

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 -

Tami Parsons
("Parsons")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE NO.: 1999/337

DATE OF HEARING: August 17, 1999

DATE OF DECISION: November 17, 1999

DECISION

APPEARANCES

For the Appellant: Tami Parsons
The Respondent: Herman Hans
For the Director of Employment Standards: no appearance

OVERVIEW

This is an appeal by Tami Parsons ("Parsons") pursuant to s. 112 of the *Employment Standards Act* ("the Act"). The appeal is from a Determination issued by Kevin Molnar as a delegate of the Director of Employment Standards on May 7, 1999. The Determination dismissed Parsons's complaint that she is entitled to overtime pay and compensation in lieu of notice as a result of her dismissal by Biport Forest Products Ltd. ("Biport"). Parsons filed an appeal on May 31, 1999. An oral hearing was held at Prince Rupert, B.C. on August 17, 1999.

FACTS

Parsons was employed as a clerk/office manager for Biport between September 27, 1995 and July 31, 1997, when she was dismissed. Biport is a logging contractor operating a remote logging camp employing between 7 and 18 people in camp. Parsons was the only office employee of Biport, located at its offices in Prince Rupert. The terms of her employment were that she was to work from 9 to 5 each day with an hour off for lunch; she was paid \$2,500.00 per month. Following her dismissal, Parsons filed a complaint that she was not paid overtime wages for work she was required to do outside normal office hours. Parsons also complained that she was entitled to compensation for length of service, but abandoned that issue at the appeal. Biport disputes that Parsons was routinely required to work overtime, and claims that any legitimate overtime wages have already been paid to Parsons.

ISSUE TO BE DECIDED

This appeal requires me to decide whether Parsons is entitled to overtime wages.

ANALYSIS

In the course of making her submissions, Parsons stated she had just received a large number of documents from Biport a week before the hearing. These documents were sent to her as part of the disclosure of evidence in the possession of the Director. She recounted a history of communications between herself and the Director's delegate, relating primarily to when the Director would receive documentation in support of Biport's claim that she was not entitled to

overtime. Parsons stated that she spoke with Mr. Molnar at least monthly since she made her complaint, and on each occasion she was advised that no documents had been received from Biport. At one point she was told by Mr. Molnar that if documents were not forthcoming, he would proceed with his Determination without hearing further from Biport. Parsons also asked Mr. Molnar on several occasions whether he had contacted a number of witnesses who would support her complaint. On each occasion, Mr. Molnar replied that he had not had a chance to speak with these witnesses, but that there would be time for him to interview them before arriving at his Determination. Mr. Molnar did receive documents from Biport, but unfortunately Parsons was not given an opportunity to see or respond to them before the Determination was made. She expressed concern as well that Mr. Molnar may not have spoken with the witnesses she wanted him to interview before deciding her complaint. As a result, Parsons wished to file at the hearing some letters from the witnesses whose names she had given to Mr. Molnar. She was also left with the problem of having to respond to Biport's documents at the hearing, without being given an opportunity to make any submissions to Mr. Molnar before he made the Determination.

The relevant portions from the Determination which dismissed Parsons's complaint are as follows:

Biport produced a substantial body of evidence in support of their position including payroll records, telephone log books and bills, letters from business colleagues and daily dairies kept by both Parsons and Hans.

Findings

The only evidence provided by Parsons to substantiate her claim are wall calendars upon which she claims to have recorded extra hours worked. Biport produced a substantial amount of evidence which challenges the hours Parsons claims to have worked. Of particular importance was the daily diary Parsons was required to maintain which appears to be written in her own handwriting. Almost invariably there are no notations in the diary relating to the weekend work and substantial overtime Parsons claims she worked. There are also inconsistencies relating to hours Parsons claims she work [*sic*] when the diary indicates she was off work. The evidence indicates Parsons received paid time off in excess of her vacation entitlement. Based on the balance of probabilities I accept Biport's evidence as the best available information upon which to base a decision. I find that Parsons did not work overtime and is not owed any outstanding wages.

It is my view that the Determination was arrived at in a procedurally unfair manner. Mr. Molnar accepted documents and records from Biport on a contentious issue, but did not give Parsons an opportunity to see them or be heard on them before the Determination was made. Parsons was in regular contact with Mr. Molnar, and it would have been appropriate, at a minimum, for him to inform her of the nature of the documents he received, and to give her an opportunity to address them before he decided her complaint. This unfairness is sufficiently grave that I find Parsons has satisfied the threshold test for setting aside or varying the Determination. I allowed her to present evidence at the appeal to rebut Biport's documents and to address the possibility that the Determination was arrived at without information from several witnesses whose names were

given to Mr. Molnar.

Parsons testified that she recorded overtime hours in a wall calendar between January, 1996 and August, 1997. She brought my attention to a "Draft Contract Agreement" dated October 23, 1995, which was not signed by the parties but which outlined, among other things, a system whereby Parsons would bank her overtime hours and take them as time off. Parsons stated she believed the agreement had been signed, but she does not have access to the original. She says she operated on the assumption that she would be getting time off, and to that end, she recorded overtime hours on her calendar. She testified that the overtime arose as a result of errands she did for Mr. Hans of Biport and for employees at camp. As examples, she stated she often picked up machine parts after regular office hours and took them to the floatplane dock for delivery to camp; she would receive calls from camp employees while she was at home, with requests that she perform certain tasks the next day; she frequently picked up groceries from the Safeway store in Prince Rupert, and delivered them to the dock for shipment to camp; she would also receive calls from Mr. Hans to perform errands for him (she says Mr. Hans regularly called her at the office just before 5:00 PM, and asked her to perform tasks outside regular office hours). On January 2, 1996, for example, 1.5 hours of overtime were claimed by Parsons when she was asked by Mr. Hans to pick up payroll records and also a prescription for him and send these to him in Vancouver. On another occasion, Parsons was called at home at 7:00 AM to attend the office when the burglar alarm went off.

Parsons could not, however, provide details of the precise work she performed during most of the overtime hours recorded in her calendar, primarily because she noted only the hours worked, and not the tasks done during those hours. In the course of rigorous cross-examination by Mr. Hans, it was put to Parsons that she had fabricated the overtime hours recorded in her calendar. I am satisfied, from my observations of Parsons and her demeanour under cross-examination, that she is a credible witness and that she recorded overtime hours on her calendar shortly after she worked those hours.

Some of the documents filed by Biport purported to be lists of telephone calls to Parsons's home telephone number from Biport's camp telephone and from the tug boat "The Herschel." Parsons took issue with these documents being given to Mr. Molnar without an opportunity for her to respond to them. Parsons pointed out at the appeal hearing that Biport did not file all of the telephone records and instead made excerpts from records for the months of March, May and November, 1997. These excerpts identified a total of 14 calls to Parsons's home outside regular office hours. At the hearing, Mr. Hans produced the complete telephone records, which identified other calls made to Parsons's home throughout the period in question. I noted that most of these calls corresponded to overtime hours noted on Parsons's calendar. Parsons pointed out that Mr. Hans did not produce records from his cell phone or home telephone in Vancouver (where he resided for two weeks out of every month during Parsons's employment). Mr. Hans did not deny making calls to Parsons at home or at the office just before 5:00 PM, to assign work tasks on a regular basis, particularly during those weeks that he resided in Vancouver.

As to the alleged time-banking agreement, Mr. Hans denied entering into any such agreement, but he did acknowledge having discussed it with Parsons in the fall of 1995. Parsons pointed out, however, an interesting and significant fact: she recorded no overtime hours in 1995 at all,

but started keeping track of these hours in January, 1996. Parsons says this is because she started keeping track of her overtime hours only after there had been an agreement with Biport that she would get time off for overtime. Parsons's claim that there was a time-banking agreement between herself and Biport is supported to some extent by documents filed by Biport. In particular, one handwritten document filed with the Director is entitled "Time off given to Tami Parsons," dealing with the months January to April, 1997. This document shows what the employer terms "time off in lieu" to Parsons in the total amount of 24.5 hours for that period.

Biport placed great emphasis on the office diary which it says Parsons was required to keep. Biport claims there are no notations in the diary to support the overtime hours claimed by Parsons. Parsons, however, points out that she was not in the office when she worked overtime, as she was at home. Further, she pointed at random to several dates in the diary which did correspond accurately with her calendar notations of extra hours worked. Nevertheless, there remained some dates in the office diary which did not correspond properly with Parsons's calendar and with other records of time off for holidays and illness.

Although Parsons cannot prove exactly what she did during the many overtime hours claimed, she was able to provide anecdotal evidence which satisfies me beyond a reasonable doubt that she performed work for Biport on a regular basis outside office hours. I find the Determination to be in error in that regard, as it was Mr. Molnar's conclusion that Parsons worked no overtime at all. Her problem, however, is that she could not provide records or detail about any particular overtime claim when pressed by Biport to prove her claims. By the same token, however, Biport could produce no records or detail to disprove any of the overtime hours claimed by Parsons. In fact, when Biport's own telephone and handwritten records were examined, they tended to support Parsons's claim instead of casting doubt upon it.

In this situation, an employer should not be rewarded for its failure to manage an employee's time properly. In my view, Biport is as much to blame for Parsons's problem of proving her hours as Parsons is herself. I found Mr. Hans of Biport to be so aggressive in his defence of Parsons claim that at several points in his evidence I doubted his credibility. For example, Mr. Hans presented only excerpts from Biport telephone bills in an effort to minimize the number of calls Parsons received, yet in cross-examination he had to admit that he called her regularly from either his cell phone or home telephone number in Vancouver, which records he did not produce. Mr. Hans selected certain dates from his own diary which he said proved Parsons to be lying, and in particular December 4, 1996, when Mr. Hans claims his diary shows Parsons was off sick for the entire day (Parsons claimed 2 hours of overtime that day). Biport made mention of this and other dates in its submission to Mr. Molnar, and argued that Parsons therefore fabricated her overtime claims. At the appeal, however, Mr. Hans had to admit that the office telephone message book contained two messages taken in Parsons's handwriting on December 4, 1996, one at 10:30 AM and the other at 1:30 PM. As a result of these and similar revelations during Mr. Hans's evidence, I am inclined to prefer Parsons's evidence over Mr. Hans's evidence where their stories conflict.

Parsons's complaint claims she worked a total of 450 overtime hours between January, 1996 and July, 1997. Neither party kept any adequate records of hours worked or tasks assigned to Parsons outside regular office hours. As noted, I found Parsons to be credible in her claims, but

unable to support the amount of time claimed with any detail about the work she performed. The problem is now what remedy should be ordered to correct this difficult situation. The Director has a computer program for calculating wages owing to an employee for overtime, which automatically allows for statutory holidays, watches for the total hours worked in a week, and makes appropriate adjustments to the calculations. Having found Parsons to be a credible witness, there are nevertheless some problems in calculating what is owed to her by Biport. Biport has presented its own calculation, for example, that 24.5 hours of time off "in lieu" were given to Parsons in 1997. Mr. Molnar made a finding that Parsons received paid time off in excess of her vacation entitlement, which may or may not be the same as the 24.5 hours I have noted.

Another problem is that the complaint was filed on August 15, 1997. Nearly two years went by before the Determination was made. It would, in my view, be contrary to the objectives of the Act to remit the matter back to the Director, as Parsons would then be placed in the position of having to wait another lengthy period of time before a second Determination could be made. Parsons's salary, converted to an hourly rate, would be in the range of \$15.00 per hour. Most of the overtime hours she claims would be paid at time and a half, although some could be payable at double-time. In these circumstances, I have decided that fairness between the parties can be accomplished by reducing Parsons's claim by a substantial amount, as a contingency to allow for hours that Biport claims she received as time off "in lieu," and also to allow for the vexing problem of Parsons's inability to specify exactly what work was done for any particular overtime claim. The reduction would also address the probability that the parties did have some agreement (which Mr. Hans denied) that Parsons would bank her overtime and simply take time off. I expect Parsons would not have made a complaint if this agreement had been defined clearly by the parties at an early stage. As I have said, Biport is just as responsible for this situation as is Parsons. Rather than remit the matter back to the Director to perform calculations of her hourly rate and the correct overtime rates, I order Biport to pay a total of \$4,500.00 to Parsons as overtime wages. This sum is inclusive of interest pursuant to section 88 of the Act, but interest will accrue on this sum from the date of this order until the date of payment.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by Mr. Molnar is incorrect and the appeal should be allowed. Pursuant to section 115 of the *Act*, I order that the Determination dated May 7, 1999 be cancelled, and that Biport pay overtime wages to Parsons in the total amount of \$4,500.00, inclusive of interest pursuant to section 88 of the *Act* up to the date of this order.

Ian Lawson
Adjudicator
Employment Standards Tribunal