

An appeal

- by -

Paul Binder
(the “Employee”)

-and by-

All American Cedar Products Ltd.
(“All American” or the “Employer”)

- 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.: 2001/582 and 2001/583

DATE OF HEARING: October 23, 2001

DATE OF DECISION: October 25, 2001

DECISION

APPEARANCES:

Mr. Paul Binder	on behalf of himself
None	on behalf of the Employer
None	on behalf of the Director

OVERVIEW

This decision deals with two appeals--one by the Employee, Binder, and one by the Employer, all American--pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director issued on July 18, 2001.

The Determination concluded that Binder was owed \$1,632.56 by the Employer, which operated a cedar products company, on account of overtime wages and vacation pay. According to the Determination, Binder was employed by all American from August 26, 1999 to May 26, 2000. He was paid at the rate of \$2,500 per month. The Delegate accepted the Employee’s records with respect to hours worked (less time for lunch). The Delegate did not accept the Employer’s assertions, including that the hours worked over 40 per week could be considered, among others, “voluntary.”

FACTS AND ANALYSIS

1. All American Appeal

The Employer appeals the determination. The Employer, as the appellant, has the burden to persuade me that the Determination is wrong.

Although duly notified, all American did not attend the hearing, scheduled for 9:00 a.m. on October 23, 2001. Binder attended. I waited some 20 minutes before commencing the hearing. I confirmed with the Tribunal’s office that the Employer had not contacted it. When the hearing commenced, I ordered that the Employer appeal be dismissed on the ground that it had abandoned the appeal. The Tribunal’s hearing notice clearly states: “[I]f an Appellant fails to attend the hearing, the Tribunal will consider the appeal to be abandoned.”

After the hearing had commenced, and after I had indicated to Binder that I considered the Employer’s appeal to have been abandoned, I was notified by the Tribunal that the Employer had sent a letter, dated October 23, 2001, transmitted by fax, and received by the Tribunal on that date at 10:04 a.m. In the letter, the Employer claims to have shown that Binder’s claims are false and says that it wants the appeal adjudicated on the basis of the material submitted. The

Employer also says that it is unable to attend because Mr. Mann has a "nagging cold" that has kept him away from the office since Friday [presumably October 19, 2001].

In my view, this letter does not change anything. There is no medical evidence to support that the hearing ought to be adjourned. In any event, there is no request for an adjournment. I reject any suggestion that the Employer was unable to attend for medical reasons. The letter was transmitted by fax and received after the hearing had commenced. There was no indication prior to the commencement of the hearing, that the Employer had any valid reason for failing to attend. The Tribunal ordered a hearing because there were factual matters in dispute between the parties. I am of the view that the issues must be decided on the evidence presented under oath or affirmation. As the Employer elected not to attend, it must bear the consequences of that election.

Moreover, as noted, the issues before me are largely of a factual nature: did Binder work the overtime, what was the agreement between him and the Employment with respect to remuneration and hours of work, was he given advances or loans etc.? As noted, Binder appeared at the hearing and confirmed the factual underpinnings of the Determination. I am cognizant of the fact that he disagrees with the calculation of the amount owed as noted below. From the evidence before me at the hearing, I am not convinced that the Delegate erred in his Determination that Binder was owed overtime wages and vacation pay.

In short, the Employer's appeal is dismissed.

2. Binder Appeal

In his appeal to the Tribunal, Binder says, however, that the Delegate erred in his calculations. At the hearing, he also sought to raise the issue that he had not been paid for the last two weeks of his employment. I ruled that I was not prepared to deal with that aspect, as it had not been raised in the appeal.

In any event, Binder says that the Delegate erred in his calculation as follows. He agrees that the "total wages earned" awarded by the Delegate, \$22,768.99, is correct. He says, however, that the "wages paid" was not correct because it included amounts that he had not actually been paid and included amounts paid to him outside his employment. The source of "wages paid" is a calculation sheet and cheques paid by the Employer. Binder says he did not receive any other cheques than those before me (and part of the material before the Delegate). He says that there was an agreement that he take an unpaid leave of absence from his regular job in December 1999-January 2000 to work on a contract. He was "sub-contracting" with the Employer outside his regular work. It is clear from the calculation sheet that the delegate did not consider these hours worked.

Binder's evidence before me with respect to the calculations is as follows:

- He did not work his regular job in December 1999. The amount of \$2,500 paid to him in January was part payment channelled through the Employer from the customer on the sub-contract project. No deductions were made from this cheque.
- There is an error on the cheque for November 1999. It is stated to be \$2,200.76. The amount of the cheque is, in fact, \$2,022.76. The difference is \$178.
- Another cheque from January 2000 in the amount of \$500 was also on account of the sub-contract project.
- A payment by cheque in February 2000 in the amount of \$2,200 also relates to the project and should not be counted towards wages paid.
- Binder says he did not receive a cheque in the amount of \$3,771 in February 2000.
- Binder says he did not receive \$75.00 cash in April 2000.

In short, the Delegate, says Binder, erred and the amount of \$9,224 should not be considered as "wages paid."

On the basis of the evidence, I agree with Binder. I vary the Determination accordingly and refer the calculation of the exact amount owed, plus interest and vacation pay back to the Director for calculation on an expeditious basis.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated July 18, 2001, be varied. I order that the Employer owes Binder an additional \$9,224, plus the statutory vacation pay and interest.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal