Employment Standards TRIBUNAL

An appeal

- by -

Rod Kenny
("Kenny")

- 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: Carol L. Roberts

FILE No.: 2001/420

DATE OF DECISION: August 16, 2001

DECISION

This is a decision based on the written submissions of Rod Kenny and Peter Croft.

OVERVIEW

On February 27, 2001, I issued a decision in respect of an appeal by Rod Kenny ("Kenny"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued October 30, 2000. In that appeal, Mr. Kenny complained that Peter Croft operating as Planet Dogs ("Croft") owed him regular wages, overtime wages, vacation pay, statutory holiday pay and compensation for length of service in the amount of $12,130.98.

The Director's delegate concluded that there was no contravention of the *Act* and that no wages were owing to Mr. Kenny.

Following a hearing, I determined that Mr. Croft had contravened the *Act*, and that wages were owing to Mr. Kenny. The matter was referred back to the Director's delegate, Mr. Lee, for a determination of Mr. Kenny's statutory entitlement based on minimum wages from April 12 to November 1, 1999, and interest.

Mr. Lee was unable to settle the matter between the parties, and issued a supplementary determination on May 14, 2001. The delegate found that Mr. Kenny was entitled to $9,836.85, representing wages and interest to May 14, 2001, based on a rate of $7.15 per hour and a standard 8 hour shift.

Mr. Kenny disagrees with the delegate's determination of the amount owing to him.

ISSUE TO BE DECIDED

At issue is whether the delegate erred in his determination of wages owing to Mr. Kenny.

FACTS

The facts leading to this appeal are set out in BC EST #D097/01. They will not be repeated here, but for those pertinent portions dealing with wages.

At the time of dissolving the partnership in Planet Dogs, Mr. Kenny sent Mr. Croft a letter setting out what he understood were the terms of the dissolution. Clause 2 read, in part, as follows: "I will work as your employee in the Planet Dogs business at a reasonable salary agreed by the two of us." The parties never agreed upon what constituted a "reasonable salary".

However, on November 1, 1999, Mr. Croft paid Mr. Kenny $7.50 per hour for 3 hours of work performed that day.

On filing his appeal with Employment Standards, Mr. Kenny enclosed a calendar of hours worked, which he indicated he made contemporaneously. In his determination, the delegate stated, in part, as follows:

> The parties are aware that the employer did not keep any form of time sheets or record of the hours worked by Mr. Kenny. Mr. Kenny submitted his personal record of the hours allegedly worked by him to the Tribunal in his appeal. The adjudicator, however, did not address the issue of these records submitted by Mr. Kenny in her decision. In the absence of a ruling, this calculation is, therefore, based on a standard 8-hour shift.

ARGUMENT

Mr. Kenny argues that he should not be paid anything less than $7.50 per hour. In support of that position, he provided 3 letters from other dog-caring or dog-minding facilities, which indicated that salaries ranged from $8.00 to $12.00 per hour.

Mr. Kenny also argues that he should be paid for overtime hours worked, and not simply for an 8 hour day. Mr. Kenny says that he kept careful track of his overtime hours, and enclosed copies of his original slips, which he then copied into his calendar.

Mr. Croft disputed owing Mr. Kenny any wages at all, and contends that he never paid his employees more than minimum wage. He also argued that although Mr. Kenny was at work by 7:00 a.m., he left work by approximately 2 p.m. each day.

ANALYSIS

Hourly rate

In his complaint to the Employment Standards Branch, Mr. Kenny claimed he was owed $7.50 per hour. Furthermore, the delegate concluded that, on November 1, 1999, Mr. Croft "correctly" paid Mr. Kenny $7.50 per hour for 3 hours on that day. My decision was that Mr. Kenny was entitled to a minimum wage from April 1, 1999 to November 1, 1999. I acknowledge that my decision was ambiguous in this respect. Although the minimum wage from April 1, 1999 to November 1, 1999 was $7.15 per hour, at the time the determination was issued, the minimum wage was $7.50 per hour. In light of the amount Mr. Kenny was in fact paid $7.50 per hour for the work he performed on November 1, 1999, and the hourly wage he claimed on November 3, 1999 was $7.50, the appropriate hourly wage to be paid to Mr. Kenny is $7.50, not $7.15.

Hours of work

At the time Mr. Kenny filed his complaint, he included a calendar of hours worked, which he stated that he made contemporaneously. He says he worked 9 or 10 hour days, 5 days per week. This is borne out by his calendar, which shows that Mr. Kenny worked from 6:45 a.m. until 5:00 p.m. Monday through Friday in April, May and June, 2000, and 6:40 until 4:00 p.m. July through October, 1999. Mr. Croft kept no records.

The Tribunal has determined that the test to be applied in circumstances such as this is "the best evidence rule." In Hofer v. Director of Employment Standards (BC EST #D538/97), the Tribunal said as follows:

> In the absence of proper records which comply with the requirements of Section 28 of the Act, it is reasonable for the Tribunal (or the Director's delegate) to consider employees' records or their oral evidence concerning their hours of work. These records or oral evidence must then be evaluated against the employer's incomplete records to determine the employees' entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate may accept the employees' records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable. Under those circumstances, if an employer appeals a determination, it would bear the onus to establish that it was unreasonable for the Director's delegate to rely on the employees' records (or evidence) and to establish that they were unreliable.

Further, the Tribunal stated

> Thus, in my opinion, the appropriate test to apply in such circumstances is the "the best evidence rule". That is, the Director's delegate must make a reasoned decision, based on an evaluation of all the records and evidence which is available, to determine what is the best evidence of the number of hours actually worked by the employee.

The matter was referred back to the delegate to make a determination. There is no basis for the delegate to use a 8-hour day "in the absence of a ruling" from the Tribunal. The delegate's duty is to make a determination on the best evidence. The delegate failed to apply this test, instead using an arbitrary determination of an 8 hour day, despite being provided with Mr. Kenny's calendar, and having been given no evidence from Mr. Croft.

The employer has the obligation to maintain payroll records, which include the hours worked by an employee on each day. Mr. Croft did not do so. I have reviewed Mr. Kenny's calendar, and find no reason to conclude that it is unreliable.

Rather than referring the matter back to the delegate for further consideration, I have calculated Mr. Kenny's entitlement, which is as follows (wages of $7.50 per hour, 9 hours per day from April 12, 1999 to June 30, 1999, and 8 hours per day from July 1, 1999 to October 30, 1999:

1116 hours @ $7.50	$ 8,370.00
57 hours @ $11.25	$ 641.25
5 stats @ $60.00	$ 300.00
	$ 9,311.25
4% vacation pay	$ 372.45
	$ 9,683.70
Interest to May 14, 2001:	$ 331.70
Total wages owing including interest up to August 15, 2001:	$10,015.40

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated October 30, 2000, be varied as follows: Peter Croft operating as Planet Dogs is to pay the amount of $10,015.40 to the Director in favor of Rod Kenny. That amount is to be paid immediately.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal