Employment Standards
**TRIBUNAL**



An appeal

\- by -

J. Matsimala Enterprises 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:** Wayne R. Carkner

**FILE No.:** 2001/315 and 2001/355

**DATE OF HEARING:** August 29, 2001

**DATE OF DECISION:** September 19, 2001

# DECISION

## APPEARANCES:

| | |
|---|---|
| For the Appellant | Richard McLeod |
| For the Respondents | No Appearances |
| For the Director | No Appearances |

## OVERVIEW

This is an appeal by J. Matsimala Enterprises Ltd. (the Employer) pursuant to Section 112 of the *Employment Standards Act (*the *Act)* of two Determinations dated March 28, 2001 and April 12, 2001. The Determinations concluded that Clayton Peter Neuner (Neuner) was owed wages and interest totaling $1,497.12 and that Kent Watson (Watson) was owed wages and interest totaling $1,969.08. In the case of Neuner the Director concluded that the Employer had contravened Sections 18, 40 and 42 of the Act and, in the case of Watson the Director concluded that the Employer had contravened Sections 40 and 42 of the *Act*. At the commencement of the hearing the Employer clarified the issues under appeal.

## ISSUES

1. Was Watson a "Manager" which would exclude him from the overtime provisions of the *Act*?
2. Should a ½ hour lunch hour be deducted from the Director's calculations for each shift that Neuner and Watson worked?
3. Did the Director properly calculate the vacation pay owed to Neuner and Watson?
4. Was the Director correct in calculating that Neuner was owed wages for two statutory holidays and that Watson was owed wages for one statutory holiday?

## FACTS AND ANALYSIS

Richard Mcleod (McLeod) gave evidence under oath and was very forthright and credible. In testimony dealing with the managerial exclusion McLeod testified that Watson was hired as a working Manager and that his intent was to include Watson in partnership with the Company after one year if the relationship worked out. He testified that input was received from Watson prior to hiring decisions being made but acceded that he (McLeod) had the final decision on hiring. McLeod testified that he relied on Watson to assist with evaluations of employees and the scheduling of work however McLeod acceded that the large majority of Neuner's time was spent performing the same duties as the other employees working for the Employer. I am satisfied after hearing the evidence and reviewing the facts and the submissions of the Director that Watson did not meet the definition of a Manager under the *Act* (see Tribunal Decision BC EST # D479/97). Watson's primary function was performing work assigned to him. The

Appellant has not met the onus of showing that the Director erred in finding that Watson was not a manager for the purposes of the *Act.*

McLeod argued that ½ hour should be deducted from each shift for the purposes of calculating wages owed. He testified that when the employees were hired it was agreed that they would be paid from the time they left home until the time they returned home including a lunch period, however those terms were based on the agreement that no overtime would be paid. McLeod's position was that now that the original terms of employment were voided that the paid lunch period should also be voided. This same argument is outlined in the Determination and was not accepted by the Director. It is clear from McLeod's evidence that the terms and conditions of employment for Neuner and Watson included a paid lunch period and the Employer cannot unilaterally alter those terms as a result of complaints being filed. I therefore conclude that the ½ hour lunch period be included in the calculation of time worked for both employees.

McLeod alleged that the calculations of the Director were inaccurate in that the calculations for vacation pay entitlement were not performed properly. He alleged that vacation pay was calculated on vacation pay. McLeod requested that I review all the calculations by the Director, his own calculations and amend the Determination accordingly. I have reviewed the Director's calculations, McLeod's calculations and reviewed all the payroll documents, which McLeod provided for me subsequent to the hearing, and I fail to comprehend the Appellant's position. I must concur that the Director's calculations are correct.

Turning to the issue of duplication of payment for statutory holidays McLeod testified that there was a clerical error on the payroll relating to the Labour Day Holiday for Neuner and Watson and a clerical error relating to the July 1st Holiday for Neuner. The evidence presented was credible and uncontested and I conclude that these holidays were paid to the Respondents and should be deducted from the calculations of wages owed to Watson and Neuner.

## ORDER

I order that the Determination dated March 28, 2001 regarding Neuner be varied to exclude the payment of the July 1st holiday and the Labour Day holiday. This Determination is referred back to the Delegate for recalculation of the overall remedy and any interest accrued, pursuant to Section 88, utilizing the variance. I further order that the Determination dated April 12, 2001 regarding Watson be varied to exclude the payment of the Labour Day holiday. This Determination is referred back to the Delegate for recalculation of the overall remedy and any interest accrued, pursuant to Section 88, utilizing the variance.

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**Wayne R. Carkner**
**Adjudicator**
**Employment Standards Tribunal**