

**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 -

Ernesto Sousa  
(“Sousa”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Paul E. Love

**FILE No.:** 2000/242

**DATE OF DECISION:** August 8, 2000

**DECISION**

**APPEARANCES:**

Ernesto Sousa

Victor Botari, for Maple Ridge Family Education Centre

**OVERVIEW**

This is an appeal by Ernesto Sousa (“Sousa” or the “employee”) of a Determination, dated March 10, 2000, relating to overtime pay, statutory holidays, vacation pay, and a 25% top up of Workers Compensation Board (“WCB”) benefits to meet the employee’s full salary while on a workers compensation claim. In the Determination, the Delegate preferred the records of the employer, over the position advanced by the employee with regard to overtime pay, statutory holiday pay and vacation pay. The Delegate found that there was no agreement between the employer and the employee to “top up” the WCB rate, and that the “top up” would be contrary to WCB policy.

**ISSUE TO BE DECIDED**

Did the Delegate err in finding that Mr. Sousa was paid fully for all hours of work including overtime, statutory holidays and vacation pay?

Did the Delegate err in finding that Mr. Sousa was not entitled to a “top up” of WCB benefits by the employer?

**FACTS**

Mr. Sousa was employed by the Maple Ridge Family Education Centre as a project coordinator between December 1, 1998 and April 6, 1999. Mr. Sousa resigned from his position by letter on or about March 18, 1999, but his final day was April 6, 1999. On February 17, 1999 Mr. Sousa was injured at work. Mr. Sousa was involved in coordinating the fathering project. Mr. Sousa claims overtime wages, statutory holiday pay and vacation pay. Mr. Sousa also alleges that the employer did not top up his salary by 25 % when he was on WCB benefits.

Mr. Sousa claimed 30 hours of overtime for the period December 1, 1998 to February 20, 1999. He has provided written materials in his appeal submission where he states that Ms. Munro agreed to 30 hours of overtime in a meeting on February 15<sup>th</sup> or 16<sup>th</sup>. Ms. Munro did not give evidence in these proceedings.

In his appeal notice Mr. Sousa seeks:

- (a) compensation of bank time in the amount of \$495.00

- (b) reimbursement of unauthorized deductions of \$278.00;
- (c) statutory holiday and bank time for April 2, 1997 of 173.25;
- (d) holiday pay of \$261.14
- (e) a top up of 25 % of his wages from the 75 % paid by WCB during his disability period

From all the material before me, it appears that Mr. Sousa, since the appeal was filed was reimbursed for the unauthorized deductions. There is a note signed by him that he received the sum of \$280.00 on April 3, 2000.

The Delegate found, as a result of an investigation that Mr. Sousa was not entitled to more than 75 % of his salary when he was on WCB benefits. Mr. Sousa worked some hours for the employer while on WCB benefits, and the WCB has billed the employer for those hours.

**Overtime:**

Mr. Sousa submitted a number of time sheets of all his hours worked, however, none of the time sheets were signed for approval by the employer. Mr. Sousa says that he was obliged to work extra time on evenings when he was facilitating meetings related to the father's project. This was largely for clean up, and emergency counselling after the meetings. Mr. Sousa was the only person with a key, and could not leave until all the participants left. Mr. Sousa also claims overtime with respect to a garage sale on February 7, 1999. Mr. Sousa says that the overtime was permitted or approved by the employer. It is unclear to me whether Mr. Sousa's participation in the garage sale was in the nature of work, or whether he volunteered to assist his group in the raising of money. It is apparent from the material before me that Mr. Sousa was dedicated to the group, and worked well with the group.

The written contract of employment between the parties provides as follows:

Your workweek will be 35 hours. It is expected that you will complete your assigned duties within your regular work schedule. All overtime must be approved in writing by the Executive Director and will be compensated by equal time off. Your regular hours of work are 9:00 - 4:00 pm, Monday to Friday. Changes to this schedule must be approved by the Executive Director.

I note that in answer to questions by the employer's representative, Mr. Sousa indicated that he was unaware of the employer's standard policy that overtime had to be approved in advance of working overtime. This policy is clearly stated in his contract of employment, and I reject his evidence that he was unaware that overtime required advance approval.

**Holiday Pay and Statutory Holiday Pay:**

Mr. Sousa did not file any material to show any error with regard to holiday pay and statutory holiday pay. He did file pay stubs, but he did not show how the pay stubs supported his allegation that the Delegate erred.

## ANALYSIS

The burden is on the employee, in this case, to establish an error such that I should vary or cancel the Determination.

The Delegate noted that "... he accepted the records provided by the employer as true records of the employment relation between the Complainant and the Employer" and that the records were reliable and accurate. I note that generally at this hearing there was little documentary support for any of the positions advanced by Mr. Sousa. He did not elaborate fully on the nature of the claims which he raised in his notice of appeal. Given that there is a conflict between his oral evidence and the documentary evidence on advance approval of overtime, this raises some doubt in my mind with regard to the claims advanced by him, particularly when he advances claims which are unsupported by documentary evidence. At the end of the day, I am left in a "haze" with regard to the errors alleged by Mr. Sousa, with little evidence to bring clarity to his argument.

### **Overtime:**

There is no support in either the written material or oral evidence before me that the employer approved of overtime in advance of any overtime worked by Mr. Sousa. I note that the contract between the parties provides that the duties are to be performed within regular working hours. With regard to group meetings, Mr. Sousa had control over the meeting, and could stop the meeting in time to facilitate clean up, or alternatively schedule persons who required counselling to a time within his regular working hours. Mr. Sousa did not submit his time sheets on a regular basis, and was given considerable latitude in how he was to perform his job. The Delegate found that the employer was never given an opportunity to approve any overtime worked in advance, as the time sheets were not submitted by Mr. Sousa on time. In his opening statement Mr. Sousa says that at a meeting between himself and Carol Munro, the executive director, Ms. Munro agreed to pay overtime, and as a result he volunteered to stay on after he had given his resignation. He did not provide any evidence in support of this proposition during the evidence portion of the hearing. In my view the Delegate did not err in determining that Mr. Sousa was not entitled to overtime pay.

### **A Top Up of the WCB Rate:**

Mr. Sousa says that he was entitled to 100 % of wages. He says that he spoke to the executive director, Carol Munro, and she agreed to "top up" the wage. The Delegate noted that this was disputed by the employer. Ms. Munro was not called by the employer to give evidence. There is no evidence which supports that the employer agreed to top up the wages. Given the WCB policy in this matter, that an employee is only entitled to 75 % of his wages while on WCB, it would seem improbable that an employer would agree to a top up. Employers pay premiums to fund WCB benefits, and Mr. Sousa's view that his employer agreed to top up wages appears improbable. I am not persuaded that the Delegate erred in the assessment of the top up of wages.

### **Vacation Pay:**

There is insufficient documentary evidence before me to determine if the Delegate erred with

regard to vacation pay. Given that the burden is on Mr. Sousa to establish error, I am not persuaded the Delegate erred with regard to vacation pay.

**ORDER**

Pursuant to section 115 of the *Act*, I confirm the Determination dated March 10, 2000.

---

**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**