

An appeal

- by -

B.C. Furnace Service Ltd.
("B.C. Furnace")

- 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: Carol L. Roberts

FILE No.: 2002/242

DATE OF HEARING: August 16, 2002

DATE OF DECISION: August 26, 2002

DECISION

APPEARANCES:

On behalf of B.C. Furnace:	Bayne Vardy
On their own behalf:	Bobby James Dean Kresna R. Widjaja

OVERVIEW

This is an appeal by B.C. Furnace Service Ltd. ("B.C. Furnace"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued April 11, 2002. Bobby James Dean and Kresna Widjaja complained that B.C. Furnace owed them statutory minimum wage.

The Director's delegate concluded that B.C. Furnace had contravened sections 16, 17(1), 34(1), 35(a) and 58(1)(a) the Act in failing to pay wages, and Ordered that it pay \$1,502.43 to Mr. Dean and \$1,246.19 to Mr. Widjaja.

ISSUE TO BE DECIDED

At issue is whether the delegate erred in his findings with regard to the number of hours worked. B.C. Furnace concedes that both Mr. Dean and Mr. Widjaja are owed wages, but disputes the amount. Mr. Vardy, the CEO of B.C. Furnace, alleges that the delegate never gave him an opportunity to respond to the complaints, and that he was unfairly treated.

I have not addressed the latter issue, as it appears Mr. Vardy has, or will, pursue his complaint about the delegate through other channels. In any event, this appeal is designed to cure any deficiencies in the original investigation.

FACTS

Mr. Dean and Mr. Widjaja were hired as commissioned salespersons by B.C. Furnace to sell portable air conditioners in Metrotown mall. Mr. Dean and Mr. Widjaja worked from June 25 to July 15, 2001 inclusive. Although there is no dispute that Mr. Dean and Mr. Widjaja were told to cover all the hours at the mall, the parties disputed the hours worked by each employee. Mr. Vardy did not provide the delegate with any records of hours worked, while Mr. Dean provided the delegate with a contemporaneously maintained record of hours. Mr. Widjaja also provided the delegate with a record of the hours he worked that was corroborated by Mr. Dean.

The delegate found that the complainants' records were consistent with the mall hours, and concluded it would not have been possible for one employee to do the required work without assistance of the other. The delegate determined that B.C. Furnace had contravened the Act, and that the employees were owed wages as noted above.

At the hearing, Mr. Vardy conceded that Mr. Dean and Mr. Widjaja had not been paid the statutory minimum wages as required by the Act. He agreed that he owed Mr. Widjaja \$204.40, and Mr. Dean \$415.80 in outstanding wages.

Mr. Vardy also conceded that he did not keep records of the hours Mr. Dean and Mr. Widjaja worked, as required under s. 28 of the Act.

ARGUMENT

Mr. Vardy argued that the delegate did not allow him to adequately respond to the complaints. His evidence is that, when he hired Mr. Dean and Mr. Widjaja, he told them to cover all the hours at the mall, and to split the shifts. He conceded that none of these instructions were put into writing. Mr. Vardy also contended that he did not ask Mr. Dean or Mr. Widjaja to work overtime, nor did he permit them to do so.

Mr. Dean and Mr. Widjaja both denied that they were given any instructions on hours of work by Mr. Vardy. They testified that they received their instruction from Mr. George Girk the sales general manager, and Mr. Lorne Furtner, the sales manager. They both testified that they told to cover all the mall hours, and were never told to split their shifts. They also testified that it would have been impossible to do so in any event, given that the mall was very busy, particularly after work, and that they would need to relieve each other for breaks and lunch. Mr. Widjaja contended that he told Mr. Vardy that he was working from morning until closing time each day.

The parties agreed that Mr. Vardy checked the booth approximately 8 times during the period they staffed the booth, and that they were both there approximately 80% of that time.

Mr. Dean contended that he attempted to give his hours of work to Mr. Vardy after his employment ended, but that Mr. Vardy was never in the office, and never returned his calls.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

B.C. Furnace failed to keep a record of hours worked by Mr. Dean and Mr. Widjaja. Therefore, the only record of hours available to the delegate was that kept by Mr. Dean. Mr. Dean's records were made contemporaneously, and accepted as the best evidence by the delegate. I find no error in this conclusion, in the absence of any better evidence from B.C. Furnace.

Section 1 of the Act defines an employer to include a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee.

Work is defined as meaning "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."

Although Mr. Vardy argued that he never asked or permitted either Mr. Dean or Mr. Widjaja to work overtime, or instructed both to be at the booth at all times, he agreed that he visited the booth from time to time and found them both present. He did not tell one of them to leave, or that they were not permitted to work together. In the absence of any schedule, or any written instructions that refute the employees' evidence that they were told to cover the booth according to the mall hours, I find no basis upon which to vary the Determination.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated April 11, 2002 be confirmed, together with whatever interest that might have accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal