

An appeal

- by -

Master Log & Lumber Ltd.
("Master Log")

- 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: James Wolfgang

FILE No.: 2002/274

DATE OF DECISION: August 12, 2002

DECISION

OVERVIEW

This is an appeal by Master Log & Lumber Ltd. (“Master Log”) or the (“Employer”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* of a Determination issued by the Director of Employment Standards (the “Director”) dated May 08, 2002. The Determination found Master Log owed Greg L. Cutler (“Cutler”) \$18,334.42 as compensation for regular wages, overtime, statutory holiday pay, vacation pay and compensation for length of service.

The determination found Master Log had violated Sections 17(1), 18(1), 40(1) & (2), 45, 58(3) and 63(2) of the *Act*.

Master Log dispute the hours claimed by Cutler for 2001. They have requested the case be referred back to the Branch for further investigation. They claim if the customers were interviewed and their records checked the outcome would prove Cutler had not worked the hours claimed.

Master Log had sought an extension of time for appeal until May 30, 2002. There is no evidence the extension was granted however the final date for submissions to the Tribunal was July 4, 2002.

No additional submission was received from Master Log as of that date.

Master Log is in financial difficulty and has sought protection from their creditors.

No penalty has been assessed against Master Log.

ISSUE

It is difficult to understand what precisely Master Log are appealing, as their appeal seems to be a request for an extension of time. It is not clear if Master Log were going to get additional evidence or whether they wanted the Director to conduct a further investigation.

Is Cutler entitled to the amount set out in the Determination?

THE FACTS AND ARGUMENT

The Employer provided the Director with the majority of the payroll records used in the investigation and calculation of monies owed as outlined in the Determination. Where Master Log had no payroll records the records of Cutler were used.

In the appeal by Master Log they included the following statement under the heading:

Are there other facts that weren't considered during the investigation?

Yes.

Until now some customers of Master Log & Lumber were reticent regarding the hours of documented work performed on their house sites in 2001 by Greg Cutler and as such weren't

considered during the investigation. We believe their records will demonstrate a pattern of activity by Greg Cutler that will challenge his claim for 2001.

In order to evaluate this information with the delegate, we kindly request an extension of the appeal deadline to May 30, 2002.

There is no submission from the complainant.

The delegate for the Director made a submission to the Tribunal dated May 29, 2002. She states the majority of the calculations were made from the records of the employer. The only records used from the complainant were for the period when the Employer had no records. She further stated:

2. I would point out that records presented by the Employer, after the original records were presented to the Employment Standards Branch, were incorporated into the calculations. I cannot see what benefit a delay in the appeal deadline would accomplish.

ANALYSIS

The Determination found Cutler was owed money for wages, overtime, statutory holidays and vacation pay.

The calculations for the majority of the claim were made from the records supplied by the Employer. The only time the employee's records were used was when the Employer had no records. It has been well established by the Tribunal that in the absence of records by the Employer the records of the employee should be used.

For example, Hi-Rise Salvage Ltd. BC EST#D 293/97 states, in part:

In several previous decisions this Tribunal has found that where the employer has not kept accurate records of the hours worked the evidence of the employee should be preferred and that any partial records should be accepted unless there is substantial credible evidence to establish the facts alleged by the employer. (emphasis added)

The acknowledgement letter from the Tribunal dated May 16, 2002 to the parties indicated they had until June 7, 2002 to submit a response. We have no evidence any submission has been made by the appellant or the complainant either before or after that date.

The delegate for the Director responded in writing to the Tribunal dated May 29, 2002, however the Tribunal did not receive this until June 13, 2002.

The Tribunal forwarded that submission to the parties and invited a response be received not later than July 04, 2002.

We have no evidence either of the parties responded to that submission.

There is an onus on the appellant to prove the Determination is wrong in fact or in law. In this case Master Log has failed in this regard and the Determination is confirmed.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated May 08, 2002. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal