Employment Standards TRIBUNAL

An appeal

- by -

Signet Industrial Repair Ltd.
("Signet")

- 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: David B. Stevenson

FILE No.: 2001/264

DATE OF HEARING: August 24, 2001

DATE OF DECISION: September 4, 2001

DECISION

APPEARANCES:

on behalf of Signet Industrial Repair Ltd. Mary Anka

on behalf of the individual In person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Signet Industrial Repair Ltd. ("Signet") of a Determination that was issued on March 13, 2001 by a delegate of the Director of Employment Standards (the "delegate"). The Determination concluded that Signet had contravened Part 3, Section 17, Part 4, Sections 40(1)(2) and 42(2)(4) and Part 8, Section 63(2)(4) of the *Act* in respect of the employment of Witold Kowalski ("Kowalski") and ordered Signet to cease contravening and to comply with the *Act* and to pay an amount of $14,846.01.

Signet has raised two grounds of appeal. First, Signet says they had just cause to terminate Kowalski and the Determination was wrong in concluding he was entitled to length of service compensation. Second, Signet says Kowalski was paid for all overtime worked and was not entitled to any additional overtime pay.

Signet also says Kowalski did not work from October, 1995 to July, 1999 because he was laid off from February 1, 1997 to February 17, 1997. Kowalski acknowledges that he was laid off February 1, 1997, but says he went back to work on February 4, 1997. I do not need to decide that factual difference as, even accepting Signet's version of the facts, a period temporary layoff does not create a break in an employee's continuous employment for the purposes of the *Act*.

At the commencement of the appeal hearing, I was given a document indicating Kowalski had been invoiced by Signet for approximately $39,000.00 relating to his use of a company vehicle during his employment. The matter was not raised again during the appeal. I have not given any consideration to this document. In my view, that amount, as it was described to me, would fall within those matters caught in the prohibition set out in Section 21 of the *Act* and could not be set off against wages found owing under the *Act*.

ISSUE

The issues in this appeal are whether Signet has shown the Director was wrong in concluding Kowalski was entitled to length of service compensation and whether they have shown the Director's calculation of overtime owing was wrong.

THE FACTS

Signet is an electrical contracting, repair and service company. Kowalski worked for Signet as an electrician from October, 1995 to July, 1999 at a rate of $21.00 an hour.

Following his termination in July, 1999, Kowalski filed a complaint under the *Act*, alleging he was owed overtime pay and length of service compensation. In support of his claim for overtime pay, Kowalski provided the Director with detailed records outlining his claim. The Determination noted that "Kowalski's records correspond to those provided by Signet in the number of hours he was paid in each pay period". the Director accepted Kowalski's records as accurately reflecting his hours worked and wages paid. In respect of the records provided by Signet, the Determination stated:

> Signet did not provide a daily record of hours worked. Signet provided a payroll summary that, when compared to Kowalski's record of hours worked shows that only regular rates of pay were used and that overtime and on occasion regular hours worked were credited to a time bank. Signet did not provide a formal accounting of the time bank. Kowalski maintained and provided an accounting of the time bank.

The records provided by Kowalski also included, and set off against the overtime wages claimed, approximately $12,000.00 in purchases made on his behalf by Signet. Most of these purchases were supported by receipts provided by Kowalski.

Kowalski was terminated on or about July 23, 1999. While the Record of Employment indicated Kowalski had been laid off due to a shortage of work, it is apparent from some of the material and file, taken together with the evidence I received at the hearing, that Kowalski was dismissed for what Signet alleged was just cause. There is an oblique reference to those allegations in the Determination:

> Signet did not provide any evidence that Kowalski had been terminated for cause.

In the investigation, in the appeal and in the hearing, Signet alleged Kowalski had been fired for "insubordination". The specific allegations are captured in the appeal:

> Eight months prior to his dismissal Mr. Kowalski underwent a dramatic change towards the company and I, [sic] but given that he had been employed by Signet off and on for many years I gave him a chance to rectify is [sic] attitude and work with us as a team again. It went fine for a few months and then he started reverting back to his old ways of questioning my instructions, arguing with me in front of other employees and refusing to answer his phone and pager.

One might have expected, in light of the above allegations, that the hearing of the appeal would involve hearing evidence to support the allegations made. That was not the case. Signet was

represented at the hearing by Mrs. Mary Anka, the wife of the President of Signet and Signet's Office Manager/Controller for the company. No one else attended for the appellant.

Mrs. Anka provided evidence of the practice at Signet of allowing employees ½ hour each day to complete administrative tasks, such as filling out time sheet, work sheets and reports, related to the work performed during the day. In response, Mr Kowalski stated that this was an area of disagreement between him and Mr. Anka. Kowalski, as much as possible, performed the required administrative tasks on company time. He told Mr. Anka if he was required to perform those tasks outside of regular working hours he wanted to be paid for that time. Mr. Anka did not want to pay for an employee doing those tasks.

ARGUMENT AND ANALYSIS

Signet, as the appellant, has the burden in this appeal of persuading the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. This burden has been described by the Tribunal in *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96) as the "risk of non-persuasion":

> Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L.Rev. 34 puts it, "the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy". In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of "burden of proof" is only of significance where the tribunal has not been persuaded.

In respect of the issue of just cause, Signet has, in effect, a dual burden in this appeal, as it also bears the burden of establishing just cause for termination. The Director found Signet had provided no evidence of just cause for termination. It was open to Signet in this appeal to show that conclusion was incorrect by providing evidence establishing just cause. They have not done so. Even if accepted what Mrs. Anka said occurred, the circumstances fall far short of establishing just cause for termination, either on the basis of insubordination or generally. This ground of appeal fails.

On the issue of whether Kowalski was paid for overtime worked, Signet has similarly failed to provide any evidentiary basis for concluding the Determination was wrong in respect of Kowalski's entitlement to overtime pay. In the appeal, there is a bald assertion that Kowalski was told on numerous occasions to quit work ½ hour early and to take this time to fill out his time sheet and reports for the day, but he consistently continued to add ½ hour to his time sheets and expected to be paid overtime. Mrs. Anka was unable to provide any details concerning the "numerous" occasions Kowalski was told to quit work nor was she able to contradict Kowalski's claim that, as often as possible, he did his time sheet, work sheets and reports during regular hours and only worked overtime on those tasks if he could not do them inside regular hours. I might add that a review of the Director's Overtime Calculation Report does not bear out the assertion that Kowalski "consistently" added ½ hour to his time sheets.

Nothing in the evidence provided by Signet shows the record provided by Kowalski and accepted by the Director was wrong. I note in that respect, the comment in the Determination that Kowalski's record of hours worked corresponded to the number of hours for which he was paid by Signet.

No error in the Determination has been established and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determinations dated March 13, 2001 be confirmed in the amount of $14, 846.01, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal