

**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 -

Pamela Fulton  
("Fulton")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** C. L. Roberts

**FILE No.:** 2000/409

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

**DECISION**

This is a decision based on written submissions from Pamela Fulton (“Fulton”) and Jane Kitsul on behalf of Evergreen Interior Display (“Evergreen”).

**OVERVIEW**

A delegate of the Director of Employment Standards (the “Director”) investigated a complaint by Fulton against Jane Kitsul and Henry Huisman operating as Evergreen and on February 3, 2000, issued a Determination in which Evergreen was found to owe Fulton \$1,205.78 in unpaid wages, statutory holiday pay, vacation pay and interest. Both parties appealed, and after hearing from Fulton, and reviewing the documents attached to the Determination, I sent the matter back to the delegate for a reasoned decision as to whether five additional hours were worked per day. (BC EST#D175/00).

On May 8, the delegate issued a decision indicating that he had accepted the employee’s records in the absence of proper records from the employer, and calculated that Evergreen owed an additional \$1,295.33 plus \$219.93 interest, bringing the total amount owed to Fulton \$2721.04. The delegate then forwarded the calculations to Evergreen and Fulton for reply, and offered to assist the parties in resolving the matter.

Fulton agreed with the delegate’s calculations. Evergreen disputes the calculations, but agreed that a total of \$1606.60 was owed to Fulton.

**ISSUE TO BE DECIDED**

Whether the delegate erred in his calculation of additional wages.

**FACTS**

The facts are outlined in BC EST#D175/00 and need not be repeated here.

**ARGUMENT**

Kitsul’s submissions centred on the discrepancies in Fulton’s calendar, and contended that the delegate had erred in awarding Fulton \$1114.64 more than she was entitled to.

Fulton initially contended that it was unreasonable for the Director’s delegate to reject all of her records because of minor inconsistencies. She acknowledged that although there were some errors in recording the information, those errors had been rectified. Fulton also states that she had three meetings with the delegate in an attempt to resolve the issue of her hours after my decision was issued.

**ANALYSIS**

In my previous decision, I found that the appropriate test to be applied in circumstances is the best evidence rule, as set out in *Hofer v. Director of Employment Standards* (BC EST #D538/97):

In the absence of proper records which comply with the requirements of Section 28 of the *Act*, it is reasonable for the Tribunal (or the Director's delegate) to consider employees' records or their oral evidence concerning their hours of work. These records or oral evidence must then be evaluated against the employer's incomplete records to determine the employees' entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate may accept the employees' records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable. Under those circumstances, if an employer appeals a determination, it would bear the onus to establish that it was unreasonable for the Director's delegate to rely on the employees' records (or evidence) and to establish that they were unreliable.

Further, the Tribunal stated

Thus, in my opinion, the appropriate test to apply in such circumstances is "the best evidence rule". That is, the Director's delegate must make a reasoned decision, based on a evaluation of all the records and evidence which is available, to determine what is the best evidence of the number of hours actually worked by the employee.

In this appeal, the delegate made a second effort to calculate the amount of wages owed, in consultation with the parties. It appears that the only evidence was that of Fulton, which Evergreen now challenges. In *Hofer*, where an employer appeals a determination, it bears the onus of establishing that it was unreasonable for the Director's delegate to rely on the employees' records (or evidence) and to establish that they were unreliable. In this instance, Fulton acknowledged the discrepancies in her calendar, and explained them to the apparent satisfaction of the delegate over the course of three meetings.

The employer has an obligation to comply with the *Act*. Where it does not do so, there is no burden on an employee to provide "clear evidence" of what is owed. I am satisfied that the delegate reviewed Fulton's evidence and made a reasoned decision in arriving at the amount owing.

## **ORDER**

I Order, pursuant to Section 115 of the *Act*, that the Determination be confirmed in the amount of \$2,721.04, and that this amount must be paid together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since May 8, 2000.

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**C. L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**