Employment Standards TRIBUNAL

An appeal

- by -

Advanced Wing Technologies Corp.
(The “Employer” or “Advanced”)

- 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:** Ib S. Petersen

**FILE No.:** 2001/506

**DATE OF HEARING:** September 25, 2001

**DATE OF DECISION:** September 26, 2001

# DECISION

**APPEARANCES:**

Mr. Manuel Rodrigues on behalf of the Employer

**OVERVIEW**

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on June 15, 2001. The Determination concluded that a former employee, Reginald Lalonde, was owed $6,924.41 by Advanced on account of compensation for length of service, overtime wages and unauthorized deductions.

**FACTS AND ANALYSIS**

Advanced appeals the determination and says that it is wrong. It takes issue with the award on account of overtime wages only. As the appellant, it has the burden to persuade me that the Determination is wrong.

A hearing was held at the Tribunal's offices on September 25, 2001. Rodrigues appeared for the Employer and provided sworn testimony with respect to the overtime issue.

Following a layoff, Lalonde worked for the Employer, a company involved in the manufacture, design and sale of aircraft components, from August 26, 1999 to May 11, 2000. From the Determination, it appears that the Delegate accepted his claim for overtime based, among others, on the record of punched timecards which indicate that on most days he arrived in advance of his 7:00 a.m. start time and left later than his 3:30 p.m. finish time. The Delegate notes that "the vast majority of such early arrival or late departures are less than 30 minutes." The Delegate rejected the assertion of the Employer that Lalonde worked on personal matters. The Delegate accepted Lalonde's assertion that he never clocked in until he was commencing company work and clocked out before starting work on his own projects.

The dispute before me is largely a factual one. I accept the Employer's sworn evidence and have decided to uphold the appeal with respect to the award for overtime wages.

First, Rodrigues testified that the clock used for punching in is located near the entrance to the plant. He explained that the first thing employees do when they arrive, is to punch in. They, and that includes Lalonde, then get changed for work, have a coffee etc. Work does not start until 7:00 a.m. Similarly at the end of the work day, employees punch out when they leave the plant. In Rodrigues' view, therefore, the Delegate could not simply rely on the punch time cards to determine hours worked. I agree with the Employer. Because only one employee can punch in at one time, there will almost inevitably be some variance between the time indicated on a punch card and the time work commences and finishes.

Second, I am persuaded that even if Lalonde came to work early and left later than the scheduled times, I accept that he did not commence or finish work at the time he punched in or out. I accept that some of this time is the result of punching in or out earlier than the scheduled start time or later than the scheduled finish time. The fact that much of the overtime is of a very short duration--the Delegate notes that "the vast majority of such early arrival or late departures are less than 30 minutes"--supports that. I also accept that some of the time is the result of personal work done by Lalonde on his personal projects, including the building of his personal aircraft. Computer files submitted with the appeal supports that assertion. As well, the initial employment agreement contemplates that overtime may be paid or banked. There is evidence before me that Lalonde, in fact, claimed overtime on several occasions when he was working for the Employer. Pay records for May and December 1999 and 1998, indicates that Lalonde was paid for overtime. The fact that he did not claim for the overtime based on the punch time cards during his employment, in my mind raises serious doubts as to the validity of the claim.

The Delegate notes that the computer files was not submitted as part of the investigation and should not be admitted and considered. In the circumstances, I disagree. This is not a situation where the Employer is seeking to "lie in the weeds." The Employer stated to the Delegate that Lalonde was working on his private projects and provided the names of several individuals, including Rodrigues, who could confirm that and that he did not work overtime as claimed. Rodrigues explained that the Employer did not find the relevant computer files until later. As well, at the hearing, Rodrigues explained that these individuals were never interviewed as part of the investigation. In the circumstances, I am of the view that the computer files support the Employer's contention that Lalonde worked on personal matters.

In short, I am persuaded that the delegate erred in his conclusions. The Employer has discharged the burden on the appeal and I vary the determination to cancel the conclusion that Lalonde is entitled to overtime wages from the Employer.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 15, 2001, be varied. I order that the award on account of overtime and associated vacation pay, $5,140.87 plus interest be cancelled.

**Ib S. Petersen**
**Adjudicator**
**Employment Standards Tribunal**