

An appeal

- by -

Braden Contracting Ltd. &/or L.B. Chapman Contracting & Sons Ltd. &/or
L.B. Chapman Contracting Ltd.

("Braden")

- 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.: 2002/138

DATE OF HEARING: June 19, 2002

DATE OF DECISION: July 18, 2002

DECISION

APPEARANCES:

on behalf of Braden Contracting Ltd. and others	Michael Yawney, Esq. Mr. Leonard Chapman
on behalf of the individual	in person
on behalf of the Director	Ms. Adele Adamic Mr. Graham Jickling

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Braden Contracting Ltd. &/or L.B. Chapman Contracting & Sons Ltd. &/or L.B. Chapman Contracting Ltd. (collectively, “Braden”) of a Determination that was issued on February 22, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Braden had contravened Part 4, Sections 31(1), 32(1), 40(1) and 40(2) of the *Act* in respect of the employment of Howard Schultz (“Schultz”) and ordered Braden to cease contravening and to comply with the *Act* and to pay an amount of \$1,866.78.

The appeal form gives the reason for filing the appeal as follows:

IRO determination unclear, requires clarification as to what evidence relied on and calculations made. Unsure what IRO considered and how he came to determination.

Braden asks that the Tribunal vary the Determination to properly reflect the amounts, if any, that may be owing to Schultz.

The Director appeared at the hearing of this appeal to explain the calculations.

ISSUE

The issue in this appeal is whether Braden has shown any error in the Determination.

THE FACTS

Braden operates in the construction industry in and around Vernon, BC. During the period October 18, 2000 and May 4, 2001, Braden was involved in site preparation for the Wal-Mart complex in Vernon and some site work for the City of Vernon. Schultz was employed by Braden during that period as a truck driver at a rate of \$14.00, later raised to \$15.00, an hour. Schultz complained that he was not properly paid and was owed regular and overtime wages.

The Director investigated and made the following findings on the matters of complaint filed by Schultz:

1. There was no evidence that Schultz was ever scheduled or instructed to take a meal break, it did not appear that he was given a meal break free from duty and was required to be available for work; and
2. Based on the records provided by Braden, Schultz worked hours in excess of eight in a day and forty in a week and was entitled to be paid overtime wages on those hours according to the requirements of the Act.

Braden had provided the Director with a summary of hours worked by Schultz. The wages Schultz was paid by Braden was based on those hours. At the hearing of the appeal, the Director stated that the amounts found owing to Schultz were determined by applying those hours to the requirements of the *Act*.

I heard evidence from Mr. Steve Barnett, Mrs. Catherine Pearce and Mr. Leonard Chapman on behalf of Braden. Mr. Graham Jickling gave evidence on behalf of the Director. While the evidence of Mr. Barnett and, to some extent, Mr. Chapman addressed the matter of meal breaks, I am satisfied from all of the evidence that the conclusion reached in the Determination concerning breaks was basically correct - Braden never scheduled or instructed Schultz to take a meal break and, with a few exceptions, Schultz was never given a meal break and was required to be available for work throughout the day. Mrs. Pearce testified how she recorded the hours worked for employees, including Schultz, and how she prepared the paycheques for employees. She indicated that each employee would submit their daily hours on time slips, such as those attached to the Determination, she would enter those hours into a payroll computer program, break them down into straight time and overtime hours, calculate the wages owing, calculate and enter annual and statutory holiday pay. Employees were paid every two weeks and such pay included annual and any applicable statutory holiday pay. Mrs. Pearce had prepared a spread sheet for the hearing showing all of the payments made to Schultz during the relevant period. It was apparent, however, that the spreadsheet did not accurately reflect the requirements of the *Act*. For example, maintenance hours, time spent doing maintenance work on a truck, were never paid at more than straight time regardless of when they worked, and minimum and maximum daily hours provisions were not applied.

ARGUMENT AND ANALYSIS

Section 115 of the *Act* sets out the remedial authority of the Tribunal in respect of an appeal of a Determination:

115. (1) After considering the appeal, the tribunal may, by order,
 - (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director
- (2) The tribunal must make a written copy of its order with reasons available to
 - (a) the person who requested the appeal, and
 - (b) the persons who under the tribunal's rules were notified of the appeal.

The Tribunal does not have the authority to order the Director to communicate more clearly and completely or to make adjustments to the time lines for responding to inquiries made during an investigation, unless the Director runs afoul of a procedural requirement of the Act or fails to adhere to principles of natural justice. There is no allegation and, in any event, no evidence the Director failed to

provide Braden with a reasonable opportunity to respond or failed to adhere to principles of natural justice.

The burden is on Braden, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. Placing the burden on the appellant is consistent with the scheme of the Act, which contemplates that the procedure under Section 112 of the Act is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the Act, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST # D325/96)).

Braden has failed to meet this burden. Nothing in the evidence provided at the hearing show that the calculations of the Director were incorrect. While I can appreciate that a person not familiar with the requirements of the *Act* and the layout of the wage Calculation Summary prepared by the Director might require an explanation for some of the notations, I am satisfied that reasonable efforts were made by the Director to clarify the methodology used in deciding the *Act* had been contravened and that wages were owed by Braden to Schultz. I am also satisfied the calculations made by the Director accord with and correctly apply the minimum statutory requirements found in Sections 31, 32, 35 and 40 of the *Act*. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 22, 2002 be confirmed in the amount of \$1,866.78, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal