Employment Standards TRIBUNAL

Citation: Place-Crete Systems L.P. (Re)
2018 BCEST 94

An appeal

- by -

Place-Crete Systems L.P. carrying on business as Floor Tech Systems

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Allison Tremblay

FILE NO.: 2018A/63

DATE OF DECISION: September 19, 2018

DECISION

SUBMISSIONS

Diane McGillis	on behalf of Place-Crete Systems L.P. carrying on business as Floor-Tech Systems
Paul Grace	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Place-Crete Systems L.P. carrying on business as Floor-Tech Systems (the "Company") has filed an appeal of a Determination dated April 26, 2018 (the "Determination"), by Paul Grace, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"). In the Determination, the Delegate found that the Company contravened sections 27 (wage statements), 40 (overtime), 45 (statutory holiday pay), and 46 (statutory holiday worked) of the *ESA* with respect to its employee, William McDermott Long ("McDermott Long"), and ordered it to pay $4,338.90 in wages and interest and $2,000 in administrative penalties under section 29 of the *Employment Standards Regulation* ("*Regulation*").

2. The Company seeks to vary the Determination, alleging that the Delegate erred in law. In the Company's appeal document, it references some additional information that was not before the Delegate. Accordingly, I also treat the appeal as a request to vary based on new evidence.

3. Finally, the Company advises that the Determination was issued in the wrong name.

4. The section 112(5) record (the "Record") was provided to the Tribunal by the Director, and a copy was delivered to the Company and McDermott Long. The Company provided objections to the Record provided by the Director. The Director conceded to the objection. Accordingly, the Tribunal accepts the Record as amended as being complete.

5. Under section 114(1) of the *ESA*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:
>
> …
>
> (f) there is no reasonable prospect that the appeal will succeed;

6. The Tribunal assesses appeals under section 114(1) based on the Determination and reasons for the Determination, the material before the Delegate when making the Determination, and the appeal materials. It is only if an appeal is not dismissed under section 114(1) that the parties are invited to make submissions on the merits of the appeal.

7. I find that the issues raised in this appeal may be addressed without seeking submissions from the parties.

ISSUES

8. What is the correct name of the Company?

9. Was McDermott Long a person excluded from Part 4 of the *ESA* by virtue of his being a "manager" under the *Regulation*, sections 1(1) and 34(f)?

10. What is the appropriate wage for the payment of travel time?

11. Should meal breaks be included in the calculation of overtime?

THE FACTS AND ANALYSIS

12. The Delegate held a complaint hearing by teleconference on December 11, 2017 (the "Hearing"). McDermott Long, Ryan Hawkins ("Hawkins"), and Bryana McDermott Long gave evidence for McDermott Long. Diane McGillis, Andrew Sorensen, and Benjamin Shaw gave evidence for the Company. The Delegate also reviewed payroll and other records provided by the Company and a personal calendar and other information provided by McDermott Long. From these sources, the Delegate determined the following facts relevant to the appeal.

13. The Company operates a concrete laying business.

14. McDermott Long worked for the Company as a site foreman from June 16, 2014, to August 17, 2017. Until April 1, 2017, he earned $28.00 per hour, after which date his wage increased to $29.00 per hour.

15. McDermott Long's shift began at 6:00 a.m. He attended the Company's shop facility. Some days he remained at the shop for the day; other days he prepared equipment in the morning and then either drove a Company truck or rode as a passenger in a Company truck to various sites in British Columbia.

16. On days when McDermott Long traveled to a work site, the Company paid him three hours at straight time pursuant to its Overtime Policy (the "Overtime Policy"). The Company says that the three hours represent the average travel time to and from work sites, being 1 ¼ hours each way, plus a half hour paid break. Pursuant to the Overtime Policy, the Company did not include the three hours in its calculation of whether an employee worked overtime.

17. McDermott Long often did not take breaks. Witness Hawkins described the work environment as "go, go, go" all day. McDermott Long sometimes used his Company credit card to buy meals or drinks for the crew.

18. The Delegate found that McDermott Long worked more than 8 hours per day on some days when the Company failed to count the three hours of travel time as hours worked, yet the Company did not pay him overtime at overtime rates. Accordingly, the Delegate performed a calculation and determined that the Company owed McDermott Long $3,968.75 in unpaid overtime.

Name of the Company

19. The Determination was issued in the name "Place-Crete Systems L.P. carrying on business as Floor-Tech Systems Inc." The Company advises that it carries on business as "Floor-Tech Systems" and not "Floor-Tech Systems Inc." This is consistent with information included throughout the Record, including McDermott Long's complaint form. It appears that the Delegate made a simple error. I order that the correct name "Place-Crete Systems L.P. carrying on business as Floor-Tech Systems" be substituted.

Managerial status

20. The Company argues that it is not required to pay overtime to McDermott Long because McDermott Long was a manager, and so he is excluded from the Part 4 overtime provisions of the *ESA* by virtue of section 34(f) of the *Regulation*. To support this argument, the Company says it submitted at the Hearing evidence of his role and responsibilities, his entitlement to a phone allowance, corporate fuel and credit card, and receipt of a "management RRSP incentive." The Company does not present any new evidence to support this argument, but rather characterizes and emphasizes evidence in the Record, for example, its statement that McDermott Long was an "acting supervisor" at the time he ceased employment.

21. That McDermott Long was a manager within the definition of the Regulation was not an argument advanced before the Delegate.

22. An appeal is not a venue for parties to make new arguments or present evidence that was available at the time of the Hearing but was not presented. Parties are expected to make their best case before the Delegate. I find that this argument is one that could have been made before the Delegate prior to the Determination. This ground of appeal is dismissed.

Travel time

23. The Company says that the Delegate erred in finding that travel time from the Company's shop to and from various work sites is payable at a rate above minimum wage and that "[t]he requirement of the law is that this travel time be paid at minimum wage."

24. Section 40 of the *ESA* requires that:

> 40 (1) An employer must pay an employee who works over 8 hours a day, and is not working under an averaging agreement under section 37,
>
> (a) 1 ½ times the *employee's regular wage* for the time over 8 hours, and
>
> (b) double the *employee's regular wage* for any time over 12 hours.
>
> [*emphasis added*]

25. There is no dispute that McDermott Long's regular wage was initially $28.00 and later $29.00 per hour. There is no indication on his wage statements or elsewhere in the Record that McDermott Long was paid different wage rates for different duties, such as for work during travel.

26. The Company says that the Delegate did not include as travel time travel at the end of the day from the various work sites to the shop. The Delegate's reasons clearly state that the Delegate used the "best

available evidence" provided by the Company to determine the travel time "to *and from* the shop" [*emphasis added*].

27. The Delegate found as a fact that McDermott Long's travel time was at the Company's direction and so was "hours worked." The Company does not take issue with this factual finding. As McDermott Long performed work during travel time, the Company must pay him wages for that work and must include that work time in calculating entitlement to overtime.

28. This ground of appeal is dismissed.

Meal Breaks

29. The Delegate included in the calculation of hours worked a half hour lunch break each day. The Delegate did not deduct the break time because the Company paid for breaks. The Company argues that it only paid for breaks as what it characterizes as a benefit under the Company's Travel Policy (the "Travel Policy"). The Company says that if it cannot rely on the Travel Policy to reduce the amount of overtime that would otherwise be payable, then McDermott Long should not receive the benefit of another element of the Travel Policy, that is, the entitlement to a paid break.

30. Section 32 of the *ESA* provides,

> 32 (1) An employer must ensure
>
> (a) that no employee works more than 5 consecutive hours without a meal break, and
>
> (b) that each meal break lasts at least a ½ hour.
>
> (2) An employer who requires an employee to work or be available for work during a meal break must count the meal break as time worked by the employee.

31. The Company paid McDermott Long for meal breaks as part of its Overtime Policy. The Company suggests that if one element of the Overtime Policy is contrary to the *ESA,* then the entire policy should be void. This is not what the *ESA* requires. Section 4 of the *ESA* says that an agreement to waive minimum standards has no effect. It was only the part of the policy with respect to overtime that purported to waive minimum standards and only that part of the policy that has no effect.

32. For completeness, I have reviewed the Record, including the meal receipts and hours of work provided by the Company. For the majority of days worked, there is no evidence of a break being taken in the form of a meal receipt. For some days, there are receipts indicating a meal was purchased while traveling on a BC Ferry. *Interior Retread & Sales* (BC EST # D148/98) addresses this situation, holding that employees traveling on a BC Ferry must remain available to follow the emergency directions of the crew and so are available for work during this travel time.

33. For other days, receipts indicate McDermott Long purchased food and drink near the beginning or end of his shift. For example, on March 8, 2017, the Company's records indicate that McDermott Long began his shift at 6:30 a.m., ended his shift at 7:00 pm, and purchased a meal at McDonalds at 6:36 p.m.

He was paid for 3 hours of travel time on that day; therefore, he would have been working (traveling) at the time the Company says he was taking a break.

34. The Company's evidence was that McDermott Long was responsible for ensuring the crew took breaks and for using the company credit card to purchase food and drink for the crew. The meal receipts support that assertion. For example, on March 25, 2017, McDermott Long purchased 25 burgers at McDonalds. For those days when McDermott Long purchased meals at a time that does not coincide with travel time, the amounts and items purchased indicate that McDermott Long was purchasing food for the crew with his Company credit card as part of his foreman responsibilities. Purchasing items for the employer's benefit is work, not a break.

35. Accordingly, the evidence available suggests that McDermott Long did not take regular meal breaks during which he was not working.

36. This ground of appeal is dismissed.

ORDER

37. Pursuant to sections 114(1)(f) and 115(1)(a) of the *ESA*, I make the following orders:

a. The Determination is varied to substitute the correct name for the Company, "Place-Crete Systems L.P. carrying on business as Floor-Tech Systems" in place of "Place-Crete Systems L.P. carrying on business as Floor-Tech Systems Inc."

b. In all other respects the Determination is confirmed and the appeal dismissed.

Allison Tremblay
Member
Employment Standards Tribunal