

An appeal

- by -

Dr. Rudy Wassenaar

- 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.:** 2001/496

**DATE OF HEARING:** September 21, 2001

**DATE OF DECISION:** October 22, 2001



## DECISION

### APPEARANCES:

For the Appellant	Dr. Rudy Wassenaar (the “Appellant”)
For the Respondent	Diana L. Mason (the “Respondent”) Bill Mason
For the Director	Tracey L. Thompson

### OVERVIEW

This is an appeal by Dr. Rudy Wassenaar pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued by the director of Employment Standards (the “Director”) on June 12, 2001. The Determination concluded that the Appellant had contravened Sections 34 & 40 of the *Act* and awarded the Respondent a remedy of \$3,540.04 and, pursuant to Section 88 of the *Act*, interest in the amount of \$225.20. The appeal was adjudicated by means of an oral hearing with extensive written submissions provided by all parties. The appeal was filed within the time frames outlined under the *Act*.

### ISSUES

1. Was the Respondent a “Manager” as defined by the *Act* and therefore excluded from the overtime provisions of the *Act*?
2. Was the complaint filed in a fraudulent nature and therefore should be canceled for reasons of “bad faith”?
3. Was there an error in the calculations of the remedy in the Determination?
4. Was the investigation conducted in a biased manner?

### FACTS

The Appellant operates a dental practice, which falls under the auspices of the *Act*. The Respondent was hired as a part-time Dental Assistant in November 1987. The Respondent’s duties were to assist chair side, order and stock supplies for the clinic within a defined budget, arrange for repairs required by the clinic and coordinate the visits of sales people. The Respondent performed these duties until she resigned her position July 31, 2000. After resigning her employment, the Respondent reviewed the calendar of work hours she kept at home and filed a complaint with the Director who subsequently conducted an investigation. During the



investigation unsuccessful settlement discussions were held and the Director identified a dollar amount that differed from the amount that was eventually awarded in the Determination. The Appellant testified that this difference amounted to a perception of “bias” by the Delegate of the Director. The Delegate testified that she had erred in her preliminary calculations and that when the final draft of the Determination was issued these errors were corrected. The Appellant also testified that in the Determination the figures did not correctly add up and erred in favour of the Respondent which further added to the perception of bias that he concluded the Delegate had regarding the Respondent. The Delegate explained that the figures within the text of the Determination were summaries and added that the detailed calculations that were attached to the Determination. These detailed calculations were part of the overall Determination and clearly showed how the remedy was calculated. The delegate reaffirmed that the calculations were based on the Appellant’s payroll sheets that had been provided to her.

The Appellant further testified that the hours provided to the Delegate by the Respondent were less hours than were identified in the payroll sheets that he had provided. He alleged that the Respondent was “stealing time” and that this constituted fraud. He had submitted in his written submissions that the RCMP were actively investigating charges of fraud against the Respondent and that this supported a finding that the complaint was filed in bad faith and supported his position that the Determination should be canceled.

Both the Delegate and the Respondent testified that they had recently been in touch with the RCMP and learned that there is no active investigation being conducted into these allegations. In cross-examination the Respondent asked the Appellant how he had calculated the alleged fraudulent claim for hours. He stated that he had not calculated them in detail. He was asked if these hours could have been for statutory holidays and sharing positions. The Appellant answered that he did not know. The Respondent testified that the alleged fraudulent hours did not take into account statutory holidays and shared positions and produced a document outlining the hours in dispute. The Respondent was not cross examined on this evidence.

The Appellant also testified that the complaint was filed in bad faith as a result of the Respondent resigning one week after dental work was completed on the Respondent’s husband. The Appellant provided dental work as a benefit to his employees and their families and that the timing of the Respondent’s resignation also supported the allegations that the complaint was filed in bad faith. In cross-examination the Appellant was asked if he suggested to his patients that if they were leaving their employment they should maximize their dental benefits before they resign. The Appellant answered in the affirmative. The Appellant was then asked what is the difference between what he recommended that his patients do and what the Respondent did? The Appellant did not respond to the question.

The Appellant further testified that the Respondent had acted in bad faith by signing a variance on the hours of work she worked and then filing a complaint. In cross-examination the Respondent testified that the Appellant’s variance was not posted and that each of the employees signed the variance in private with the Appellant. The Respondent stated she signed the variance



as she wanted to retain her position. The determination outlined the variance that had been granted to the Appellant by the Director and that the variance was for permanent employees only and did not apply to part-time employees. The Director's written submission contained a copy of the variance that was issued to the Appellant and the Respondent was specifically excluded from the application of the variance. It was uncontested that the variance was not posted at the work site as is required under the *Act*.

It was clear from the Appellant's payroll records that the Respondent was paid less than the minimum hours required by the *Act* on many of the days that she worked. It was also clear from these records that the Respondent also worked in excess of eight hours on many days without receiving overtime pay.

The Appellant's position was that the Respondent was a Manager and as such had the right to hire and fire suppliers. The Appellant acceded that the Respondent did not have the authority to hire and fire employees but that she was given a budget for supplies for the clinic and could change suppliers to keep the supplies within budget. The Respondent did not set the budget as this was done by the Appellant. The evidence on this issue was outlined in the Determination:

“According to both Dr. Rudy Wassenaar and the complainant, the primary duties of the complainant's position did not include supervising and directing other employees. She did not discipline staff, authorize overtime, call employees in to work or lay them off...” “... As such , the primary employment duty of this part-time position is dental assisting with secondary duties of managing supplies.”

This evidence was not contradicted either in the hearing or in the written submissions.

## ANALYSIS

The “*burden of proof*” to show errors in fact, errors in the conclusions of fact or errors of law in the Determination lies with the Appellant.

The Definitions Section of Employment Standards Regulation (the “*Regulation*”) defines a manager as:

“*manager*” means

- (a) a person whose primary employment duties consist of supervising and directing other employees, or
- (b) a person employed in an executive capacity

It is very clear on the evidence that the Respondent does not perform any of these functions. The Respondent manages supplies and suppliers within a budget set by the Appellant. This function, which is not a function outlined under the *Regulation*, is only a secondary function in any event and the primary function of the Respondent was to work as a dental assistant. I therefore



conclude that the director made a proper finding when determining that the Respondent was not a “manager” under the *Act* and *Regulation* and was entitled to the minimum standards provided under the *Act*. This ground of appeal is dismissed.

Turning to the bad faith/fraudulent allegations I find that the appellant has failed to meet the onus required of him to substantiate these claims. It is clear on the evidence, both oral and written (see Director’s reply submission), that there is not, nor has there ever been, a criminal investigation into the fraudulent allegations pursued by the Appellant, nor has there been any substantive evidence led by the Appellant to support an allegation that the Respondent was guilty of “stealing time” from the Appellant. Indeed, there is substantive evidence that the respondent filled out her time claims in an appropriate manner. The Appellant, when questioned on where the false claims arose testified that he had not studied the issue in detail and couldn’t identify where the falsifications occurred. The evidence led by the Respondent clearly identifies where the two time records, the Respondent’s and the Appellant’s, differed and provided concrete reasoning for the differences. The Appellant was informed from the beginning of the investigation that the Respondent’s records were incomplete and this was also identified in the determination. I find that this ground for appeal is frivolous and dismiss it.

The Appellant alleges that the errors in calculation should lead to cancellation of the determination. He cites errors during the settlement stage as well as errors in the Determination itself. The evidence of the Director clearly shows that an error was made in the settlement stage but that this error was corrected prior to the Determination being issued. The evidence also showed that the figures in the text of the Determination were a summary and that the final figures in the Determination were clearly outlined in the detailed calculations attached to, and forming part of, the Determination. I have reviewed the figures and find that they are accurate. I therefore dismiss this ground of appeal.

Dealing now with the allegation of bias during the investigation, I find no evidence to support this ground of appeal. The Appellant alleges that the fact that the Delegate did not pursue a criminal investigation into the allegations of fraud and that the errors of calculation, being in favour of the Respondent, support a finding that the Delegate was biased in favour of the respondent. As outlined above, there is no evidence to support a finding that a fraudulent act has occurred. The evidence in the written submissions identified that the Appellant had approached the RCMP with charges and was informed that there was no basis for criminal charges. Turning to the calculations, as outlined above, an error occurred during the investigative stage and was corrected in the Determination, which included detailed and accurate calculations.

I find that the issue of bias rises from the fact that the Appellant did not like the conclusions in the Determination and not from any factual points.



Regarding this issue the Court of Appeal stated in *Adams v. Workers' Compensation Board*, B.C.C.A., (1989) 42 B.C.L.R. 228, at 231-232:

“An accusation of this nature is an adverse imputation on the integrity of person against whom it is made. The sting of the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause.”

In this case no evidence of bias was provided. It is unfortunate that this allegation is put forward so regularly by Appellants whose only assertion is that a bias has occurred because Determinations have found in favour of Respondents. As outlined in the quotation above, a person, even with a complete lack of evidence, cannot do anything but make a “general denial”. In my mind this attacks the credibility of the person lodging these unsubstantiated allegations and would colour the credibility of their overall testimony. I therefore dismiss this last ground of appeal.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 12, 2001 be confirmed in the amount of \$3,765.24, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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