

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 -

Handrick Christofferson
("Christofferson")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/267

DATE OF DECISION: September 14, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Handrick Christofferson (“Christofferson”) of a Determination which was issued on April 2, 1998 by a delegate of the Director of Employment Standards (the “Director”). In respect of Christofferson the Director found he was owed an amount of \$2114.80 by his employer Insulpro Industries Ltd. and Insulpro (Hub City) Ltd. (“Insulpro”). This amount was comprised of vacation pay in an amount of \$1434.18, unauthorized deductions in an amount of \$558.71 and interest from January 11, 1997 to April 2, 1998 in an amount of \$121.91. The Determination denied Christofferson’s claim for overtime pay, statutory holiday pay, minimum wage and minimum daily pay due to a lack of evidence. Christofferson says the Director’s decision to deny a large part of his claim because he included travel time was wrong. He also says that his claim, if the Director is required by this decision to re-calculate it, should be calculated on a rate of \$15.00 an hour.

Insulpro has also filed an appeal of the Determination, arguing, among other things, the Director erred in concluding Christofferson was an employee of Insulpro and Christofferson is owed no amount under the *Act*. That issue has not yet been decided, so this appeal will be addressed as though Christofferson was an employee of Insulpro for the purposes of the *Act*, accepting that this decision will be nullified if the individuals are found to be independent contractors. Insulpro also filed a brief reply to the appeal, dated May 19, 1998, saying, in effect, there is no merit to the appeal.

ISSUES TO BE DECIDED

There are two issues in this appeal. The first is whether Christofferson has shown that Director erred in concluding his claim for overtime pay, statutory holiday pay, minimum wage and minimum daily pay was not supported by the evidence the Director had available. The second issue is whether the Director erred in determining the “hourly rate” for Christofferson and the other individuals affected by the that aspect of the Determination. The second issue only needs to be addressed if Christofferson is successful on the first issue.

FACTS

Insulpro operates an insulation installation business in several locations in the province, including Nanaimo. Christofferson was employed by Insulpro to install insulation in homes and apartments. There are several types of installation, including attic, spray and/or crawl space and batt insulation. Christofferson mostly worked installing batt insulation. He maintained a record of his hours worked.

Christofferson filed a complaint which was investigated by the Director. In support of his claim Christofferson filed the record of hours he worked each day. The record provided by him was found to include hours during which he did not engage in work and, ultimately, the record was not accepted by the Director as reliable evidence upon which to reach any final conclusions about the number of hours he did work.

ANALYSIS

On the first issue in this appeal, the burden is on Christofferson to show that the Director was wrong to conclude his claim was not supported by reliable evidence. In his appeal, Christofferson says:

Sorry, you must have misunderstood what I said about travel time. I didn't put down travel every day as you may think. I only put travel time down when it was needed. . . .

. . . I would put travel time down for those days I worked out of town, not for the days that I worked in town. It may seem like I have lots of hours, but Craig and I would work late seven days a week. If I did get paid any travel time, I would only get paid to get there but not to come back and that was only for long distances, for example, Tofino. I would not get paid travel to go to Ladysmith, Duncan, Gabriola Island, Shawnigan Lake, Parksville, Bowser, Port Alberni. Each of these places take forty minutes to an hour each way. All other days I worked, I put proper hours down, not including travel time if the jobsite was in Nanaimo or Nanaimo area.

In effect, Christofferson concedes the record given to the Director does not accurately show his hours worked. What is absent in the appeal is any reason for concluding that it should now be considered reliable with the explanation given in the appeal. For example, there is no suggestion the non-working hours can be identified and the record adjusted accordingly. Christofferson has not met his burden in this case, which is to show, from the available facts, that there was no rational basis for the Director refusing to accept his record as a reliable indication of his hours worked. The appeal does little more than register a disagreement with the conclusion reached by the Director about the evidentiary value of his record of hours worked. Neither is the burden met simply by conceding non-working hours were included in the record. The Tribunal has no way of knowing whether the inclusion of non-working hours in the record in effect “tipped the scales” and gave added weight to other problematic aspects of the record, which in their totality weighed against accepting the record as reliable evidence of Christofferson’s hours worked. The Tribunal must decide whether the Determination is wrong in light of the available facts and the statutory requirements. It is not the function of the Tribunal to investigate a complaint. Subsection 76(1) requires the Director to investigate unless there are reasons to refuse to investigate or to stop or postpone an investigation. The Tribunal has no

equivalent authority. The jurisdiction of the Tribunal relative to the merits of an appeal are found in subsection 115(1):

115. (1) *After considering the appeal, the tribunal may, by order,*
- (a) *confirm, vary or cancel the determination under appeal, or*
 - (b) *refer the matter back to the director.*

In the absence of some reason to do so, the Tribunal will not interfere with the statutory authority of the Director to investigate and make a determination on a complaint based on the material they acquire through their investigation.

The appeal on the first issue is dismissed.

In light of the answer on the first issue, the second issue does not need to be decided. In any event, that question has been considered and decided in the context of two appeals filed by individuals whose complaints were also addressed in the Determination (see *Berube and Norton*, BC EST #D406/98). In that decision, the Tribunal did not accept that the Director had erred in concluding the individuals were paid “*flat rate, piece rate, . . . or other incentive basis*” and calculating the regular wage of the individuals under paragraph (b) of the definition of “regular wage” in the *Act*. The Tribunal stated, in part:

None of these scenarios support a conclusion the hourly rate paid for the job ought to be treated as the hourly wage of the individuals. There is nothing to indicate that the rate given to a job by Insulpro was only for the work performed by the individuals on that job. In fact, it is apparent that the hourly rate given to the job incorporated other factors unrelated to work, or as Berube put it, “the hourly rate of \$15.00 would become the incentive rate”. In my opinion, the best the individuals can say is that they worked on some jobs which were valued at a certain hourly rate. However, under the *Act*, it is the *employee* that must be paid by the hour and, in the circumstances of this case, that pay must be for work before it is considered to be an “hourly wage”.

In this case, it is not difficult to support the conclusion of the Director that the individuals were not “*paid by the hour*”, but were paid on what is best described as a “*flat rate, piece rate, . . . or other incentive basis*”, even when doing those jobs which were paid on an hourly basis.

(pages 4-5)

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 2, 1998 be confirmed as it relates to the matters under appeal.

David Stevenson
Adjudicator
Employment Standards Tribunal