Employment Standards TRIBUNAL

An appeal

- by -

Planet Earth Operating Services Inc.
(the “Employer” or “Planet Earth”)

- 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: Ib S. Petersen

FILE No.: 2002/169

DATE OF DECISION: July 10, 2002

DECISION

SUBMISSIONS:

Ms. T. Morin	on behalf of the Employer
Mr. Ramon Pinto	on behalf of himself
Ms. Stacy Robertson	on behalf of herself
Ms. Stephanie Newman	on behalf of the Director

OVERVIEW

This an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director issued on March 5, 2002. The Determination concluded that Mr. Pinto and Ms. Robertson were owed a total of $855.53 by the Employer on account of overtime wages. Mr. Pinto was owed $89.70 and Ms. Robertson $765.83.

Mr. Pinto was employed between June 8, 2001 and June 22, 2001 in the accounting department at the salary of $3,200 per month. Ms. Robertson was employed in the same department from January 24, 2001 to June 20, 2001, initially at a salary of $2,800--and from April 30, at a salary of $2,900.

FACTS AND ANALYSIS

The Employer appeals the Determination. The Employer, as the appellant, has the burden to persuade me that it is wrong. I am of the view that the Employer has failed to meet that burden.

Before the Delegate, the Employer took the position that both employees' hours of work was from 7:30 a.m. to 5:00 p.m. with one hour off for lunch and that they did not work overtime. No overtime had been approved, and the salary paid was intended to cover all hours worked. The Employer did not keep records of hours worked.

The employees both stated to the Delegate that they worked hours in excess of 8 in a day and that their lunch breaks were not one hour but only one half hour. Mr. Pinto provided records of hours worked to the Delegate, Ms. Robertson did not.

Based on the information before her, including interviews with the Employer's senior staff, the Delegate accepted the evidence of the employees. She found that they had only one half hour for lunch and worked in excess of eight hours per day. 7:30 to 5:00 equals 8 1/2 hours, even if the employee took one hour for lunch. The Delegate noted, among others, that the Employer did not keep records of daily hours, that the Employer stated that the employees were paid a salary for all hours worked, and that if the Employer's statement as to start and finish times were taken at face value, the employees clearly worked overtime.

In the appeal on the merits, the Employer largely reiterates its position before the Delegate. The Employer also says that the Delegate failed to allow it an opportunity to supply additional information

and was "one-sided" in favour of the employees. The Employer alleges that the delegate "entered [its] office with great hostility." Other than the Appellant "grasping at straws," seeking to discredit the Delegate, it is not clear to me what this means. I reject the suggestion that there was any breach of principles of natural justice in that respect. However, the suggestion that the Delegate denied the Employer a final opportunity to respond is clearly disingenuous. In fact, the Delegate wrote to the Employer before issuing her Determination stating that she would issue the Determination based on the information available unless the Employer provided further information. There was no response to this.

It is clear that the Employer disagrees with the Determination--that, however, is not, *per se*, grounds for appeal. The Employer's disagreement does not support an allegation of bias, either. Considering all of the material on file, I am of the view that the Employer has not discharged the burden on the appeal.

In the appeal, the Employer acknowledges that the hours of work was 7:30 a.m. (changed to 8:00 a.m.) to 5:00 p.m. There is nothing to indicate when this change occurred and I place no weight on this information. In other words, as noted by the Delegate, even if the Employer's version of the facts is accepted, the Employees worked overtime. The Employer did not keep records of hours worked. In one of its letters to the Delegate the employer the time records submitted by one of the employees did not indicate work, mere "who is here and who isn't." A memorandum attached to the submission of Ms. Robertson, specifically instructs salaried personnel not to submit time sheets indicating hours worked because they are paid a salary. As well, the employees, it would appear, were specifically instructed to stay until their work had been completed.

The Employer now claims that Mr. Pinto (as manager) was responsible for monitoring his own breaks and took smoke breaks (which should be taken into account). There is nothing to support that he was a manager under the *Act*. According to the Employer, Ms. Robertson also took smoke breaks which ought to be taken into account. I place no weight on these alleged smoke breaks. There are no particulars to indicate whether or not these breaks were based on the respective employment contract of the employees, nor are there any details as to times and dates. I reject this argument.

The employer also claims to be entitled to deduct for medical appointments during working hours for which no deduction was made at the time and, in Mr. Pinto's case, for half the day on the day he was terminated. I do not agree that the Employer should be given credit for this. It appear that the medical appointments were done with approval at the time. In my view, the Employer cannot retroactively change the terms of the respective employment contracts. Even if I accept the factual basis for the Employer's assertion that Mr. Pinto only worked half a day on the day he was terminated, and he disagrees with that, I do not see any reason to take this amount paid for that half day into account. There is nothing before me to show that this payment was made in error. The Employer paid the amount, and it ought not to be allowed to retroactively re-characterize this amount.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated March 5, 2001, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal