

An appeal

- by -

Julie E. Sirois
("Sirois")

- 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.: 2002/448

DATE OF DECISION: November 5, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Julie E. Sirois (“Sirois”) of a Determination of the Director of Employment Standards (the “Director”) dated July 29, 2002.

Sirois had filed a complaint with the Director alleging she had worked overtime hours without being paid overtime rates. Following investigation, the Director concluded Sirois’ employer, Preferred Restoration & Emergency Services Inc. (“Preferred Restoration”), had contravened Part 4, Sections 40(1) and 40(2). The Director determined Preferred Restoration owed Sirois an amount of \$319.45. This amount was paid and a Determination was issued indicating no further amounts were owing to Sirois.

Sirois disagrees and says that the Director erred in calculating the amounts owed to her. She has raised three issues: statutory holiday pay for October 8, 2001; payment for her final day of work; and the rate of pay used to calculate the wages owing.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue in this appeal is whether Sirois has shown the Director erred in calculating the amount of wages owing.

FACTS

Preferred Restoration is one of a group of companies involved in construction, renovation and emergency repairs. Sirois worked for Preferred Restoration from September 13, 2001 to November 2, 2001 as an office worker at a salary of \$2800.00 a month.

The Determination concluded Sirois was not entitled to statutory holiday pay for October 8, 2001 as she had not qualified under the *Act* for that entitlement. On that basis, no special consideration was given to the statutory holiday in calculating the amounts owed. The Director accepted that Sirois had worked 3 hours on her last day of employment with Preferred Restoration. The Determination concluded she was entitled to be paid the daily minimum wage on that day, 4 hours, and that conclusion was reflected in the calculation of the amounts owing.

Daily time sheets were provided by Sirois. These time sheets were accepted by the Director as an accurate reflection of hours worked by Sirois. The daily time sheets confirmed that overtime hours were worked. The Determination contains the following analysis relating to the matter of the wage rate to be used in calculating wages owed:

The complainant was paid a monthly salary of \$2800.00. In order to calculate the amount of wages to be adjusted as compensation for overtime hours worked, an hourly rate is calculated

based on the provisions noted above in section (d) as a regular wage for employees paid by monthly salary. During the seven full weeks worked between September 16 and November 2, 2001 she worked a total of 293.25 hours. This averages to be 42 hours per week. Therefore the calculation of the complainant's regular wage is:

$$\$2800.00 \times 12 \div (52 \times 42) = \$15.38 \text{ per hour}$$

I do not accept Sirois' argument that her hourly rate should be based on a 40-hour week. This is inconsistent with the calculation required by the *Act* for an employee paid by monthly salary.

Information provide by Sirois indicated that when she was paid an hourly rate, as she was for hours worked on September 13 and 14 and November 1 and 2, 2001, she was paid at a rate of \$16.15 an hour.

No new information has been provided with this appeal.

ARGUMENT AND ANALYSIS

The burden is on Sirois to persuade the Tribunal that the Determination is wrong in law, in fact or in some combination of law and fact (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not simply an opportunity to re-argue positions taken during the investigation. No new information has been provided to the Tribunal in this appeal.

I shall address each of the three issues raised by Sirois.

Sirois says she was paid for the October 8, 2001 statutory holiday. The Determination found no evidence supporting that assertion and, as her employer paid her the same salary in each pay period regardless of the number of days worked, no special consideration was made in the calculations for statutory holiday pay on that day. While acknowledging she was not statutorily entitled to pay for that the October 8, 2001 holiday, Sirois says she should not be 'deducted' for that day.

There is, however, nothing in the Determination, the material on file or the appeal that shows any 'deduction' was made for the statutory holiday. The reasoning of the Director for not giving special consideration in the calculations for statutory holiday is supportable on the facts. Sirois has not shown an error. More directly, she has not shown the Director erred in stating there was no evidence she was paid for the statutory holiday. This aspect of the appeal is dismissed.

On the issue of Sirois having 4 hours 'deducted' from her wages for November 2, 2001, I agree with Sirois on this point. The Determination acknowledges Sirois was paid a net amount of \$258.46 for November 1 and 2, 2001. It is an inescapable conclusion arising from other material that such amount represented payment of 16 hours wages for those two days. That was the exact amount Sirois was paid for working 16 hours on September 13 and 14, 2001. The decision of the Director to recognise only Sirois' entitlement to minimum daily pay was, on the evidence, unreasonable and by doing so the Director has effectively set off 4 hours wages which her employer had already paid her against her statutory overtime entitlement by returning those wages to the credit of the employer in the overtime calculation. It is a well established principle that wages already paid to an employee may not be used, directly or indirectly, to set off liabilities arising under the *Act*. Such a consequence is inconsistent with the prohibition found in Section 21(1) of the *Act*. If the employer could not do it directly, the Director cannot

do it indirectly on behalf of the employer. The 4 hours wages, at the appropriate rate, must be returned to Sirois in the calculation of wages owing.

On the issue of the wage rate calculation, I agree with the analysis made and conclusion reached in the Determination. I accept that Preferred Restoration, when paying wages to Sirois for something less than a full pay period, used a rate of \$16.15 an hour. However, the *Act* specifically provides for the method of converting a monthly salary to an hourly wage rate for the purposes of calculating amounts owed under the *Act*. As the Determination noted, the conversion formula for a monthly salary is found in Section 1, definition of “regular wages”, paragraph (d), which says:

“regular wages” means

. . .

(d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee’s normal or average weekly hours of work, . . .

The Determination concluded, correctly in my view, that Sirois’ ‘average’ hours of work should be used in the conversion, that a seven week period was appropriate for the calculation and that her average hours of work were 42 in each week over that period. While it is not specifically addressed in the Determination, I agree the information provided during the investigation did not indicate ‘normal’ hours of work. The Determination does note that there were no weeks during her employment that Sirois worked 40 hours. Her weekly hours of work, where she worked a full week during the period included in the wage rate calculation, ranged from 38.50 hours to 45.50 hours a week and for all but one of those weeks she worked 44 hours or more.

This aspect of the appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 29, 2002 be varied to show an amount owing of \$63.98 (4 hours x \$15.38 = \$61.52, plus 4% vacation pay), together with any interest that has accrued on that amount pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal