

An appeal

- by -

Kurt Giddings
("Giddings")

- 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: David B. Stevenson

FILE No.: 2002/226

DATE OF HEARING: August 8, 2002

DATE OF DECISION: September 9, 2002

DECISION

APPEARANCES:

on behalf of Kurt Giddings	In person
on behalf of Lutz Consulting & Contracting Ltd.	Henry Lutz

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Kurt Giddings (“Giddings”) of a Determination that was issued on December 11, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Lutz Consulting & Contracting Ltd. (“LCCL”) had contravened Part 3, Sections 17(1), 18(1) and Part 4, Sections 34(2) and 40(1) and (2) of the *Act* in respect of the employment of Giddings (“Giddings”) and ordered LCCL to cease contravening and to comply with the *Act* and to pay an amount of \$3,586.23.

Giddings takes issue with the decision to reject his record of hours worked.

ISSUE

The issue is whether Giddings has shown the decision to reject his record of hours worked, and accept the record of hours worked provided by LCCL, was wrong, or unfair and unreasonable.

THE FACTS

Giddings claimed he had worked for LCCL from July 13, 2000 to December 19, 2000 and was owed overtime pay, for hours worked in excess of eight in a day and forty in a week, annual vacation pay and statutory holiday pay. By way of background, the Determination noted that LCCL is a construction company and general contractor.

The Determination concluded that Giddings was an employee for the purposes of the *Act* and was owed wages. LCCL has also appealed the Determination, arguing an error in the conclusion that Giddings was an employee of LCCL. That appeal has been dismissed.

The Determination cited several reasons for rejecting the record of hours of work claimed by Giddings and accepting the record of hours worked provided by LCCL. The Director refused to use information provided by Giddings because:

. . . Giddings was unable to produce his original records worked and Giddings was not truthful throughout the investigation.

ARGUMENT AND ANALYSIS

Giddings takes issue with the statement that he never produced the original of his record of hours worked. In his evidence on this appeal, Giddings said he provided a copy of his original records at the same time he filed the complaint and was surprised that copy was never found. He also said, in his appeal submission, that the requests from the investigating officer to provide the originals of his hours of work confused him as he had provided copies. There is nothing, however, in the Determination suggesting that he told the investigating officer he was ‘confused’ by the request to provide his original record of hours worked. What the Determination did indicate was that he told the investigating officer in October, 2001, during a discussion when the third request to provide the originals was made, that they had been stolen. The investigating officer disbelieved him, for reasons stated in the Determination. Nothing in the evidence has persuaded me the reasoning in the Determination for rejecting the record of hours worked provided by Giddings was wrong, or manifestly unfair and unreasonable.

In disputing the reasons given for rejecting what Giddings says he provided, he contends, *inter alia*, that the copies were from his original record, a ‘Day Timer’ type of record keeping book and the comment in the Determination that the copies do not appear to be from a ‘little black book’ is wrong. He has not, however, provided any objective evidence to support that contention. Nor has he provided any evidence generally that the record of hours worked which he did provide ought to be accepted and preferred to the records kept by LCCL.

In fact, evidence given in the appeal hearing independently confirmed the correctness of the decision to reject Giddings’ records. Maryanna Prodan, the bookkeeper for LCCL, testified that the invoices for Giddings, while written by her, were prepared by her and Giddings together from information provided by Giddings of the hours he worked and which were submitted to her on a daily basis. Until late December, 2000, Giddings had no disagreement with those hours as recorded and paid by LCCL. I accept her evidence on this point. In late December, Giddings came to Ms. Prodan claiming he was entitled to be paid for a greater number of hours than he had been paid for. Ms. Prodan reviewed the hours claimed and found several discrepancies, including a claim for hours worked during a period LCCL had no work going on (September 28 to October 11). During that period Giddings claimed he had worked in excess of 100 hours. The claim by Giddings led to a dispute between he and Mr. Henry Lutz, owner of LCCL, and that dispute led to Giddings’ termination from LCCL.

The burden in this case is on Giddings to show the decision of the Director to use information provided by LCCL to calculate the amounts owed is wrong, or unfair and unreasonable. In *Mykonos Taverna operating as the Achillion Restaurant*, BC EST #D576/98, the Tribunal said:

After the Director has determined that a person has lost wages because of a contravention of the Act, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving “efficient” resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged on its facts, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the Act (see *Shelley Fitzpatrick operating as Docker’s Pub and Grill*, BC EST #D511/98).

In this case, the question is simple, has Giddings demonstrated that the decision to accept the information provided by LCCL, and to coincidentally reject the information provided by Giddings, was wrong or unfair and unreasonable. The answer is a resounding ‘no’. Nothing in this appeal would justify such a conclusion and the appeal is rejected.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated December 11, 2001 be confirmed in the amount of \$3,586.23, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal