

**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 -

Paul Marcil operating PL Construction and P & L Construction  
("PL")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 98/484

**DATE OF DECISION:** September 21, 1998

## DECISION

### OVERVIEW

This is an appeal by Paul Marcil operating PL Construction and P & L Construction (“PL”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated June 30, 1998 issued by a delegate of the Director of Employment Standards (the “Director”). PL alleges that the delegate of the Director erred in the Determination by concluding that Scott Hunter (“Hunter”) was owed wages for minimum wages, overtime wages and annual vacation pay. The Director’s delegate concluded that PL had contravened Sections 16, 28, 40 and 58 of the *Act* and PL was required to pay the amount of **\$934.27** to Hunter.

### ISSUES TO BE DECIDED

The issues to be decided in this appeal are whether Hunter is entitled to minimum wage, overtime wages and annual vacation pay.

### FACTS

The following facts are not in dispute:

- Hunter was employed from January 23 to March 6, 1998 by PL to install siding and soffits;
- the period for which payment is in dispute is from February 19 to March 6, 1998;
- Hunter was to be paid on a “piece work” basis;
- PL deducted from the calculation of Hunter’s pay the cost of correcting deficiencies.

PL contends that Hunter agreed to work for the “piece work” rate and was aware that he was to correct any deficiencies at his own expense. PL further contends that Hunter did not correct his deficiencies and other employees had to be paid to do the corrections. PL finally contends that they should not have to pay Hunter for the work which was done incorrectly and for which other employees had to be paid to correct.

Hunter states that he was told by PL he would not receive his final pay unless all the deficiencies were corrected. Hunter further states that he had made arrangements with 2 other co-workers to correct his deficiencies and he would pay them but PL refused to allow this arrangement to take place. Hunter finally states that on March 27, 1998 he received a cheque in the amount of \$36.80 for the work he had performed.

## ANALYSIS

There is no dispute by PL that Hunter was not paid minimum wage, overtime wage or annual vacation pay. PL disputes their obligation to pay these as PL states Hunter agreed to work for a “piece work” rate only which excludes the application of minimum wage, overtime wage and annual vacation pay.

The obligations of an employer are set forth in the *Act* and Section 4 of the *Act* stipulates that the standards of the *Act* are minimum standards which may not be waived. Section 4 provides:

*“Section 4, Requirements of this Act cannot be waived*

*4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.”*

(Note: Sections 43, 49, 61 and 69 deal with employees covered by a collective agreement.)

Employers are required to pay **at least** the minimum wage as established by the *Employment Standards Regulation* ( the “*Regulation*”). Section 16 of the *Act* provides:

*“Section 16, Employers required to pay minimum wage*

*16. An employer must pay an employee at least the minimum wage as prescribed in the regulations.”*

Employers are required to pay overtime wages for work performed by an employee in excess of 8 hours in one day or forty hours in one week. Section 40 of the *Act* provides:

*“Section 40, Overtime wages for employees not on a flexible work schedule*

*40. (1) An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38*  
*(a) 1 1/2 times the employee's regular wage for the time over 8 hours, and*  
*(b) double the employee's regular wage for any time over 11 hours.*

*(2) An employer must pay an employee who works over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38*  
*(a) 1 1/2 times the employee's regular wage for the time over 40 hours,*  
*and*  
*(b) double the employee's regular wage for any time over 48 hours.*

*(3) For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.*

*(4) If a week contains a statutory holiday that is given to an employee in accordance with Part 5,*

*(a) the references to hours in subsection (2) (a) and (b) are reduced by 8 hours for each statutory holiday in the week, and*

*(b) the hours the employee works on the statutory holiday are not counted when calculating the employee's overtime for that week.”*

The requirement for an employer to pay annual vacation pay is set forth in Section 58 of the Act which provides:

*“Section 58, Vacation pay*

*58. (1) An employer must pay an employee the following amount of vacation pay:*

*(a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;*

*(b) after 5 consecutive years of employment, at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay.*

*(2) Vacation pay must be paid to an employee*

*(a) at least 7 days before the beginning of the employee's annual vacation, or*

*(b) on the employee's scheduled pay days, if agreed by the employer and the employee or by collective agreement.*

*(3) Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.”*

Pursuant to Section 4 of the Act, the agreement by Hunter to work for “piece work” rate only is **of no effect** where such agreement results in payment to Hunter for work performed which is less than the statutory requirements.

With respect to the actions of PL in deducting the cost of correcting the deficiencies, this is contrary to Section 21 of the Act which provides:

*“Section 21, Deductions*

*21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*

*(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.*

*(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.”*

The cost of correcting deficiencies is a business cost and pursuant to Section 21 (2) may not be deducted from an employee's wages.

Based on the information provided, I conclude that PL contravened the *Act* by not paying minimum wage, overtime wage and annual vacation pay to Hunter. I further conclude that PL contravened the *Act* by deducting from Hunter the cost of correcting deficiencies.

Upon review of the calculations performed by the delegate of the Director and set forth in the Determination, I am satisfied that those calculations are correct.

The appeal by PL is therefore dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 30, 1998 be confirmed in the amount of \$ **934.27** together with whatever further interest may have accrued, pursuant to Section 88 of the *Act*, since the date of the issuance.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**