An appeal

\- by -

Darrel Innes
(“Innes”)

\- 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:	David B. Stevenson
FILE No.:	2003A/243
DATE OF DECISION:	November 17, 2003

DECISION

SUBMISSIONS

Darrell Innes	on behalf of himself
John Drew	on behalf of Forsite Consultants Ltd.
Ken MacLean	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Darrell Innes ("Innes") of a Determination that was issued on august 1, 2003 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Innes was owed wages by his former employer, Forsite Consultants Ltd. ("Forsite") and ordered Forsite to pay Innes an amount of $1,812.43.

Innes contends the Director made several errors which resulted in the Director concluding he was entitled to considerably less than what he claimed was owed by Forsite. He asks that the Tribunal vary the Determination to reflect the amount he has claimed.

The Tribunal has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue in this appeal is whether Innes has shown any error in the Determination that justifies the intervention of the Tribunal to vary it.

THE FACTS

Innes filed a complaint with the Director on, or about, September 19, 2001 alleging Forsite had contravened the *Act* by failing to pay regular wages, overtime, minimum daily wage, compensation for length of service and annual vacation pay on the unpaid amounts. The Director noted the claim period was July 6, 1999 to July 5, 2001. The claim for length of service compensation was settled during the complaint investigation process.

Innes was employed by Forsite from September 23, 1996 to July 5, 2001 as a Research Analyst. The Director found Innes was employed under terms which required him to work "an expected 90 hours in a two week period".

Innes was paid at the rate of $18.25 an hour from June 3, 1999 to May 8, 2000 and thereafter, until the end of his employment, at the rate of $1950.00 bi-weekly. When Innes' wage was changed from an hourly rate to a bi-weekly amount, he and Forsite signed an employment agreement. The employment agreement did not specify the number of hours Innes was expected to work for the bi-weekly wage. If Innes worked less than 90 hours in a two week period, he was paid only for the hours worked; his wages

for that period would be pro-rated based on the number of hours worked (*x*) relative to 90 hours multiplied by the bi-weekly wage (*x*/90 x $1950.00). Based on the evidence, the Director made the following finding:

> . . . the employer clearly expected a return of 90 hours work for the payment of $1950.00 bi-weekly, a condition of employment the complainant had been working under since his date of hire in 1996.

Forsite submitted an hourly wage rate for Innes that incorporated overtime rates of pay. Innes took the position that his hourly wage rate should be based on his bi-weekly wage, $1950.00, divided by 80 hours. The Director did not accept the position of either party.

In respect of the position taken by Forsite, the Director found that the formula for converting a weekly wage into an hourly wage, which is set out in the definition of "regular wage" in Section 1 of the *Act*, did not allow Forsite to incorporate overtime rates of pay into the bi-weekly wage rate. The relevant part of that definition states:

> *"regular wage" means*
>
> *(c) if an employee is paid a weekly wage, the weekly wage divided by the lesser of the employees' normal or average hours of work, . . .*

In respect of the position taken by Innes, the Director found that the *Act* does not put a ceiling on the amount of hours which can be included in a remuneration package, subject to health and safety concerns, and the parties in this case had established a remuneration package that provided a bi-weekly wage based on 90 hours work in that period. The Director provided the following reasons for not accepting Innes' position:

> . . . I would have to ignore the payroll evidence as well as that provided by the complainant that the complainant's wages were paid on a prorated basis based on 90 hours per pay period, that statutory holiday pay was based on 9 hours per day, that the complainant has worked on the basis of an expected 90 [hours] per pay period from the date of hire and though incorrect, that the employer's calculation of the hourly rate of pay included payment of 10 hours overtime above the 80 hour overtime threshold.

There is reference in the Determination to an Industrial Adjustment Services, Time Record invoice, but the Director did not accept the document was reflective of Innes' hourly wage rate.

ARGUMENT AND ANALYSIS

The burden is on Innes, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

> *112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*

> (b) *the director failed to observe the principles of natural justice in making the determination;*
>
> (c) *evidence has become available that was not available at the time the determination was made.*

Innes' appeal challenges the decision of the Director to calculate his hourly wage rate on 90 hours of work in each pay period rather than 80 hours. Essentially, that decision was based on findings of fact that are adequately supported in the record and sufficiently reasoned in the Determination. In the appeal submission, Innes resubmits all the same points which were considered and rejected by the Director in the Determination.

No error of law has been shown, or argued. The Director correctly applied relevant provisions of the *Act* to the findings of facts. Innes has not shown the Director failed in any way to comply with principles of natural justice in making the Determination. The record shows Innes was given ample opportunity to make his case and to respond to information provided and positions taken by Forsite. No new evidence has been advanced by Innes.

I can find no reviewable error and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated August 1, 2003 be confirmed in the amount of $1,812.43, together with any interest that may have accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal