Employment Standards TRIBUNAL

An appeal

- by -

Warren Dingman

- 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: John M. Orr

FILE No.: 2001/180

DATE OF HEARING: June 18, 2001

DATE OF DECISION: June 19, 2001

DECISION

APPEARANCES:

Warren Dingman	On his own behalf
Ann Wood	On behalf of D.F. Wood & Associates Inc. operating as Priority Security

No one appeared on behalf of the Director

PRELIMINARY MATTER

The hearing of this appeal was scheduled to commence at 9:00am on June 18, 2000. Warren Dingman, Ann Wood and Dave Wood attended at approximately 8:50am. Ms Wood then advised this adjudicator that she was expecting to be represented by legal counsel who would be attending the hearing. Counsel did not appear at 9:00am. This adjudicator and the Parties waited until 9:20am and counsel had still not appeared. Ms Wood then stated that the hearing could proceed without counsel and the hearing commenced.

At 9:50am a telephone call was received in the hearing room from the office of the Tribunal indicating that counsel wished to attend by telephone. This was not possible, as arrangements had not been made for a “speaker phone”. I said that counsel could speak to his clients if he wished but that we could not accommodate his request. Ms Wood agreed to proceed with the hearing in the absence of counsel.

Counsel did not appear and the hearing was concluded without his participation.

BACKGROUND

This is an appeal by Warren Dingman ("Dingman") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination numbered ER# 093-118 dated February 09, 2001 by the Director of Employment Standards (the "Director").

Dingman worked in the security patrol and security system sales business known as Priority Security ("Priority"). Priority was owned and operated by Ann and Dave Wood through a corporation, D.F. Wood & Associates Inc. (“the employer”). Dingman commenced work on or about June 8th 1998 and the relationship terminated August 15, 1999. Dingman claims that he was employed on a salary basis but that he did not receive wages as required by the *Act*.

On February 29, 2000 (over a year before the index determination) the Director issued a determination in which the Director's delegate found that Dingman was a partner in the business and was only entitled to a share of profits and not wages.

Dingman appealed that determination on the grounds that the Director misinterpreted the nature of the business relationship. He claimed he never was a partner, never received a share of the profits, and did not receive his wages and certain commissions. The nature of the ownership of Priority was in issue but Dave Wood was involved at least as a part owner. Dave Wood ("Wood") and his wife Ann Wood ("Ms Wood") were the sole shareholders in D.F.Wood & Associates Inc. ("the corporation") that owned and operated Priority Security.

After two days of hearing evidence this adjudicator on behalf of the Tribunal found (in the "original adjudication") that there was no partnership and that Dingman was an employee. It was also found that he was a "manager". As the evidence of any agreement about the wage rate was completely unreliable, I found that Dingman was, at least, entitled to the minimum wage for all of the hours worked in whatever category. I referred the matter back to the director to establish the hours worked and to apply the minimum wage (subject to the fact that Dingman was a "manager"). I cancelled the original determination that had concluded that Dingman was not an employee. The original adjudication of the Tribunal is dated July 12, 2000 – BC EST #D277/00.

The conclusion reached in the original adjudication was as follows:

> "Where there is no reliable and clear evidence as to the agreed upon wage rates the *Act* requires that an employer pay the employee at least the minimum wage as provided in the legislation. I find that Dingman is entitled to minimum wage for all hours that can be established that he worked. However this is subject to the provisions of the legislation that exempt managers.
>
> On the material before me I am not able to establish what hours Dingman worked during the time period from June 8th, 1998 to August 15, 1999.

CONCLUSION

I find and conclude as follows:

1. Dingman was employed by Priority from June 8th, 1998 to August 15, 1999;

2. Priority was solely owned by D.F. Wood & Associates Inc.;

3. Dingman was employed as a manager;

4. Dingman is entitled to minimum wage for all provable hours worked subject to the provisions of section 34(1)(f) of the *Regulation*;

5. All duties performed by Dingman for Priority are to be paid at the minimum wage rate and guard duties or security patrol duties were part of his normal duties and are not to be paid as an extra item;

6. Dingman should also paid minimum wage for all provable hours of work on the St Michael's University School contract;

7. All funds paid by Wood or Priority to Dingman between June 8th, 1998 and August 15th, 1999 should be credited against the wages owing to Dingman by the corporation.

8. For additional clarity, I find and conclude that Dingman is not entitled to a salary of $2,000.00 per month, is not entitled to $10.00 per hour for guard work, nor to commissions on retail sales of security alarms or systems. He is entitled to minimum wage for his hours worked, subject to the management exclusions."

The final Order read as follows:

ORDER

I order, under section 115 of the *Act*, that the Determination is cancelled and this matter is referred back to the Director to issue a determination based on the above findings and conclusions and an investigation of the provable hours worked by the appellant.

In the seven months that intervened between the making of the above order and the second determination the Director's delegate reports in the determination that he attempted to settle the "quantum" issue but to no avail. He reported that Dingman agreed to accept a certain figure for some of the work done and he finally determines that Dingman is only owed $726.76.

Both parties now dispute this amount. Dingman, who filed the appeal, says that the delegate failed to perform any analysis of the employer's time sheets and that he has missed a considerable portion of the hours worked. Dingman claims that he is owed $6,218.32. The respondents say that the delegate's basic position is correct but that he failed to deduct two cash payments made to Dingman and that the delegate added vacation pay when vacation weeks had been included within the payment calculations. In the result the respondents would not owe any further payment to Dingman.

ANALYSIS

It is unfortunate that almost a year has passed since the Order was made in the original adjudication and there still has been no detailed analysis of the employer's time sheets and employment records. In the first determination the Director's delegate did not perform that

investigation because he wrongly concluded that Dingman was a partner in the business. After the Tribunal found that Dingman was not a partner and was an employed manager it behoved the delegate to perform the kind of full investigation that is normally performed to establish wages owing to an employee.

The employer testified that there was no demand made for employer records and that at no time prior to the second determination were the full time sheets and other employer records disclosed to the delegate. Some of these records were shown to me at the hearing but they were not submitted as exhibits and not shared with the appellant.

As stated in the original adjudication, this is a case where the emotions associated with the breakdown of long-time friendships has resulted in a situation where "truth" has become expendable or buried in obfuscation for all three significant participants in this dispute. Many documents are alleged to be lost; others have been dubiously recreated. The failure of the delegate to acquire all of the employer's records at an early stage in the investigation has meant that records are incomplete, undisclosed, and of dubious reliability.

There are two evidentiary principles that may be applied to assist in deciding a case such as this. The first is that the onus is clearly on the appellant to establish that the determination is wrong. The second is the onus upon the employer to keep proper records of hours worked and to provide those records to the Director's delegate and the Tribunal if the employer is disputing the hours claimed by the employee.

In considering the first principle, there is little doubt that the determination is patently wrong. Both parties submit that it is wrong for different reasons. However, the significant error is that the hours of work used in the calculation were derived from some discussions in a settlement conference and were not hours accepted by either of the parties outside of the settlement context. The delegate did not conduct an independent investigation of the hours worked. He did not access the employer's time sheets or payroll records and did not compare those to the journals provided by the employee.

It was evident to me at the hearing that there were records in existence in the control of the employer that could have been examined by the delegate and that could have led to a more accurate assessment of the hours worked by Dingman. However, referring this matter back yet again to the Director is not a viable option as too many of the records are now missing or have become of doubtful reliability. As the last referral back resulted in a delay of nearly a year another referral would not meet the stated purpose of the *Act* to have a fair and efficient resolution of disputes.

As stated in the Tribunal decision *Re: 467226 BC Ltd.* [1997] BCEST #D581/97 it is inconceivable that an employee's claim for minimum wages should fail just because the employer failed to meet the statutory obligation to keep and maintain accurate records of the hours worked by the employees. In the aforementioned decision the Tribunal applied an "average

work week" for the employee in question and this seems to me to be a reasonable and fair method to use to calculate the hours worked by Dingman and the wages owing if any.

It is important to note that Dingman performed many different duties in his role as manager of the business. Much of his regular daytime hours were spent promoting the business, doing "cold calls", tendering on jobs with various size businesses from the one-time 4-hour assignment to complex tenders for government projects. He also sold alarm systems and monitoring. Over and above his regular daytime hours Dingman often took shifts as a security guard himself, or doing security patrols.

I have listened to and weighed carefully the evidence of the parties, reviewed those documents made available and applied the test in *Faryna v. Chorney* [1952] 2 D.L.R. 354 (BCCA) and I conclude, and find as a fact, that Dingman worked at least an average basic 30 hour week for the employer in his management duties including, but not limited to, such things as searching for clients, promoting the business, hiring and scheduling employees, selling alarm systems, advertising and tendering. I note that the employer has never acknowledged this work done by Dingman and has offered many reasons why it should not be paid work. The primary reason, that was firmly rejected by the Tribunal in BCEST #D277/00, was that Dingman was a partner and therefore was not entitled to be paid until there were corporate profits. The employer's submissions were rejected and the thirty-hour workweek is a minimum reasonable average of the hours worked by Dingman for the employer. This conclusion is consistent with the number of hours considered by the Director's delegate but the delegate overlooked significant other work performed by Dingman.

As noted above Dingman also took on shifts as a guard over and above his regular daily work schedule. Dingman claims that the hours worked on these extra duties totals 694.5 hours. At the hearing the employer challenged some of these hours claimed by comparing them to certain time sheets for other employees and invoices for the particular jobs. However as noted previously these time sheets had not been delivered to the Director's delegate and had not been provided to the Tribunal or the other party prior to the hearing. The time sheets were not submitted in evidence and I am unable to rely upon them in assessing any lack of accuracy in the hours claimed by Dingman.

There are many decisions of this Tribunal that conclude that in the absence of accurate and reliable records from the employer the Tribunal may rely upon the evidence of the employee. See for example: *Re: Rodrigue* BCEST #D600/97; *Re: Hi-Rise Salvage Ltd.* BCEST #D293/97; *Re: Dosanjh* BCEST #D487/97; *Re: 49265 B.C. Ltd.* BCEST #D131/97; *Re: Kyllo Bros. Holdings Ltd.* BCEST #D063/96.

While there was clearly some dispute between the parties about the shifts and hours worked by the employee in these guard duties I am not prepared to accept and rely upon employer records that were not provided to the Director's delegate, were not provided in advance to this Tribunal or to the employee and were not tendered in evidence at the hearing. As a result I accept the

evidence of the employee as to the hours worked on these guard duties. I also accept that these duties were extra to the basic 30 hour week worked by the employee in the general duties described previously in this decision and in BC EST #D277/00.

As found by the delegate, the thirty hour workweek amounted to a total of 1860 hours @ $7.15 for a total owing of **$13,299.00**.

The additional hours worked were 694.5 @ 7.15 totalled $4,965.68. The hourly wages then totalled $13. 298.00 + $4,965 = **$18,264.68**.

As pointed-out by the employer the 1860 hours already included paid vacation so the 4% would only apply to the guard duty wages. This amounts to $198.63 for a total amount owing of **$18,463.31**.

The total paid to Dingman in cheque form by the employer has not been disputed and was found by the delegate to be **$13,769.96**. When this is deducted from the balance owed the remaining sum owing to Dingman is **$4,693.35.**

The employer submitted that there were two cash payment not taken into account. These totalled $325.00. Dingman's explanation of these amounts was not very plausible and therefore I accept that they were in fact paid and that they should be deducted leaving a balance of **$4,368.35**.

There is one last significant amount to be taken into account. Although the employment relationship was supposed to have ended on August 15th 1999 Dingman worked on a project, along with another worker called Barkley Powell ("Powell"), at St Michael's University School. Dave Wood took the full payment for that job and at the hearing in July 2000, Dave Wood testified under oath that the St Michael's School job was his contract. If that was the case, and Wood received full payment for that Job, then Dingman and Powell, who performed all of the work on the contract, were by law his employees despite intentions to the contrary. I found in the original adjudication that Dingman was therefore entitled to be paid his wages for that project.

In addition, as Wood failed to pay the wages, Dingman paid Powell his wages. No employee should be put in a position to have to pay the wages of another employee and therefore I find that those wages are payable to Dingman. Powell was paid $587.70 and Dingman is owed $464.75 (65 hours @ $7.15) for a total payable to Dingman of $1,052.45 plus 4% = **$1,094.55**.

I conclude therefore that the wages owed to Dingman total $4,368.35 + $1,094.55 = **$5,462.90**.

The determination will be varied to find that Warren Dingman is entitled to wages in the amount of $5,462.90 together with interest calculated from August 31, 1999.

ORDER

I order, under section 115 of the *Act*, that the determination is varied to show that the amount of wages owing by the employer to Warren Dingman is **$5,462.90** plus interest from August 31, 1999.

John M. Orr
Adjudicator
Employment Standards Tribunal