

An appeal

- by -

Garret Chapman operating as Midnight Express Ent.
("Chapman")

- 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: Lorne D. Collingwood

FILE No.: 2001/447

DATE OF HEARING: October 11, 2001

DATE OF DECISION: October 22, 2001

DECISION

OVERVIEW

Garret Chapman operating as Midnight Express Ent. (also referred to as “the employer” and “the Appellant” in this decision), pursuant to section 112 of the *Employment Standards Act* (“the Act”), has appealed a Determination issued on May 17, 2001 by a delegate of the Director of Employment Standards (“the Director”). In the Determination, Chapman is ordered to pay Gordon Grant, Michael Griffith, Ron Paul and Travis Sanwald wages, \$1,553.56 in all, interest included.

The Determination is that Chapman failed to pay for overtime work and that a deduction from Griffith’s pay is contrary to section 21 of the *Act*. Chapman, on appeal, seeks to reargue the latter conclusion. The Appellant accepts that it must pay overtime but it seeks to have the amount of the Determination reduced. I can see no reason to vary the Determination.

An oral hearing was held in this case.

APPEARANCES:

Garret Chapman	On his own behalf
Rod Bianchini	The Director’s delegate

ISSUES TO BE DECIDED

It is said that the Determination fails to reflect cash advances to the employees.

According to the Appellant, Sanwald and Grant were paid for days that they did not work. And in that regard, the employer seeks to have the Determination reduced.

The Appellant claims that the amount which is awarded Griffith should be reduced by the dollar amount of his personal telephone calls.

What I must ultimately decide is whether the Appellant has or has not shown that either or both of the determinations ought to be varied or cancelled, or a matter referred back to the Director, for reason of an error or errors in fact or law.

FACTS

Chapman operates a business that clears brush from BC Hydro right-of-ways. Gordon Grant, Michael Griffith, Ron Paul and Travis Sanwald worked for Chapman.

The Determination orders Chapman to pay overtime wages. It also requires that Chapman return money that was deducted from Griffith's pay in a dispute over a telephone bill.

Chapman supplied Griffith with a cell phone. The point of doing so was so that Griffith had a way of contacting help in the event of an emergency but Griffith ran up a bill of \$260.56 in that he made a large number of personal telephone calls. According to Chapman, Griffith was told that the telephone was for emergencies only and that he was not allowed to make personal calls.

In regard to the matter of the cash advances I find that the employer kept a record of the cash advances and that the delegate has taken them into account in calculating the amount paid.

For reason of the Determination, Chapman spent considerable time checking his records and he has found what he believes is an instance where Sanwald and Grant made a false claim for wages. The two claimed two days of boat travel but Chapman has found that the boat was not scheduled to run on the days that Sanwald and Grant say they were travelling on the boat. The employer is asking that the Determination be reduced accordingly.

ANALYSIS

As matters are presented to me, I find that the delegate relies on the employer's payroll records and the employer's record of work, not records supplied by the employees.

The employer, on appeal, claims that he now has evidence to show that his records are wrong. In that regard he claims that two of its former employees did not work as they have claimed and he is seeking to put that new evidence before the Tribunal.

The Tribunal has said [in decisions beginning with *Tri-West Tractor Ltd.* (BCEST No. D268/96) and *Kaiser Stables Ltd.* (BCEST No. D058/97)], that it will not normally allow an appellant to raise issues or present evidence which could have been raised or presented at the investigative stage. In *Tri-West*, the principle is stated as follows:

“This Tribunal will not allow appellants to ‘sit in the weeds’, failing or refusing to cooperate with delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. ... The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.”

I see no reason to make an exception here. Chapman is seeking, on appeal, to make a case that could have and should have been given to the Director's delegate. The delegate can hardly be faulted for a Determination which is based on the employer's own records.

Contrary to what the employer may believe, the delegate's calculations do take into account the cash advances that the employer made to the employees.

The delegate did not allow the deduction for personal telephone calls. I agree with that. Doing so would have been contrary to section 21 of the *Act*.

21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, **an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.**

(my emphasis)

I can appreciate that the employer may not want to pay for personal cell phone calls, at least all of them, but it may not deduct the amount of the calls as to do so is contrary to section 21 of the *Act*.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated October 1, 2001 be confirmed in the amount of \$1,553.56 and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal