

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 -

Marchesi Marblecraft Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO.: 1999/353

DATE OF DECISION: August 24, 1999

DECISION**OVERVIEW**

This is an appeal by Marchesi Marblecraft Ltd. ("Marchesi") pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination (File No. ER#021-130), dated May 28, 1999 by the Director of Employment Standards (the "Director").

In the determination the Director's Delegate found that Marchesi owed wages to an employee, Santolo Esposito ("Esposito") which included overtime pay, compensation for length of service, and vacation pay plus interest which together amounted to \$10,243.22.

Marchesi has appealed on the grounds that Esposito was not entitled to compensation for length of service as he was given notice of lay-off and secondly that Esposito's overtime was paid by increasing the overtime hours by 50% and applying the regular wage rather than applying a time and a half wage - in effect, amounting to full payment of overtime.

ISSUE TO BE DECIDED

The issues to be decided in this case are whether the employee's overtime pay was miscalculated by the delegate and whether Esposito was entitled to compensation for length of service.

FACTS AND ANALYSIS**Compensation for Length of Service:**

Section 63 of the Act provides that an employee is entitled to compensation based on the length of service with the employer. In Esposito's case this amounted to 8 weeks. The liability of the employer to pay such compensation is deemed to be discharged if the employee is given the equivalent amount of *written* notice (emphasis added). Marchesi claims to have told Esposito of pending lay-offs, although this is denied by Esposito, but Marchesi has not produced, either to the delegate or on this appeal, any evidence that such information was given to Esposito by way of *written* notice of lay-off. Without such written notice the liability is not discharged and remains outstanding as calculated by the delegate.

Overtime Pay:

Marchesi does not deny that Esposito worked overtime but claims that the time marked by the men and shown on the records was increased by 50% to be inclusive of time and half. He says that for example if the men worked six hours overtime they would write down 9 hours. Marchesi says that this was done to simplify bookkeeping so that all marked hours would then just be paid at the regular rate. Marchesi says that this was done by all of the employees and can be corroborated by them. However, Marchesi has not provided any statements or affidavits from any of his employees to support this proposition.

Esposito denies that he ever wrote down more hours than actually worked and challenged Marchesi to produce any such proof. Marchesi has not. Esposito also produced a photocopy of one pay-slip which delineates between regular wage @\$20.00 per hour and overtime @\$30.00 per hour. This one pay statement obviously refutes Marchesi's claim that overtime hours were first increased and then paid at straight time.

Although the Director's delegate does not specifically address the issue of the hours being increased by 50% and then paid at regular rates I am not persuaded by Marchesi that this practice actually occurred. The onus on an appeal is on the appellant to persuade the Tribunal that the determination is wrong. I am not so persuaded and find that the determination should be confirmed.

ORDER

I order, under Section 115 of the *Act*, that the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal