Employment Standards TRIBUNAL

An appeal

- by -

Abco Building Maintenance Ltd.

- 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: John M. Orr

FILE No.: 2002/291

DATE OF HEARING: August 30 and October 7, 2002

DATE OF DECISION: October 16, 2002

DECISION

APPEARANCES:

Kelvin A. Scheuer	Counsel on behalf of Abco Building Maintenance Ltd.
Paul Rai	On his own behalf
Kuljit Rai	On her own behalf

OVERVIEW

This is an appeal by Abco Building Maintenance Ltd. ("Abco") pursuant to section 112 of the *Employment Standards Act (*"the *Act")* from a Determination dated May 3, 2002 by the Director of Employment Standards ("the Director").

Abco operated a building maintenance business and employed Paul and Kuljit Rai to perform maintenance services on a number of buildings. A dispute arose over the alleged failure to pay overtime. There were some other issues in relation to compensation for length of service, vacation and statutory holiday pay which were not before me.

The Director dealt with the claims of Paul and Kuljit Rai together and found that they were owed, in total, $27,165.15. Abco appealed on the grounds that the Director's delegate did not properly understand or take into account the nature of the employment contract. It was also submitted that the delegate improperly concluded that Abco did not dispute the amounts owing.

ISSUES

The issues in this case are whether the employment contract was properly applied, whether wages were owing and, if so, in what amount.

FACTS AND ANALYSIS

Having heard the evidence presented by Abco and the submissions made by the parties I am satisfied that the Director's delegate misunderstood the submission made by Abco. It appeared to me at this hearing that there was very little disagreement between the parties as to the factual underpinnings of this somewhat unusual employment contract.

While the contract was unusual it met or exceeded all the minimum requirements of the *Act.* Therefore the delegate should have attempted to calculate the wages based on the terms of the employment contract.

The evidence and submissions made before me indicated that the employment contract provided that Paul and Kuljit Rai agreed to provide maintenance service to a number of buildings. The parties agreed in advance as to the appropriate number of hours required to do the work. If the work were completed in fewer hours the Rai's would still receive the full contracted wage amount. It was stipulated that no amount of work should be done that exceeded the contracted hours.

It was specifically agreed that no extra payment would be made over and above the contracted amount. The Tribunal has previously decided that an employee may not incur overtime wages without the consent or acquiescence of the employer; *Re:Schutt (c.o.b. Abco Building Maintenance)* BCEST #D287/97. I agree with this principle.

However, in this case, the contracted amounts for each "run" of buildings exceeded the 40 hours per week and therefore inherently attracted the overtime provisions of the legislation. For example, one "run" called for 65 hours per week. And therefore, twenty-five hours should have been paid at the overtime rates. But, I repeat, that no time in excess of the 65 hours should be paid.

During the hearing it became apparent that the Abco bookkeeper had applied a formula that effectively paid the inherent overtime at straight time and not at the overtime rates. This was contrary to the legislation. It is clear that some wages are indeed owing to the Rai's. However, the method of wage calculation used by the Director's delegate was in error. It did not take into account the terms of the contract of employment as discussed above.

The inherent overtime for each of the Rai's was only paid at straight time and not at overtime rates and I have concluded that this matter should be referred back to the Director in order to complete the calculation of wages owing based on the nature of the evidence presented that this hearing.

An additional point was clarified by the Rais. They noted that there were one or two exceptional situations where additional work was required over and above the contracted "run". These included such things as work required for the C.V.R.D. and at Christmas. However they stipulated that these amounts had been paid.

In conclusion therefore, I am referring this matter back to the Director to recalculate the amount of wages owing to the Rais based on the following facts. Firsty, that there should be no payment for wages in excess of the contracted amount for each "run". Secondly, that each "run" that called for more than 40 hours per week should have attracted overtime rates for the additional hours included in the run.

ORDER

Pursuant to section 115 of the Act I order that this matter is referred back to the Director.

John M. Orr
Adjudicator
Employment Standards Tribunal