

An appeal

- by -

KJB Lift Systems Ltd.
(the "Employer" or "KJB")

- 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: Ib S. Petersen

FILE No.: 2002/349

DATE OF DECISION: August 26, 2002

DECISION

OVERVIEW

This is an appeal by the Employer, KJB, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), of a Determination of the Director issued on May 28, 2002. The Determination concluded that Mr. Douglas Andrew was owed a total of \$3,102.91 by the Employer on account of overtime wages and compensation for length of service.

KJB operates mobility solutions for the disabled. Mr. Andrew was employed between March 5, 1999 and January 2, 2001 as a hydraulic lift installer at the rate of \$15.50 per hour. On January 2, 2001, he was given written lay off notice effective that day. The Record of Employment (“ROE”), also issued that day, indicated that he was “not returning.”

The nub of the Determination, with respect to overtime, is that the Delegate did not accept that a verbal agreement between the Employer and Mr. Andrew “on overtime wages and that travel time would not be overtime hours.” It appears that travel time was paid at the regular hourly rate. Section 40 of the *Act* requires overtime be paid and Section 4 provides that an agreement to waive the requirement of the *Act* is of no effect. With respect to the termination, the Delegate noted that Mr. Andrew was given notice and laid off on January 2, 2001, and that the ROE indicated that he was not returning.

FACTS AND ANALYSIS

The Employer appeals the Determination. The Employer, as the appellant, has the burden to persuade me that it is wrong. I am of the view that the Employer has failed to meet that burden.

The Employer appeals on two grounds, and is opposed by both the Delegate and Mr. Andrew. In a nutshell, the Delegate argues that the Determination is correct, and Mr. Andrew takes issue with the Employer’s factual assertions, as well. Not surprisingly, they seek to uphold the Determination.

The first ground is that, while the Employer agrees with the “time sheets summarized in this determination,” these time sheets do not reflect time off with pay for this overtime. Mr. Andrew disagrees that he was given time off as claimed. The Employer candidly admits that it does not have records to back up this assertion. The onus is on the appellant to persuade me that the Determination is wrong. A simple bald assertion that the employee had time off in lieu of overtime, does not, in my view, warrant serious consideration and, for that reason alone, I summarily dismiss this ground of appeal.

With respect to the second ground, the Employer says that Mr. Andrew was given verbal notice in mid-December that “he should be considering other employment as the outlook for the company looked bleak.” Mr. Andrew denies that he was given notice as alleged. In fact, he says that another employee, hired after him, continued to work after his termination. The Delegate notes that a termination notice under the *Act* must be in writing (see Section 63).

I accept that Mr. Andrew’s employment was terminated on January 2, 2001 when he was given written notice. The ROE clearly supports this view. It was issued on January 2, 2001, and stated that Mr. Andrew was “not returning.” Even if I were to accept the Employer’s version of the events, I do not accept that Mr. Andrew was given notice in mid-December: advice that “he should be considering other

employment as the outlook for the company looked bleak” is far too equivocal to constitute proper notice. In any event, that is beside the point, as I agree with the Delegate that notice is required to be in writing. It is clear that whatever notice was given in mid-December, assuming it was given as asserted by the Employer, it was not in writing.

I am not persuaded that the Delegate erred. In short, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 28, 2002, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal