

**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 -

Hawkeye Holdings Ltd.  
("Hawkeye")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Cindy J. Lombard

**FILE NO.:** 1999/416

**DATE OF HEARING:** September 21, 1999

**DATE OF DECISION:** September 30, 1999

**DECISION**

**APPEARANCES:**

The Appellant-employer, Hawkeye Holdings Ltd. (“Hawkeye”) was represented by two owners of Hawkeye, namely, Dock Fitzpatrick and Hugh Fitzpatrick. In addition, a witness, Glen Freer, also gave evidence.

The Respondent-employee, Ervin Phillips (“Phillips”) did not appear .

**OVERVIEW:**

This is an appeal by the employer, Hawkeye pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) issued on June 14, 1999.

The Determination was issued following a complaint by the former employee that he was not paid for overtime. After investigating this complaint, the Director issued a determination that the records kept by Phillips was insufficient to prove that banked hours were owing but issued an Order that Hawkeye pay the sum of \$1,734.91 being compensation for length of service plus vacation pay on that amount.

**ISSUE TO BE DECIDED:**

The Appellant-employer’s appeal is based on evidence that the employee, Phillips, quit and therefore is not entitled to compensation for length of service.

**FACTS AND ANALYSIS:**

Phillips was employed by Hawkeye between July 9, 1994, and January 3, 1997, as a truck driver.

During part of a calendar year, Phillips drove a gravel truck for Hawkeye, then for approximately two months ie. in October and November he hauled trees and during the balance of the year he was laid off when work was slow.

There were times when Phillips worked overtime. These additional hours he wished banked in order to better average out his pay periods. This was done on an honour system i.e. Phillips would bring in his record of banked hours and he would be paid for them.

Dock Fitzpatrick gave evidence that in January, 1997, the payroll clerk brought in Phillips’ records of banked time for which he was claiming reimbursement and stated that it didn’t seem to be accurate according to what he had been paid and the work he had

been doing. Mr. Fitzpatrick described the detailed analysis he made of various forms to determine whether the banked time claimed was reasonable including pre-trip forms, bill books and drivers logs. On approximately January 15<sup>th</sup>, Mr. Fitzpatrick asked Phillips to come in to discuss the issue. At that point Mr. Fitzpatrick says that Phillips became defensive and said that he worked too hard for what they paid and that he quit and left.

Subsequently, a Record of Earnings was issued by Hawkeye dated January 22, 1997, indicating that Phillips had been laid off rather than he had quit. Mr. Fitzpatrick states that he did this in part to indicate to Mr. Phillips that there was no hard feelings not realizing that a Record of Earnings would impact on the question of whether Phillips had quit.

In fact, the Record of Earnings is not determinative of whether Phillips was in fact laid off or quit.

In support of the evidence that Phillips quit, Mr. Glen Freer who is another owner-operator for whom Phillips worked after Hawkeye gave evidence that he hired Phillips in August or September, 1998. Mr. Freer states that Phillips told him at that time that he had worked for Hawkeye but that he had quit over a dispute about banked hours.

In further corroboration of his evidence that Phillips quit, Dock Fitzpatrick stated that normally during the layoff period Phillips was in contact to find out when Hawkeye expected to call him back at work. Dock Fitzpatrick did not hear from Phillips again until the correspondence from the Employment Standards office arrived with respect to Phillips' complaint about not being reimbursed for banked hours.

The onus is on the employer to show that the determination is incorrect and I find that based on the evidence presented and the fact that Phillips did not appear to dispute the evidence, that the employer has discharged that onus.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination by the Director dated June 14, 1999, be set aside.

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**Cindy J. Lombard**  
**Adjudicator**  
**Employment Standards Tribunal**