

An appeal

- by -

Athwal Transport Co. Ltd.

- 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: Norma Edelman

FILE No.: 2002/244

DATE OF DECISION: July 10, 2002

DECISION

OVERVIEW

This is an appeal by Athwal Transport Co. Ltd. ("Athwal") under Section 112 of the Employment Standards Act (the "Act") against a Determination, which was issued on April 16, 2002 by a delegate of the Director of Employment Standards. The Determination found that Athwal owed Chandra Prakash ("Prakash") \$2227.74, including interest, on account of overtime, vacation and statutory holiday pay, and compensation for length of service. Athwal appealed the Determination on May 2, 2002 respecting the award for overtime and compensation for length of service. This decision has been made based on the written submissions of the parties.

ISSUE TO BE DECIDED

Has Athwal shown that the Determination is incorrect with respect to the award for overtime and compensation for length of service?

FACTS AND ANALYSIS

Prakash worked for Athwal from approximately June 15, 2001 to October 3, 2001.

Prakash filed a complaint at the Employment Standards Branch claiming that Athwal owed him overtime, statutory holiday pay, vacation pay and compensation for length of service.

The delegate found that Athwal owed Prakash \$2227.74 including interest, on account of overtime, statutory holiday pay, vacation pay and compensation for length of service. The delegate stated that Athwal agreed it did not pay statutory holiday pay or vacation pay and the payroll evidence before her showed that Prakash was never paid overtime rates of pay. As well, Athwal agreed that Prakash worked some overtime. The delegate further accepted that Prakash was laid off work and was never recalled back to work and therefore he was owed compensation for length of service.

Athwal appealed the Determination on May 2, 2002. Its appeal in whole reads as follows:

Mr. Chandra Prakash was hired as a helper to the mechanic. He was paid \$8.00 per hour. As he learned more his hourly rate went up to \$13.00 per hour. He was told in the beginning of his employment that there is no overtime in my company because company only has 5 employees and we are small business. He agreed and continued working. He was laid off because of shortage of work.

I only willing to pay 4% Holiday Pay and Statutory Holiday which is about \$500.00 and I am gladly willing to pay.

(reproduced as written)

The delegate and Prakash were invited to reply to the appeal. Prakash replied that he agreed with the delegate's findings in the Determination. In her reply, the delegate said that in its appeal Athwal confirmed it owed vacation pay and statutory holiday pay and that it does not pay overtime. She said

Athwal also confirmed Prakash was laid off due to shortage of work and it did not dispute her comments in the Determination regarding if or when Prakash was recalled. She enclosed a copy of Prakash's Record of Employment, which shows, she says, that he was given a temporary layoff. She said there is no evidence he was recalled back to work before the expiration of 13 weeks of layoff. She further stated that even if Prakash agreed to not being paid overtime, as claimed by Athwal, the agreement is null and void as per Section 4 of the Act.

Athwal was given an opportunity to make a final reply to the submissions of the delegate and Prakash. No reply was received.

The burden is on the Appellant to show that a Determination should be cancelled, varied or referred back for further investigation. In this case I am not satisfied that Athwal has met that burden.

It is not entirely clear whether Athwal, in its appeal, is saying that Prakash did not work overtime, or that he did work overtime, but agreed not to be paid overtime rates for the work. In any event, in either case, Athwal has not shown the delegate erred when she concluded that Prakash is owed overtime pay.

Athwal has provided no evidence to support a claim that Prakash did not work overtime. In the Determination, the delegate said Athwal admitted Prakash worked some overtime and she based her calculations on Prakash's timesheets and paystubs as Athwal never provided any records. In its appeal, Athwal does not dispute these claims and it still has not provided any records, such as records pertaining to daily hours of work, to challenge the delegate's overtime calculations. Further, as correctly pointed out by the delegate, if Prakash agreed to work overtime hours without being paid overtime rates of pay, this agreement is prohibited by Section 4 of the Act. Section 4 provides that the requirements of the Act, including the requirement to pay overtime, are minimum requirements and an agreement to waive any of these requirements are of no effect, except for Sections 43, 49, 61 and 69, which are not applicable in this case. In other words, Prakash cannot waive his statutory entitlement to be paid overtime pay. For these reasons, I find Prakash is owed the overtime pay as calculated by the delegate.

I further find that Athwal has not shown the delegate erred when she awarded Prakash compensation for length of service. In its appeal, Athwal does not challenge the delegate's conclusion regarding compensation for length of service. Specifically, Athwal does not dispute that Prakash was never recalled back to work within 13 weeks of his layoff. Accordingly, pursuant to Sections 1 and 63(5) of the Act, Prakash's employment was terminated at the end of the layoff. Therefore, in the absence of any evidence that Prakash received written notice or pay in lieu of notice, he is entitled to one weeks compensation for length of service as found by the delegate.

ORDER

I order under Section 115 of the Act that the Determination be confirmed.

Norma Edelman
Vice-Chair
Employment Standards Tribunal