

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 -

British Hydraulics Ltd.
("British Hydraulics")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Cindy J. Lombard

FILE NO.: 1999/357

DATE OF HEARING: September 20, 1999

DATE OF DECISION: September 27, 1999

DECISION

OVERVIEW

This is an appeal by the employer, British Hydraulics Ltd. (“British Hydraulics”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination of the Director of Employment Standards (the “Director”) issued on May 28, 1999. In that Determination, the Director allowed the employee, Michelle Reid’s (“Reid”) claim for regular wages for two weeks ending on January 24, 1999, four hours pay for the last day of work on January 25, 1999, regular wages for the 97.5 hours worked in excess of the regular 40 hours per week, plus vacation entitlement on the above. From this amount an outstanding balance was due and owing by the employee to the employer for an advance of \$1124.48 which was deducted from the amount owing to the employee. Interest was added to the monies owing resulting in an Order that British Hydraulics pay to Reid the sum of \$1,865.91.

In addition, the employee, Reid, appeals the deduction of a vacation advance which she says would add the sum of \$1,124.48 to the amount owing to her.

ISSUES TO BE DECIDED

1. What was Reid’s rate of pay per month.
2. Is Reid entitled to payment for any hours worked in addition to her regular wage.
3. Whether Reid was entitled to retain the balance of an advance received by her prior to a vacation in December, 1998, in the amount of \$1,350.00 less two payments made by the employee in the amount of \$190.00 and \$35.00 for a balance of \$1,124.48.

ANALYSIS

The burden of proof is on the Appellant to show that on a balance of probabilities that the Determination under Appeal ought to be varied or cancelled. The nature of that burden is to persuade the Tribunal that the Determination is wrong in some material respect. In other words, the Appellant must clearly set out why and how the Determination is flawed.

1. Rate of Pay

The employee, Reid, worked for British Hydraulics Ltd. from August, 1994, until January 25, 1999. As determined by the Director from Reid’s employment files, she was paid an hourly rate of \$10.50 per hour until August 1, 1998, when her pay was changed to \$2,500.00 per month. The Director accepted the Appellant’s evidence that she was paid

the sum of \$1,250.00 every two weeks with the increased difference per month over \$2,500.00 being a car allowance and that this was done with the knowledge of the President of the company who was also her father. As indicated by the Director, the actual bank deposit showed that Reid began receiving \$1,250.00 every pay period as at the pay period ending July 26, 1998.

In January, 1999, when Reid left the employment of British Hydraulics, the shares in the company were in the process of being sold from her father to the new owners.

It is the position of British Hydraulics that since there is no mention of a vehicle allowance in her employee file, that omission is evidence that no vehicle allowance was agreed upon.

The employee, Reid, simply states that it was an error that she did not note the fact in her file and that the allowance was consented to by the then President of the company, her father, Robert Reid, as confirmed in his letter of June 20, 1998.

These facts were considered and determined by the Director. The Appellant-employer has not presented any new information to show that the Determination by the Director that the employer did agree to pay Reid \$1,250.00 every two weeks was wrong.

2. Payment for hours worked by the Appellant in addition to those included in her regular pay.

The Appellant worked extra additional hours during the period, August 1998, until January, 1999, as follows:

August	9.5 hours
September	16.5 hours
October	14.0 hours
November	11.0 hours
December	12.0 hours
January	34.5 hours

The Appellant kept a record of these extra hours and those records were produced by the employer to the Director.

Initially, the employee, Reid, claimed overtime pay for these hours but subsequently accepted the Director's Determination that she was a manager and as such not entitled to overtime pay.

However, the Director did allow reimbursement for those hours in the total amount of 97.5 hours worked in excess of the regular 40 hours per week at her regular wage which totalled \$1,523.93 plus vacation entitlement on that sum in the amount of \$60.96.

In the Determination, the Director dismissed the employer's position that the employee's hours were not credible and therefore not owing.

In this Appeal, the employer-Appellant says that:

- a) Why did the Appellant not bring alleged overtime monies owing to her when she quit?
- b) Why is there a drastic increase to 34.5 additional hours in January when the Appellant was averaging 12.5 hours overtime per month for the five months prior to January, 1999?
- c) Given the dramatic increase in additional hours, why was the employee able to complete and provide November and December month-end financial reports?

The Appellant-employee response is as follows:

- a) Until September, 1998, there were two office employees including Reid; however, at that time the other bookkeeper was terminated. Therefore, she started doing the work of two people.
- b) The employer had purchased a new computer system to which she had to transfer information.
- c) In January, while she was away on holidays, the new computer crashed and she lost all information dating back to October 31, 1998, which had to be re-entered.
- d) In catching up on this work, other work did get behind.

The employer does not contest these alleged facts.

The Appellant-employer has not presented any new evidence to show on a balance of probabilities that the Director's Determination of the facts is flawed in a material way.

3. Allowance of monies for a holiday.

In his Determination, the Director determined that since the employee had received regular wages of \$1,250.00 for the two weeks that she was on vacation in December, 1998, when she was only entitled to receive \$672.26 in vacation pay, that she received an overpayment of vacation entitlement in the amount of \$577.74 (i.e. \$1,250.00 less \$672.26 being the vacation pay entitlement remaining for the period June 29, 1998, to January 10, 1999, calculated as follows: $\$16,806.50 \times .04\% \text{ percent} = \672.26

The Appellant-employee has presented a letter dated June 20, 1999, from her father, Robert Reid, who was the company President at the time, stating that they agreed to give

her a fully paid vacation as well as her vacation pay which he had done in the past for other employees.

As there is no written record of this gesture and that this evidence was not before the Director at the time, it is my Determination that there is no compelling reason to overturn the Director's findings of fact and that claim is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter dated May 20, 1999, be confirmed.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal