

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 -

Perry Rink Constructors (1995) Ltd.
("the employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Sherry Mackoff

FILE NO.: 97/542

DATE OF HEARING: September 15, 1997

DATE OF DECISION: September 30, 1997

DECISION

OVERVIEW

This is an appeal by Perry Rink Constructors (1995) Ltd. (the “employer”) under Section 112 of the *Employment Standards Act* (the “Act”) from a Determination, dated July 2, 1997, issued by a delegate of the Director of Employment Standards. The Determination found that the employer had contravened section 5 of the *Skills Development and Fair Wage Act* R.S.B.C. 1996, c. 427 and section 28 of the *Employment Standards Act*.

The essence of the Determination is that the employer owes Mr. Frank Still wages in the sum of \$9114.09 plus interest for a total of \$9191.19. In his Determination the delegate found that Mr. Still worked 760 hours for the employer and that he was entitled to \$25.62 per hour.

The employer’s appeal seeks to have the Determination cancelled as the employer maintains that no wages are owed to Mr. Still.

A hearing was held at the Vancouver office of the Employment Standards Tribunal on September 15, 1997. Mr. Perry Rink represented the employer and Mr. Jeff Roger, Vice-President of the Carpenters’ Union, Local 1995 and Mr. Bill Duck, Business Agent for Local 1995, represented Mr. Still. Both Mr. Rink and Mr. Still gave evidence under oath.

At the hearing, Mr. Roger, on behalf of Mr. Still, conceded that the Determination was in error. Mr. Roger submitted that the hours worked by Mr. Still did not total 760 hours as set out in the Determination but rather 703.5 hours. According to Mr. Roger, the employer had paid Mr. Still for only 506.5 hours and therefore Mr. Still is owed wages for the additional hours. It was his position that Mr. Still should receive \$25.62 per hour as this was a “fair wage” job.

It is the employer’s position that Mr. Still was paid for all the hours that he worked and that he was paid \$25.67 per hour or 5 cents above the “fair wage” rate.

ISSUES TO BE DECIDED

- 1) How many hours did Mr. Still work for the employer?
- 2) Does the employer owe any wages to Mr. Still and if so, how much does it owe?

FACTS

The employer is a company that does concrete form work. Mr. Rink is the general manager of the employer. This dispute arises from a project that the employer did, as a subcontractor, on the Chinese Cultural Centre (the "Centre") at 555 Columbia Street, in Vancouver. The employer, which had entered into a contract with the general contractor to do the form work at the Centre, employed 23 employees over the course of the project. One of those employees was Mr. Still, who is a carpenter, and has worked as a carpenter since 1956 or 1957. The employer's work at the Centre lasted from October, 1996 to May, 1997 and during this period 10 journeymen carpenters and 7 apprentice carpenters worked for the employer on the project.

There is no dispute that the employer's work at the Centre came under the provisions of the *Skills Development and Fair Wage Act*. By virtue of Schedule 3 of the *Skills Development and Fair Wage Regulation*, a carpenter on a "fair wage job" must receive a minimum hourly rate of \$21.62 plus a minimum of \$4.00 per hour for benefits for a minimum hourly compensation totalling \$25.62.

Mr. Still began work for the employer on Monday, October 28, 1996. He was laid off on Friday, April 25, 1997.

Mr. Still submitted his complaint to the Employment Standards Branch after he was laid off. In response to questions about why, during the course of six months of employment, he had never told Mr. Rink about the discrepancies between what he received and what he thought he should have received, he stated that he thought he would be laid off if he complained.

I will set out, in some detail, the evidence of Mr. Rink and Mr. Still on the issue of the number of hours worked.

Mr. Rink testified that the supervisor on the job site, Mr. Cool, kept track of the employees' hours in a book. As well, once a month, on the 28th day of each month, (which is the cut-off day for every pay period) each employee would submit a time sheet (or a slip of paper) with their hours on it to Mr. Cool. These time sheets, prepared by the employees, would be thrown out as soon as the employees were paid. After receipt of the hours from the employees, Mr. Rink and Mr. Cool went through them and came up with the number of hours that Mr. Rink felt was correct.

Mr. Rink prepared the payroll for the employer. He paid the employees once a month. They were paid on the last working day of the month or on the first day of the following month. The pay periods covered the 29th day of the previous month to the 28th day of the current month. If employees requested it, they would be given advances.

To substantiate his position that Mr. Still was paid for all hours worked, Mr. Rink presented several documents. I would note at the outset that Mr. Rink stated that the originals of his documents remain with the delegate.

For the number of hours worked on Monday, October 28, 1996 Mr. Rink relied on a copy of a "Worksheet Time Sheet" (Exhibit #2) that showed Mr. Still worked 5.5 hours. Those hours were taken from Mr. Cool's book. Mr. Rink testified that he could not say what hours Mr. Still worked on October 29, 30, or 31st without looking at Mr. Cool's book.

A copy of a document titled "NOV 96 WAGES-CCC" (Exhibit #3) was relied on to show the number of hours that Mr. Still worked from October 29, 1996 until November 28, 1996. This document lists payroll information for three people, one of whom is Mr. Still. It sets out Mr. Still's rate at \$24.68, his hours at 105, shows that he received "holiday pay", sets out his gross, his deductions, his advances, his net, and the cheque numbers to show the cheques that he received. This document does not list the number of hours that Mr. Still worked per day. It simply shows the hours as 105. This document was prepared from information in the book kept by Mr. Cool and that Mr. Rink and Mr. Cool went over.

To substantiate the number of hours that Mr. Still worked during the period November 29, 1996 to December 28, 1996 Mr. Rink relied on a copy of a document titled "DEC 96 WAGES-CCC" (Exhibit #4). This document, which is in the same format as Exhibit #3 outlined above, shows Mr. Still's hours to be 71.5. Again there is no day by day itemization of the hours. There is simply the number "71.5" under the heading "Hours". It was prepared from the book kept at the job site and like Exhibit #3 this document contains payroll information for three people.

Mr. Still's hours for the months of January, February and March, 1997 appear on a copy of a document titled "Worksheet Time Sheet" (Exhibit #6). This document was prepared by Mr. Rink from the book that Mr. Cool kept at the job site. Mr. Rink said that it is made up on a monthly basis. It shows the hours worked each day for Mr. Still. Mr. Rink said that this time-sheet was kept because his accountant told him that it was necessary to keep daily hours for each employee. As well as hours, this document records the rate of pay at \$24.68, that "holiday pay" was paid, and sets out the gross, the deductions, advances, the net pay, and the cheque numbers for the cheques that Mr. Still received. The total number of hours shown on Exhibit #6, which covers the week ending January 4, 1997 to the week ending March 29, 1997, comes to 241.5 hours.

Mr. Still's hours for April, 1997 are shown in the exact same format as appears in Exhibit #6. They are shown on the "Worksheet Time Sheet" which also contains the hours for October 28, 1996 and was marked Exhibit #2. This Worksheet Time Sheet also contains the same headings pertaining to rate of pay etc. that appear in Exhibit #6. According to this document the total number of hours that Mr. Still worked for the month of April, 1997 comes to 83 hours.

The total number of hours that Mr. Still worked according to Mr. Rink's documents is 506.5.

I now turn to Mr. Still's evidence concerning the number of hours that he worked. Mr. Still testified that every evening after work he would note the hours that he worked for the employer in a calendar. The calendar, which appears to me to be a compilation of pages from three different calendars, sets out Mr. Still's hours from October 28, 1996 until April 25, 1997 when he was laid off.

Prior to October 28, 1996 there are no hours noted on the calendar. Mr. Still explained this by stating that prior to October 28 he was with a union company and there was no need to keep hours.

In his evidence, Mr. Still went through each month of his calendar. On each day that he worked he noted the number of hours he worked. If he was sick he noted that. If he missed work because of snow or because his car broke down he noted that as well.

The hours noted by Mr. Still in his calendar differ significantly from the hours tabulated by Mr. Rink. For example Mr. Still's calendar shows that he worked 8 hours on October 28, 1996 not 5.5 hours as shown on Mr. Rink's sheet. Relying on his calendar, Mr. Still said he worked 32 hours in October, 119 hours in November, 96.5 hours in December, 111 hours in January, 72 hours in February, 157.5 hours in March and 116 hours in April.

As well as the calendar months where Mr. Still kept track of his daily hours, he also prepared four hand-written pages setting out each work day of the month starting from October 28, 1996 and ending with April 25, 1997. Each day shows the number of hours worked, or whether for some reason, like illness, Mr. Still did not work. Mr. Still testified that he filled these pages in every evening.

According to Mr. Still, the originals of these four hand-written pages are with the delegate and therefore I was only able to examine a copy. I have compared Mr. Still's calendar months with these four pages and there are several very minor differences from the hours shown in the calendar. The only difference of significance is that on the hand-written sheets Mr. Still shows that he worked 8 hours each on January 29, 30, and 31st whereas the calendar shows no notations on those days. In response to my question about this discrepancy, Mr. Still said that the calendar should also have shown those hours.

Mr. Still stated that in mid-February, 1997, the employer started to have the employees sign in and sign out in the book kept by Mr. Cool.

I will now review the evidence on the issue of pay rate and payment.

Mr. Still said that the employer's foreman hired him at \$18.00 per hour and that he received \$18.00 per hour. Mr. Still said that he received pay stubs once a month but that no hourly pay rate was on them. According to Mr. Still the delegate has his pay stubs and as no copies of the pay stubs were produced at the hearing I did not have an opportunity to examine them.

It was Mr. Rink's evidence that Mr. Still was paid \$25.67 per hour or 5 cents an hour above the fair wage rate. This figure was arrived at by adding 4% "holiday pay" to the base hourly wage of \$24.68 per hour. According to Mr. Rink, each employee received a stub with each pay cheque that showed the number of hours, the rate of pay, holiday pay, the gross, the deductions, the advances and the net pay.

All of the cancelled cheques that Mr. Still received from the employer were put into evidence. There were 21 cheques issued to Mr. Still over the period that he worked for the employer. Twelve of those cheques were noted as an "Advance". One cheque, cheque # 1399, dated December 18, 1996, for the sum of \$133.75 is marked "Expenses" and does not relate to the payment of wages. When I examined the payroll information contained on Exhibit #4, this cheque was rightly not included as an advance. Another cheque, cheque #1806, dated March 31, 1997, for the sum of \$153 is marked "Bal & Parking". Although Mr. Rink did not pay employees' parking he said that he agreed to help Mr. Still and Mr. Cool with parking.

The total of the 21 cheques (and I am not including the reimbursement cheque in the sum of \$133.75), according to my addition, comes to \$10,041.72.

ANALYSIS

How many hours did Mr. Still work for the employer?

The onus on an appeal of a Determination is on the appellant to satisfy the Tribunal that the Determination is wrong.

However, at the outset, Mr. Still's representatives conceded that the number of hours set out in the Determination, namely 760 hours, was too high. I was asked to find that Mr. Still worked 703.5 hours for the employer based on the daily record of his hours that he kept in his calendar.

According to the documentation that was presented by Mr. Rink, Mr. Still's total hours come to 506.5 hours.

Under the *Employment Standards Act* an employer must keep records of the hours worked by an employee on each day, regardless of whether the employee is paid on an hourly or other basis. [See: section 28(1)(d)].

In this case the employer presented no evidence (with the exception of October 28th) setting out the daily hours that Mr. Still worked in October, November or December, 1996. It was impossible to determine from the employer's documents what daily hours the employer had recorded for Mr. Still during that time period. The evidence presented for those months showed only an amalgamation of hours.

The essence of the dispute between these parties concerned how many hours Mr. Still worked for the employer and Mr. Rink did not bring any evidence of the daily hours worked by Mr. Still during that time period.

The evidence relied on by the employer for January through April, 1997 while setting out the hours worked each day, was a time sheet that was prepared by the employer once a month. Mr. Rink did not bring the book of hours kept on-site by Mr. Cool to substantiate his record of hours. Nor did he call Mr. Cool as a witness.

Mr. Still, however, kept a daily record of his hours on the job and showed it to me.

I therefore conclude, after carefully considering the testimony of the witnesses, all of the documents, and the submissions, that Mr. Still is entitled to be paid for 703.5 hours of work based on the hours he kept in his calendar months.

Does the employer owe any wages and if so how much?

The difference between the number of hours paid for by the employer and the number of hours worked by Mr. Still is 197 hours. Therefore the employer does owe Mr. Still wages.

Pursuant to the *Skills Development and Fair Wage Regulation*, Mr. Still is entitled to \$21.62 per hour and \$4.00 per hour in benefits for a total hourly rate of \$25.62. Multiplying \$25.62 by 703.5 hours comes to \$18023.67.

The employer is of course entitled to be credited for the gross wages that were paid to Mr. Still. In his determination, the delegate calculates the total gross payments to be \$10,367.92.

From my review of the payroll evidence provided by Mr. Rink (Exhibits #2,3,4, and 6) the delegate's calculation of the total gross payment is in error. The total gross payment for which the employer should be credited comes to: \$13,136.20. I arrive at this figure as follows: October-\$141.44; November-\$2695.05; December-\$1974.72; January-\$2103.92; February-\$1272.96; March-\$2823.39; and April-\$2124.72.

Therefore, the gross amount owing to Mr. Still is \$18023.67 less \$13,136.20 for a total of \$4887.47 plus interest.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination dated July 2, 1997 be varied to show that the employer is required to pay wages totalling \$4887.47, plus interest pursuant to section 88 of the *Act*.

**Sherry Mackoff
Adjudicator
Employment Standards Tribunal**