

An appeal

- by -

Native Investment and Trade Association
(“NITA”)

- 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.: 2001/407

DATE OF DECISION: September 12, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by the Native Investment and Trade Association (“NITA”) of a Determination issued on May 3, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that NITA had contravened Parts 4, 5, 7 and 8: Sections 35, 40, 45, 58 and 63 of the *Act* in respect of the employment of Brian Cochrane (“Cochrane”) and ordered the NITA to cease contravening and to comply with the *Act* and to pay an amount of \$7,425.95.

NITA has appealed the Determination, alleging it contains errors of fact and errors in conclusions reached on the available facts. NITA does not contest certain parts of the Determination, but contends other parts of it need to be reviewed and adjusted.

ISSUE

The issue in this appeal is whether NITA has demonstrated any error in the Determination sufficient to justify the Tribunal exercising its authority under Section 115 of the *Act* to vary it.

FACTS

NITA is a body that organizes conferences, workshops and trade shows to promote Aboriginal businesses. The Determination concluded that Cochrane was employed by NITA as an Information Systems Administrator from June 2, 1999 to August 2, 2000. His duties included information systems management functions and desktop publishing. His wage rate varied during the term of his employment from \$15.00 an hour at the start of his employment to \$29.00 an hour at the termination of the employment relationship.

There were nine issues addressed in the Determination, including whether Cochrane was entitled to overtime pay, statutory holiday pay and length of service compensation and whether he had been correctly paid his annual vacation pay. There was an issue about minimum daily pay also addressed in the Determination. There is no appeal on that matter. In respect of the overtime and statutory holiday issues, the Determination concluded:

An examination of the time records indicate that there were times that Mr. Cochrane worked less than four hours in a day, but was only paid for the hours worked. Furthermore the time records indicate a consistent pattern of hours worked in excess of eight in a day. There is no evidence that the company had a variance in place, there is also no evidence that the company told Mr. Cochrane not to work hours in excess of eight in a day. In addition, the records seem to indicate that Mr. Cochrane was paid statutory holidays incorrectly as he was paid

six hours for each statutory holiday, using the method set out in the Act this was at times inadequate compensation for a statutory holiday.

Cochrane submitted time sheets to NITA for his hours worked. The Determination noted that working in excess of eight hours in a day was a consistent pattern on those time sheets and that Cochrane was paid at straight time for all the hours he submitted on the time sheets, except for the pay period July 7 to July 17, 2000, where there was a disagreement about whether Cochrane should have been paid additional hours, including travel time. That disagreement was considered in the Determination and the Director concluded Cochrane had worked 57.5 hours during that period and was entitled to wages, calculated as directed by the requirements of the *Act*, for that period.

The issue of whether there was any outstanding vacation pay entitlement was determined by calculating 4% on Cochrane's total earnings. The Determination also concluded that Cochrane was entitled to length of service compensation. That conclusion was based on a finding that Cochrane gave NITA notice of resignation on August 2, 2000, that Cochrane and Alan Millbank, the General Manager for NITA, agreed the resignation would be effective September 1, 2000, but Mr. Millbank asked Cochrane to leave his employment on August 2, 2000.

ARGUMENT AND ANALYSIS

NITA has submitted a considerable amount of material with the appeal, but the appeal itself has failed to identify, except in a general way, where the Determination is wrong. The burden in this appeal is on NITA to show there was an error in the Determination. The appeal has identified the following matters relative to the various matters under appeal:

Overtime:

1. Cochrane was paid based on the time sheets he submitted.
2. Cochrane never made any claim for overtime pay.
3. NITA required every employee to seek approval before working any overtime.
4. Cochrane had never requested overtime work and had never incurred overtime without showing it on his time sheets.
5. Overtime would have been paid to Cochrane had his time sheets indicated he worked overtime.
6. No overtime was due to Cochrane.
7. Cochrane's overtime claim was made after his resignation.

The material on file clearly shows that Cochrane consistently worked more than eight hours in a day, and frequently worked eleven or more hours in a day. That material supports the conclusion that NITA was aware Cochrane worked hours in excess of eight in a day and allowed him to do

so. Cochrane's wage claim was made within the time limit set by the *Act* and he was entitled to the minimum standards provided by the *Act*, regardless of whether he claimed them during his employment. NITA has not satisfied the burden of showing an error in the Determination.

Flexible Work Schedule

1. Cochrane was employed under a flexible work schedule.
2. Cochrane did not have regular daily hours of work, but had a weekly allotment of time.

The appeal does not show any error in the Determination on this point. NITA had acquired no variance under the *Act* and was required to pay Cochrane overtime pay whenever his hours of work exceeded eight in a day or forty in a week.

Regular Wages Owning

1. NITA paid Cochrane according to his time sheets. The time sheet he submitted for the period July 7 to 17, 2000 showed he worked 43 hours.
2. Cochrane took it upon himself to revise the time sheet for his period to show 63 hours worked.

The Director accepted that Cochrane worked 57.5 hours during the disputed period. The main difference of opinion between NITA and Cochrane was travel time from Vancouver to Toronto and return. The Director found this to be time worked. NITA has not met the burden of demonstrating that conclusion was wrong. Nor has NITA met the burden of demonstrating any other aspect of the Determination on additional wages owed was wrong.

Statutory Holiday Pay

1. NITA believes it has paid Cochrane statutory holiday pay based on the time sheets submitted.

NITA has not shown there is any error in the Determination in respect of the calculation of statutory holiday pay.

Length of Service Compensation

1. Cochrane resigned his position on August 2, 2000.
2. Cochrane was displeased with his job and had resigned twice previously.
3. NITA had attempted to be flexible with Cochrane and made every effort to retain his services.
4. Cochrane quit his job and is not entitled to compensation for length of service.

The Determination noted that Cochrane had given NITA notice of his intention to resign his employment on August 2, 2000 and that he and Mr. Millbank agreed that his resignation would become effective September 1, 2000. On the same day, and following that agreement, Mr. Millbank asked Cochrane to leave, denying him the opportunity to work out the period between his notice of resignation and its effective date. The appeal itself does not challenge the conclusion that Cochrane had agreed with Mr. Millbank to make the effective date of the resignation September 1, 2000 and was then asked to leave, but has argued that *even if* the effective date of Cochrane's resignation was brought forward, that does not alter the fact he resigned and was not terminated. The Determination stated the following:

. . . as Mr. Cochrane was not allowed to work out his notice period and was terminated by the company, prior to the agreed upon quit date of September 1, 2000 it appears he is entitled to two weeks compensation . . . under Section 63.

NITA has not shown the either the Director' appreciation of the facts or the analysis of those facts in the context of the benefit provided in Section 63 of the *Act* was wrong.

Annual Holiday Pay

1. Cochrane was owed \$246.52 annual vacation pay, not \$894.92 as determined by the Director.

The Director has submitted that the annual holiday pay was calculated at 4% of total earnings, as required in the *Act*. NITA has not shown that was an incorrect statement or that there was any error in the calculation by the Director of wages paid or payable by NITA to Cochrane or in the calculation of annual vacation pay owing on those wages.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 3, 2001 be confirmed in the amount of \$7,425.95, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal