

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 -

Horizon Fiberglass Products Ltd.
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Mark Thompson

FILE NO.: 97/458

DATE OF DECISION: September 30, 1997

DECISION

OVERVIEW

This is an appeal by Horizon Fiberglass Products Ltd. (the “Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a Delegate of the Director of Employment Standards on May 23, 1997. The Determination flowed from the complaint of a former employee of the Employer, Nand Kishore, A.K.A. Kishore Nand (“Nand”). The Determination found that the Employer had violated Section 40 of the *Act* by failing to pay Nand overtime and Section 57 of the *Act* by failing to compensate Nand completely for annual vacations. The Employer appealed the Determination on June 12, 1997 on the grounds that the Determination had not considered all “pertinent records.” In particular, the Employer appealed the section of the Determination that dealt with vacation pay. In a separate Determination of May 30, 1997, the Delegate of the Director imposed a penalty of \$500 on the Employer for failing to provide payroll records within the period specified in a Demand for Employer Records. The Employer also appealed that Determination. In BC EST #D379/97, the Tribunal confirmed the May 30, 1997 Determination. Although the issues before the Tribunal raised by the Employer’s appeal are distinct from the earlier proceeding, certain facts set out in that decision are also relevant to this case.

ISSUE TO BE DECIDED

The issue to be decided is: did the Employer fail to pay Nand the proper compensation for annual vacation at the time of his termination?

FACTS

Nand was an employee of the Employer from December 4, 1990 through February 20, 1997, at which time he was dismissed. In his complaint of February 24, 1997, Nand alleged that he was dismissed without just cause, an issue the Employer did not contest. Nand claimed several items of compensation in his complaint, including annual vacation and overtime pay. As recorded in BC EST #D379/97, the Director’s Delegate wrote the Employer on April 9, 1997 requesting that it provide records of the hours Nand worked between February 20, 1995 and February 20, 1997 and payroll records for the entire period of Nand’s employment. When the Employer declined to provide the records in question, the Delegate issued a Demand for Employer Records on April 16, 1997, setting a deadline of April 30, 1997 for compliance. The Employer pointed to an apparent error in the original letter, and the Delegate issued a second Demand for Employer Records on April 22, 1997, with a deadline of May 6, 1997 to comply. On May 5, 1997, the Employer

provided payroll records for Nand's last six months of employment. The Delegate repeated her request for the records of Nand's employment, and on May 15, 1997 the Employer provided a number of time cards and payroll records for 1995, 1996 and 1997. The Delegate conducted an audit based on the records available to her and issued a Determination on May 23, 1997. The determination found that Nand was entitled to \$69.69 for unpaid overtime and vacation pay of \$1306.29, plus interest.

The Employer filed an appeal against the May 23, 1997 Determination on June 12, 1997. In the appeal, the Employer accepted that it owed Nand \$69.69 for unpaid overtime, but contested the finding in the Determination regarding annual vacation pay. In support of its appeal, the Employer submitted payroll records for Nand's employment for 1990 through 1997. It calculated amounts owed to Nand and amounts paid to Nand for vacation pay for the entire period of his employment and found that he had in fact been overpaid for vacation entitlement. In her submission to the Tribunal, the Director's Delegate pointed out that payroll records prior to 1995 had not been provided by the Employer until the appeal, despite a number of requests during the investigation of Nand's complaint. In addition, the Employer appeared to rely on payments for annual vacation during the period 1990 through 1997 to arrive at its calculation that Nand had been overpaid. The Delegate also noted that a separate determination had imposed a penalty against the Employer for failing to provide payroll records.

In his submission to the Tribunal, Nand alleged that he had not been paid for four hours of overtime work performed in November 1995. In addition, he argued that his wages should include a \$50 monthly gas allowance and \$2300 for his participation in a profit sharing plan.

ANALYSIS

Section 112 of the *Act* is clear that the Tribunal is to decide whether a Determination was correct in the light of the facts and the statutory requirements. The Tribunal is not an avenue for a re-examination of the facts underlying a Determination. In particular, it should not decide an appeal based on new information that one party failed to supply during the investigation of a complaint. The value of this distinction is apparent in this case. The Employer failed to provide all of the records requested by the Delegate, but did supply additional records in support of its appeal. To verify the information provided for the appeal would require an audit of all of the Employer's records, a task to be performed by the Director's Delegate, not the Tribunal.

In addition, the party filing an appeal bears the onus of demonstrating that the Determination was incorrect. On their face, the records the Employer provided to the Tribunal do not demonstrate conclusively that the Determination was incorrect, although it

would be beyond the jurisdiction of the Tribunal to carry out a detailed analysis, for the reasons stated above.

Nand stated in reply to the Employer's appeal that he was entitled to a share of the Employer's profits and that his wages should have included the gas allowance. He did not provide evidence to support either claim. Indeed the same principle should apply to his claim as to the Employer's appeal. The Tribunal is not established to receive evidence on matters not put to the Director's Delegate during the investigation of a complaint. If a gas allowance was paid, it would not fall within the definition of "wages" in the *Act*.

ORDER

For these reasons, the Determination of May 23, 1997 is confirmed.

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Mark Thompson
Adjudicator
Employment Standards Tribunal