

**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-

Bryan Toth  
("Toth")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	C. L. Roberts
<b>FILE NO:</b>	98/567
<b>DATE OF HEARING:</b>	November 24, 1998
<b>DATE OF DECISION:</b>	December 1, 1998

**DECISION**

**APPEARANCES**

Gerry Omstead	For the Director
Bryan Toth	On his own behalf
Brett Large	For Oak Lane Enterprises Ltd.

**OVERVIEW**

This is an appeal by Bryan Toth ("Toth"), under Section 112 of the *Employment Standards Act* ("the Act"), against Determination #085200, issued by the Director of Employment Standards ("the Director") August 7, 1998. The Director's delegate found that Oak Lane Enterprises ("Oak Lane") contravened Sections 40 and 58 of the *Employment Standards Act*, and owed Toth \$1438.22 in unpaid overtime wages.

Toth appealed the decision, contending that the rate used in calculating the amount owed is incorrect. At the time Toth was preparing his appeal documents, Toth received notice from the Director's delegate indicating that he had received a cheque in the amount of \$1438.22 from Oak Lane.

Following receipt of Toth's appeal notice, Oak Lane provided the Tribunal with additional information unrelated to the issue raised by Toth on appeal. Oak Lane submitted payroll records and documents unrelated to the issue of quantum. At the hearing, Mr. Large indicated that he wished to challenge the number of hours which were found to be payable to Toth.

The Director's delegate objected to the submission of this evidence on the grounds that it was unrelated to the issue raised on appeal, and that it ought to have been provided to the Director at first instance.

As I indicated to Mr. Large at the hearing, the appeal documents frame the issues under appeal. Oak Lane apparently agreed with the Determination, as it did not appeal it, either within the time frame provided for, or later, and indeed paid the amount as Ordered. It is not now open to the Tribunal to hear an appeal on issues which have not been appealed.

The Tribunal has held in numerous instances that an appeal is not an opportunity to provide information which ought to have been provided to the Director during the investigation process. The only evidence which will be considered is new and relevant information which was not available at the time of the investigation. (see *Kaiser Stables Ltd.* BC EST #D058/97, *Tri West Tractor Ltd.* BC EST #D268/96).

I have not considered any of the evidence provided by Oak Lane, as it is not related to the issue of overtime wages. ( see *BWI Business World Inc.* BC EST #D050/96, and *Jhalli v. British Columbia* BC EST. #D159/97)

**ISSUE TO BE DECIDED**

The issue on appeal is whether the Director correctly determined the amount of wages owing to Toth.

**FACTS**

Toth worked for Oak Lane from December 1991 to spring 1996, and from August 19, 1996 to January 26, 1998. He filed a complaint with the Employment Standards Branch regarding overtime wages and statutory holiday pay on February 11, 1998.

Oak Lane provided the Director's delegate with some of the daily time and payroll records from the August 19, 1996 to January 26, 1998 time period, but because some of the time records had been destroyed in a warehouse fire, the records were incomplete.

Following an investigation, the Director's delegate found that Toth was an employee, not a manager as Oak Lane contended, and that he was owed overtime wages, based on the records provided.

The Director's delegate also found that Toth was entitled to statutory holiday pay, but as the records provided did not indicate whether Toth actually worked on any of the statutory holidays, determined that no additional wages were owed for statutory holidays. The Director's delegate concluded that Toth "was paid on salary which would have compensated him for those days."

**ARGUMENT**

Toth argued that the Determination was incorrect due to an error in the hourly rate used by the Director's delegate. He contended that the correct hourly rate should be \$17.00 per hour, not the range of rates of \$8.83 to \$17.00 determined by the Director's delegate.

Toth suggests that the hourly rate used in the calculation was determined by dividing the salary into the total hours worked, rather than dividing the salary into the hours he should have worked.

Oak Lane agreed that Toth's rate of pay was \$17.00 per hour.

**ANALYSIS**

The obligation of establishing that a Determination is incorrect rests with the Appellant. Based on the evidence, I am satisfied that the Director's delegate erred in calculating the wages owed to Toth.

The Director's delegate calculated the wages owed to Toth on information provided to him at the time of the investigation. Included in that information were pay stubs for weeks ending August 23, 1996 and October 4, 1996. They indicated a rate per hour of \$17.00. Oak Lane agreed that this was the correct rate of pay.

I find that Toth's calculation arrives at the correct amount of pay owing to him

**ORDER**

I order, pursuant to Section 115 of the *Act*, that the Determination, dated August 7, 1998, be varied to \$1734.00 together with whatever interest might have accrued since that date on the difference between that amount and the amount contained in the Determination (\$1438.22).

**Carol Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**