

An appeal

- by -

Malcolm K. Swallow

- 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.: 2002/256

DATE OF DECISION: July 10, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") by Malcolm Swallow ("Swallow") from a Determination issued by a delegate of the Director of Employment Standards on April 19, 2002. The delegate found that Total Care Technologies Inc. and Total Care Holdings Inc. ("Total Care") owed compensation for length of service in the amount of \$ 114,351.80 to several former employees, including Swallow. Swallow appealed the Determination claiming he was owed more compensation than the amount calculated by the delegate.

ISSUE TO BE DECIDED

Is Swallow entitled to more wages than the amount set out in the Determination?

FACTS AND ANALYSIS

In the Determination the delegate said:

The companies ceased operating in August of 2001. On August 22, 2001 Arthur Andersen Inc., Trustee was appointed Receiver Manager to a voluntary assignment into bankruptcy of Total Care Technologies Inc. and Total Care Holdings Inc.

...

There is no dispute that thirty-one (31) employees were terminated as a result of the assignment into bankruptcy on August 22, 2001. The parties agree that the employer did not provide the appropriate written notice of termination to discharge the liability for compensation for length of service outlined in Section 63 of the Act, nor has the employer paid the appropriate compensation for length of service. Accordingly, I have determined that the employer failed to comply with Section 63 of the Act.

The delegate determined that Total Care owed the 31 former employees a total of \$114,351.80 in wages. With regard to Swallow, the delegate found he was owed 1 week's wages as compensation for length of service or \$1300.00, including vacation pay but not interest.

Swallow appealed the Determination on the ground he was owed twice the amount of compensation for length of service. He said his start date with Total Care was October 26, 1998 and not October 26, 2000 as found by the delegate. Accordingly he was owed 2 week's wages as compensation or \$2600.00. He enclosed a copy of his Record of Employment to support his position regarding his start date.

The other parties were invited to reply to Swallow's appeal. Only the delegate replied and she said it appears Swallow's start date was incorrectly stated in the Determination and she does not oppose Swallow's request to award him two week's wages as compensation for length of service. She said that based on two week's wages, the Determination should be varied to show Swallow is owed \$2682.67, inclusive of vacation pay and interest, which increases the total of the Determination to \$115,693.14.

The delegate's submission was forwarded to Swallow and the other parties for their reply. The Tribunal received no replies.

In an appeal the burden is on the Appellant to show that a Determination should be varied or cancelled. In this case, I am satisfied that Swallow has met the burden to show the Determination should be varied.

Swallows claims he started work on October 26, 1998 and therefore he is owed two week's wages as compensation for length of service. He provided a copy of his Record of Employment with shows October 26, 1998 as his start date, with July 13, 2001 as his end date. The delegate does not oppose Swallow's claim for two week's wages. The other parties have not responded to the appeal. Accordingly, I can find no basis to reject Swallow's claim nor can I find any basis to reject the delegate's revised calculations. I conclude that the Determination should be varied in the amounts outlined by the delegate in her reply to the appeal.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination be varied to show that Swallow is owed \$2682.67 and further that it be varied to show the total amount owed by Total Care is \$115,693.14, plus any other interest that has accumulated under Section 88 of the Act.

Norma Edelman
Vice-Chair
Employment Standards Tribunal