilson. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal