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 -

Jean-Francois Landry
(the "Employee")

- and -

Construction Multi Media Training Systems Ltd.
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	98/290 and 98/315
HEARING DATE:	October 28, 1998
DECISION DATE:	November 6, 1998

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DECISION

APPEARANCES

Mr. Gary T. Clarke on behalf of the Employee
Mr. Daniel Lipetz

OVERVIEW

This decision concerns two appeals pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination of the Director of Employment Standards (the "Director") issued on April 20, 1998 which determined that the Employer was liable for unpaid wages and compensation for length of service to Jean-Francois Landry, in the amount of $6,588.15. One appeal is brought by the Employer, the other by Landry.

Turning to the latter first, Landry says that the Directors delegate erred as follows:

- The Determination awarded Landry one week's pay on account of compensation for length of service. Landry says he had 12 consecutive months of employment and, in the result, is entitled to two weeks pay.

- The delegate rejected Landry's claim for $2,051.78 on account of business expenses paid by him at the Employer's request for the purposes of the Employer's business. The delegate stated that it was "not clear from the receipts submitted" whether the expenses were incurred for the purposes of Landry's own business or that of the Employer.

- The delegate also rejected his claim for overtime in the absence of accurate time records of daily hours worked.

- The amount awarded Landry $4,983.35 on account of unpaid wages which included $625.00 actually paid.

- The delegate issued the Determination without allowing Landry an opportunity to respond to the Employer's submission.

In a submission, dated June 2, in response to Landry's appeal, the Employer takes issue with Landry's claim for overtime wages, reimbursement for expenses, and says that it paid Landry certain amounts in cash or by way of an air plane ticket, seeking to uphold the Determination on

those points. The Employer argues that Landry terminated his employment voluntarily to set up a business in competition with the Employer.

As mentioned above, the Employer also appeals the Determination. In a submission attached to the appeal, dated May 19, 1998, the Employer argues that Landry charged business expenses for his own business to the Employer--and presumably, therefore, owes money to the Employer--and is not entitled to compensation for length of service because he voluntarily terminated his employment. Counsel for Landry argues that this appeal was not submitted in a timely fashion and, in the result, should be summarily dismissed. He also notes that the Employer--unlike in other claims--has not filed an application for an extension of time to file the appeal in Landry's case and argues, if an application is filed, is should be dismissed.

The Tribunal scheduled a hearing for October 28, 1998, with notice to the parties. By letter dated October 27, 1998, counsel for the Employer advised that the Employer had instructed him not to attend the hearing. The hearing proceeded in the absence of the Employer.

FACTS AND ANALYSIS

1. The Employer's Failure to Attend

It is trite law that the appellant has the burden to show that the Determination is wrong. Having reviewed the appeal, the merits of the appeal is not clear to me. In one of the Employer's submissions, the Employer acknowledges that it is not entitled to set off its claims (for business expenses) against Landry--and I do not know what these claims are--against payments owed under the *Act*. There are no particulars supporting the argument that Landry voluntarily terminated his employment with the Employer to set up a competing business. The delegate's conclusion that the Employer constructively dismissed Landry by failing to pay Landry his wages between December 12, 1997 and February 28, 1998, and that his pay cheques were returned NSF, is, in my view, neither wrong nor unreasonable. In any event, the appellant elected not to attend the hearing, though duly notified, to, perhaps, clarify these and other matter. In my view, this is sufficient to dismiss the Employer's appeal.

2. Timeliness

In any event, I am not satisfied that the appeal is timely. The Determination is dated April 20, 1998. The Determination inadvertently neglected to set out the date by which an appeal had to be filed with the Tribunal. The delegate sent a letter to the Employer on April 24, 1998 with a correction to the Determination setting out that the last date for filing an appeal was May 13. The letter was sent by registered mail and received by the Employer on April 29. If I accept that the

appeal was not perfected until the correction was sent to the Employer on April 24, and I do, an appeal would have to be filed no later than May 15, which is 15 days after the date of service by registered mail (Section 112(2)(a). I find support for my view that the appeal was not perfected until the proper appeal date was provided in Section 81(1)(d) of the *Act* which provides that the Director must serve a copy of the Determination that includes "the time limit ... for appealing the determination to the Tribunal". I find further support for that view in the information material provided to a parties with determinations which states that a "completed appeal form must be delivered to the Tribunal on or before the appeal deadline shown on the Determination". Having said that, the appeal was not filed until May 19, four days after May 15. Counsel for the Employer argues that the appeal is filed in a timely manner. As is evident from the foregoing, I disagree.

The Employer does not appear to be making an application for an extension of time to file the appeal. If an application were made, I would dismiss it. The merits of the appeal are not clear to me.

In the result, the Employer's appeal is dismissed.

2. Wages Owed

I will deal with Landry's appeal in the order set out above. In this case Landry, as the appellant, has the burden to persuade me that the Determination is wrong. As such, the Employer's absence is not fatal. Nevertheless, I rely on the evidence provided by Landry under oath. Given the Employer's absence, this evidence is not contradicted.

First, Landry testified that he commenced employment with the Employer on February 12, 1997. On that date he started a course, paid for by the Employer, to obtain Workers Compensation Board authorization to do audiometric testing. He started working for the Employer on the following Monday, February 17, 1997. As his employment with the Employer terminated on February 28, 1998, when he was laid off, and this is not in dispute, I find that he was employed for 12 consecutive months. The Determination is not clear with respect to the start date of Landry's employment, though it appears to acknowledge that he was employed from February 1997 to February 1998. In the result, therefore, the delegate erred in determining that Landry was entitled to only one week's pay: he is entitled to two weeks' pay (Section 63). According to the Determination, one week's pay is $498.34. Two weeks' pay, therefore, is $996.68.

Second, at the hearing, Landry produced some 42 receipts for business expenses incurred by him on behalf of, and at the request of, the Employer in the amount of $2,051.78. He testified under oath that these expenses were incurred by him on behalf of the Employer. The delegate found that it was not clear whether these expenses were incurred on behalf himself or behalf of the Employer's business. There is nothing in the Determination to suggest that the delegate actually determined whether the expenses in question were incurred for Landry's own business. The law is

quite clear. An employer must not require an employee to pay any of the employer's business expenses except as permitted by the regulations. I find that Landry is entitled to the amount claimed (Section 21(2)). If the expenses were incurred for the employer's business, the employee is entitled to recover amounts paid on behalf of the employer (Section 21(3); if, on the other hand, they were not, an employee is not. In my view, it follows from the duty to provide reasons for a determination--Section 81(1)(a)--that the delegate must investigate the claim and satisfy herself one way or the other. If the delegate did not believe Landry's claim, and she is entitled to reach that conclusion, the delegate must provide reasons for that conclusion. He testified under oath, and provided receipts, that expenses in the amount of $2,051.78 were incurred by him on behalf of the Employer. There is no reason to not believe this claim.

At the hearing, Landry also testified to an additional $200.00 of expenses that he incurred. This was the first time this claim surfaced. In the circumstances, and absence of receipts, I will not award this amount.

Third, Landry testified with respect to his duties with the Employer. He explained that he commenced employment as a technician. In that capacity, he performed audiometric tests at construction sites or other businesses which are required by WCB to have employees tested. This work constituted the bulk of his duties. In November 1997, became chief technician. The Employer's payroll records, produced at the hearing, support this, indicating that his title was technician or chief technician. A letter from the Employer dated August 15, 1997, describes him as a technician. Landry agrees that the Employer gave him the title of manager during his last few weeks of employment, and though he was a key employee, testified that he did not exercise management functions. He stated that his independent decision making role was quite limited: he did not supervise employees apart from training new technicians, did not authorize overtime, time off, leaves of absence, lay off, and did not have the authority to hire, fire and discipline. In my view, there is no evidence before me to support a finding that he is a manager as defined in the *Regulation* as argued by the Employer (*Director of Employment Standards*, BCEST #D479/97 and *Sunshine Coast Publishers Inc.*, BCEST #D142/98). In any event, the delegate found that the issue of whether he was a manager was irrelevant because she did not accept his oral evidence of hours worked.

The delegate concluded that Landry was not entitled to payment on account of overtime due to lack of accurate records. Landry testified that for the first ten months of employment he worked from 5:00 a.m. until 4:00 p.m. Monday through Friday, inclusive. He was quite clear on that point. There is no evidence before me to contradict this. Landry also says that he worked on many week-ends, though he did not provide any details in that regard. Landry does not claim for this work. While Landry explained that he worked 13 hours per day, the hours of work would appear to be 11 per day rather than 13, given the start and finish times. His original claim was for 320 hours of overtime. He explanation was that the 320 hours was an estimate for the initial application which had to be filed urgently due to the Employer's financial difficulties. In the absence of any evidence

to the contrary, and in the circumstances, I accept Landry's testimony that he worked from 5:00 a.m. until 4:00 p.m. Monday through Friday, inclusive.

In that regard, I am mindful of the fact that the Employer did not keep the records required by *Act* (see Section 28). I agree with the following comments of Chair Crampton in *Gordon Hofer* (BCEST #D538/97):

> "In the absence of proper records which comply with the requirements of Section 28 of the *Act*, it is reasonable for the Tribunal (or the Director's delegate) to consider employee's records or their oral evidence concerning their hours of work. These records must then be evaluated against the employer's (incomplete) records to determine the employee's entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate may accept the employee's records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable. Under those circumstances, if an employer appeals a determination, it would bear the onus to establish that it was unreasonable for the Director's delegate to rely on the employee's records (or evidence) and to establish that they were unreliable."

In this case the onus rests with the appellant Employee, Landry. He testified under oath that he worked the hours set out above. This evidence is not contradicted. The delegate did not accept Landry statement--or oral evidence--concerning his hours worked. She stated that she "cannot accept this in the absence of an accurate time record of daily hours worked". In my view, the delegate erred in requiring that the Employee support his claim for overtime through written records. Certainly, the delegate is entitled to consider the absence of records and arrive at the conclusion that oral evidence, in the circumstances, is insufficient or not credible and, therefore, reject it. However, in the case at hand, there appears to be no reason for the rejection of the overtime claim other than the absence of accurate records.

In the result, I find that Landry is entitled to payment for overtime in accordance with the *Act*. I refer the determination of the amount owed on that account back to the Director for calculation on the basis that Landry worked 11 hours per day Monday though Friday, inclusive.

Fourth, with respect to unpaid wages, Landry says that the delegate awarded $625.00 more than he was entitled to. Thus, from the amount of unpaid wages, $4,983.35, $625.00 should be deducted, for a total of $4,358.35.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated April 20, 1998 be varied as follows:

1. Landry is entitled to two weeks pay on account of compensation for length of service, $996.68.

2. Landry is entitled $2,051.78 on account of business expenses paid by him at the Employer's request for the purposes of the Employer's business.

3. Landry is entitled to payments for overtime. I refer the determination of the amount owed on that account back to the Director on the basis that Landry worked 11 hours per day Monday though Friday, inclusive. I direct that the Director determine the amount owing on an expeditious basis.

- Landry is entitled to $4,358.35 on account of unpaid wages.

These amounts must be paid together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal