

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 -

Hugh (“Jim”) Robertson

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/710

DATE OF HEARING: December 17, 1997

DATE OF DECISION: January 20, 1998

DECISION

APPEARANCES

Hugh (“Jim”) Robertson	on his own behalf
Bryan G. Carmichael, C.G.A	on behalf of 360759 BC Ltd. operating as Hooker Shell
Ed Wall	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Hugh Robertson, under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued on September 4, 1997 by a delegate of the Director of Employment Standards. The Determination dealt with a number of allegations which Mr. Robertson made against his former employer, 360759 BC Ltd. operating as Hooker Shell (“Hooker”), and concluded that Hooker had not contravened the *Act*.

Mr. Robertson was employed as a truck driver by Hooker to make bulk deliveries of fuel from its storage facilities in Nakusp, B.C.

Mr. Robertson gave the following reasons for making this appeal:

(The Director’s delegate) has made substantial errors in arriving at his determination, has refused to meet with me to discuss this case or contact others as witnesses, has accepted fabricated records by employer. Full employment period and conditions not covered. Request complete reinvestigation.

A hearing was held on December 17, 1997 in Nelson, B.C. at which time evidence was given under oath by Hugh James Robertson, John Keith Katchen and Barbara-Lou Hooker.

ISSUE TO BE DECIDED AND ANALYSIS

In this Decision I will deal with each ground of appeal under the following headings:

- dates of employment
- regular wages
- overtime wages
- statutory holiday pay
- vacation pay
- compensation for length of service /Notice of Termination

- *Motor Vehicle Act* fine
- payroll records
- false representations.

Dates of Employment

The Director's delegate found that Mr. Robertson had been employed by Hooker from January 2, 1996 to March 31, 1997.

At the hearing, Mr. Robertson testified that his employment began on November 29, 1995 when he was trained for two full days (November 29 and 30) by the truck driver whom he replaced. He entered into evidence a copy of the 1995 Statement of Earnings (T4) which Hooker issued to him. That document confirms that he was paid a salary of \$3,400.00 for the month of December, 1995. Mrs. Hooker testified that Mr. Robertson's employment with Hooker began on December 1, 1995. She also testified that while Hooker did not assume legal ownership of the plant until December 15, 1995 she agreed to pay Mr. Robertson's salary for the month of December, 1995. She did not give any evidence which controverted Mr. Robertson's evidence concerning his two days of training in November, 1995.

An employee being trained by his employer meets the definition of "work" in Section 1 of the *Act*, and is entitled to receive wages for that work.

I find on the balance of probabilities, that Mr. Robertson's employment with Hooker commenced on November 29, 1995 and that he worked two full days (November 29 and 30, 1995 without the payment of wages. There is no dispute that his employment ceased on March 31, 1997.

Regular Wages

The Director's delegate found that Mr. Robertson had been paid a regular monthly salary of \$3,400.00 while noting that he had alleged that he had been promised a salary of \$3,500 per month. At page 3 of the Determination, the Director's delegate states:

He alleges this is a contravention of Section 8 of the *Act*. For fifteen months the complainant received and accepted \$3,400 per month, condoning and, in effect, agreeing to this amount. I find no contravention of Section 8 of the *Act*.

Mr. Robertson testified at the hearing that his wife would confirm that he was promised a salary of \$3,500.00. However, Mrs. Robertson did not testify despite being in attendance throughout the hearing. John Keith ("Jack") Katchen gave evidence that he could not recall being present at any meeting with Mr. & Mrs. Hooker and Mr. Robertson at the Kuckanax Lodge, as testified by Mr. Robertson.

In his oral submission to the Tribunal Mr. Robertson stated that he was "...not really stuck on this point" as he had been "...somewhat compensated for the \$100.00 with fuel and odds and ends." He also does not dispute that he received a \$1,000.00 Christmas Bonus but suggests that that amount should not be included as regular wages. Based on those submissions I understood Mr. Robertson to have withdrawn this ground of appeal.

Overtime Wages

As noted above, Mr. Robertson was paid a monthly salary. An important ground in his appeal is his allegation that he is owed overtime wages. Section 35 of the *Act* creates the obligation for an employer to pay overtime wages in accordance with Section 40 or Section 41 of the *Act*. Section 127 of the *Act* gives the Lieutenant Governor in Council (more commonly referred to as "the Cabinet") the power to make regulations concerning a wide variety of issues.

The Determination notes, correctly, that:

On April 25, 1996, the Lieutenant Governor in Council approved and ordered that Sections 31 - 38 and 40 - 42 do not apply to intra-provincial truck drivers. These are the sections relating to hours-of-work notices, meal breaks, split shifts, minimum daily hours, maximum hours of work, hours free from work, flexible work schedules, overtime and time banks. On September 19, 1996, the Lieutenant Governor in Council extended this exclusion from the *Employment Standards Act* until February 28, 1997. On February 21, 1997, the Lieutenant Governor in Council again extended this exclusion until September 30, 1997.

It was in that context that the Director's delegate set out the following analysis of Mr. Robertson's entitlement, if any, to overtime wages:

Three sources were used to obtain daily hourly records - trip sheets from October to December 1996, the complainant's calendars, and "Achievement" sheets.

The trip sheets during this time period have an entry for when the shift began and when the shift ended. Often the complainant would calculate total hours worked, and, in a second entry, enter the total delivery time. The delivery time was usually less than or the same as the total working time. The complainant states he rarely took time for lunch and this is borne out by the facts during this period. For example, on October 23, the complainant began work at 8 am and finished at 6:45 pm - a total of 10.75 hours. However, he entered only 10.25 hours. I took this to mean he took a 30-minute break from work during the day.

Three types of markings relate to the complainant's hours of work on the calendars he kept at home. There are entries with start and finish times,

entries summarizing the total hours worked in a given day and entries consisting of check marks an/or start times only. I have accepted the entries with start and finish times and those totalling the hours worked in the day.

The third type of record is a sheet created by the employer which summarizes the daily deliveries for that month. Even though this sheet, headed "Achievement," contains space for delivery time in hours, this column is rarely filled in. In those cases where it is filled in *and* I have not accepted entries from the other two types of records, I have used delivery time in hours, even though it is usually less than the total time worked. Finally, in cases where there is no time entry on the "Achievement" total time worked. Finally, in cases where there is no time entry on the "Achievement" sheets but a record of delivery, I have entered the daily minimum of four hours.

Those records, and his analysis of them, led the Director's delegate to conclude that Mr. Robertson "...has been adequately paid for hours worked...."

Mr. Robertson submitted that the daily "trip sheets" for the period January 1 - March 31, 1997 had not been provided by Hooker to the Director's delegate. They were produced, for the first time, at the hearing on December 17, 1997. I stated at that time that I would require the Director's delegate to review those "trip sheets" to determine if the information contained in them would lead him to alter his finding concerning Mr. Robertson's entitlement to overtime wages and will include such an order in this Decision.

Mr. Robertson's initial submission referred to the "Achievement" sheets as a "...fabrication to a large extent." However, under cross examination he acknowledged that they contained summaries of his hours of work and may contain errors rather than being fabricated.

Mr. Robertson testified that he recorded hours of work on his personal calendar "...only if there was something unusual, otherwise he placed a " ✓ " to indicate that he had worked. Thus, a " ✓ " in his calendar could indicate an 8-hour work day or less than that. However, on some occasions such as during "spring break-up", he recorded a specific number of hours which was less than 8 per day. He also testified that he marked his calendar "...without access to all of the daily truck log sheets."

The "Achievement" sheets which Mrs. Hooker prepared and submitted to the Director's delegate constitute a summary of the daily trip sheets which Mr. Robertson completed.

My review and analysis of the "Achievement" sheets leads me to conclude that the volume of fuel delivered by Mr. Robertson (and, therefore, the number of hours worked) each day varied considerably. The sheets also confirm that the delivery time (in hours) and the number of deliveries varied greatly from day to day and from month to month. They also corroborate the notations in Mr. Robertson's calendar which record the fact that there were days when he did not work and continued to receive his normal monthly salary.

Having reviewed and considered Mr. Robertson's lengthy oral submission concerning the validity and accuracy of the calculations made by the Director's delegate I find that I concur with the methodology which the Director's delegate adopted. In particular, I find that I concur with the "hierarchy of records" methodology whereby he relied, in the first instance, on the daily trip sheets, then on Mr. Robertson's calendar (if no data on the trip sheets) and then on the "Achievement" sheets. This was a particularly fair and reasonable methodology and was consistent with the "best evidence" rule.

Statutory Holiday Pay

The Determination sets out, at paragraph 4, a detailed explanation of how Mr. Robertson's entitlement to statutory holiday pay had been paid in full. There is nothing in the evidence which suggests that Mr. Robertson worked on any statutory holiday. It is clear and not disputed, however, that he received the same monthly salary (\$3,400.00) each month during his period of employment. This meets the requirements of Section 45 of the *Act*. Therefore, I concur with the calculations made by the Director's delegate.

Vacation Pay

Section 58 of the *Act* requires an employer to pay as vacation pay at least 4% of an employee's total wages which were paid to the employee during the year in which he or she was entitled to vacation pay. Thus, the exact amount of vacation pay to which Mr. Robertson is entitled is derived by calculating 4% of his total wages. The Determination and the attached calculation schedule adopt this calculation method. Therefore, I concur with the calculation method used by the Director's delegate. The actual amount of vacation pay to which Mr. Robertson is entitled will be determined once the calculation schedule is amended as required by this decision.

Compensation for Length of Service

The Determination found at paragraph 8, that Mr. Robertson "...was paid two weeks compensation for length of service, thus there is no contravention of Section 63 of the *Act*."

Mr. Robertson did not adduce any evidence nor make any submission which challenged that finding. There is, therefore, no ground on which to disturb this finding.

Motor Vehicle Act Fine

Section 21 of the *Employment Standards Act* prohibits an employer from making any unauthorized deductions from an employee's wages for any purpose. The Determination found, at paragraph 5, that Mr. Robertson had been

"...fined \$250 under the *Motor Vehicle Act* (MVA) for operating without the proper carrier plate. However, this amount has not been deducted from

the employee's wages, and it is not an unauthorized deduction. This fine arises from the application of the MVA, and the MVA has its own appeal procedures if a party has been wrongfully fined. It is the responsibility of the complainant to make arrangements necessary to pay or appeal the fine. Thus, there is no contravention of Section 21."

Mr. Robertson identified this issue as "the real source" of his complaint because the non-payment of the fine by Hooker has "...put a black mark on (his) driver's license." While I have some considerable sympathy for Mr. Robertson's situation, there is nothing within my jurisdiction as an adjudicator which can assist him. I concur with the findings made by the Director's delegate on this point.

Payroll Records

In his evidence, Mr. Robertson stated that he never received a statement of deductions nor any explanation when those deductions were changed.

The Determination contains the following statement:

The complainant alleges there were no payroll records or wage statements. The employer complied with my demand to produce payroll records and partially complied with my demand to produce all records pursuant to Part 3 of the *Employment Standards Act*. This matter will be the subject of another determination.

The Director's delegate informed me at the hearing that Hooker had paid in full the penalty imposed on it for its failure to comply with Part 3 of the *Act*.

False Representations

Mr. Robertson's oral submission included an assertion that Hooker had falsely represented either the wages he would be paid once employed as a truck driver; or a condition of employment (banking of overtime).

As noted above, Mr. Robertson withdrew as a ground for appeal his assertion concerning the monthly salary.

On the issue of banking overtime he testified that he "...agreed to it to some extent", that is was "...not a mutual agreement", and that he was "...unsure about the situation." Given that evidence I am unable to come to any conclusion other than Mr. Robertson's assertion is without merit.

ORDER

I order, under Section 115 of the *Act*, that the Determination dated September 4, 1997 be referred back to the Director's delegate. I further order that the Director's delegate calculate the amount of wages owing, if any, based on the various findings which I have made above. In particular, I order that Mr. Robertson be paid wages for two days work (November 29 and 30, 1995) as well as any day or days during the period January 1, 1997 to March 31, 1997 for which the daily trip sheets support a finding that differs from any findings made previously by the Director's delegate.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC/bls