

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Robert L. R. Meredith
Operating R. Meredith Silviculture
("Meredith")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton
DATE OF HEARING: March 28, 1996
PLACE OF HEARING: Queen Charlotte City
FILE NO.: 96/069
DATE OF DECISION: April 10, 1996

DECISION

OVERVIEW

This is an appeal by Robert L. R. Meredith operating R. Meredith Silviculture (“Meredith”) under Section 112 of the *Employment Standards Act* (the “Act”). Meredith is appealing Determination No. CDET 000484 issued by a delegate of the Director of Employment Standards (the “Director’s delegate”) on December 15, 1995. The primary ground for this appeal is Meredith’s belief that he employed Deborah Goldin as a camp cook on a daily wage rate based on her ability and work performance. Meredith challenges the basis on which the Director’s delegate calculated total wages owed to Goldin.

The Tribunal received written submissions from both Meredith and Goldin. A hearing was held in Queen Charlotte City with Goldin and the Director’s delegate participating by way of a telephone conference call.

The Director’s delegate, Goldin, Meredith and Gordon Staffen gave evidence sworn under oath.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is: What wages are owed to Deborah Goldin - the amount set out in the Determination or some other amount?

FACTS

Deborah Goldin was employed by Meredith as a camp cook. There is some dispute about the dates of her employment. In a letter dated November 29, 1995 to the Director’s delegate, Meredith states that Goldin was employed from June 30, 1995 to July 19, 1995. The Determination shows the period of employment as June 26, 1995 to July 20, 1995. The complaint and information form submitted by Goldin to the Employment Standards Branch shows a starting date of June 27, 1995 and July 20, 1995 as the last day of work. These are the same dates stated by Goldin in her letter of September 19, 1995 to Mr. M. Granger (District Manager, North Coast District, Ministry of Forests). Gordon Staffen’s evidence was that Goldin was “fired” by Meredith at approximately 8:30 a.m. on July 20, 1995. Meredith gave evidence that he terminated Goldin’s employment on the morning of July 20, 1995 and that she was specifically told not to cook breakfast that morning. The payroll record provided by Meredith for the period ending July 31, 1995 contains neither a start date nor an end date, but shows 23.75 days @ 8 hours per day for a total of 190 hours work.

There is some dispute about Goldin’s rate of pay while she was employed by Meredith. Goldin’s complaint states that she had a verbal agreement with Meredith to be paid \$150.00 per day. In an

undated letter from Meredith which was received by the Director's delegate in late October, 1995 Meredith stated:

“I agreed to pay \$150.00 per day if she (Goldin) could start working and clean herself up”

Both Meredith and Goldin gave evidence at the hearing that they made the verbal agreement some time (about a week or ten days) after Goldin had begun her employment. Meredith's evidence at the hearing was that he agreed to a “flat rate per day, rather than keep hourly records.” He also gave evidence that the daily rate was to be “...based on performance, to a maximum of \$150.00 per day.” Goldin's evidence was that she had asked for \$250.00 per day but that she accepted Meredith's offer of \$150.00 per day.

There is also some dispute about the number of hours which Goldin worked each day. In her complaint, Goldin states that she worked between ten and fourteen hours per day. Meredith disputes that she worked that number of hours. However, Meredith's evidence at the hearing included a statement that “...if a cook worked only 3 hours she would get paid the daily rate for the day.”

Meredith paid Goldin the minimum wage for 8 hours per day (190 hours x \$6.50/hour) plus 4% vacation pay (\$49.40) for total gross wages of \$1,284.40.

The total amount of the Determination was \$3,034.57 based on the following:

Wages earned:	\$4,241.24
less wages paid:	1,235.00
plus interest:	<u>28.33</u>
	\$3,034.57

These amounts were explained in calculations attached to the Determination.

At the hearing Meredith submitted a letter dated March 18, 1996 written by Rick Fillion. Fillion was the foreman of the crew employed by Meredith during Goldin's period of employment. Fillion did not attend the hearing,. His letter sets out his understanding of the reasons giving rise to Goldin's employment being terminated by Meredith.

Goldin also submitted a letter at the hearing. It was written by Toby Peterson and was dated March 17, 1996. In it, Peterson offers his comments concerning events which took place during the period of Goldin's employment.

ARGUMENTS

Meredith argued that the Determination should be overturned because the number of hours worked each day by Goldin was not important. He objected, in particular, to the calculation of an hourly wage rate of \$18.75 per hour ($\$150.00/\text{day} \div 8 \text{ hours}$). Goldin was to be paid a flat rate of \$150.00 per day regardless of hours worked, he argued. He also argued that Goldin should not be paid \$150.00 per day because her work performance was not satisfactory. In addition, Meredith questioned the scope of the investigation conducted by the Director's delegate. Finally, he compared the quality of Goldin's work performance to the work done by the cook who replaced Goldin, Julia Brunell, whom he paid \$175.00/day.

The reasons set out in the Reasons Schedule attached to the Determination were reiterated at the hearing. The Director's delegate was satisfied that a verbal employment agreement existed between Meredith and Goldin which required wages to be paid at the rate of \$150.00 per day. However, as he found "reasonable doubt" regarding the hours worked each day by Goldin, he accepted Meredith's payroll record showing that Goldin worked 8 hours per day. On the question of Goldin's competence, the Director's delegate argued that even if Meredith found Goldin's work performance to be unacceptable, he was not entitled to alter the employment agreement unilaterally.

Goldin argued that she was entitled to be paid according to the agreement (\$150.00/day for each day she worked), and her work performance should not be compared to another camp cook who was employed under another agreement.

ANALYSIS

The first issue I must determine is what rate of pay Meredith and Goldin agreed to in their verbal agreement. I conclude, based on the written and oral evidence presented to me, that the agreement required Meredith to pay \$150.00 for each day that she was employed as a camp cook. That conclusion is confirmed by Meredith's written submission and by his oral evidence under oath that he preferred to pay a flat daily rate rather than keep hourly records.

I also conclude that the daily wage rate was not a maximum rate, subject to Goldin's work performance. The reason for that conclusion is that both Meredith and Goldin gave evidence at the hearing that they made their verbal agreement about one week or ten days after Goldin had begun working at the camp. The evidence shows that Goldin had suggested a daily rate of \$250.00 per day, which Meredith rejected. By the time that the verbal agreement was made, Meredith had had an opportunity to assess Goldin's work performance and to set a wage rate accordingly. In those circumstances, I conclude that the daily wage rate of \$150.00 per day was a "flat" daily rate rather than a maximum daily rate, dependent on Goldin's performance.

The second issue I must determine is the dates of Goldin's employment

Goldin's records show that she purchased food and cooking supplies on June 27, 1995. Her records also show that she worked on July 20, 1995. These dates appear in her complaint to the Employment Standards Branch and in her letter to Mr. M. Granger (Ministry of Forests).

Meredith's written evidence is that Goldin was first employed on June 27, 1995. He also gave oral evidence that he "fired" Goldin on the morning of July 20, 1995 before she began working. He objected to July 20 being included as a work day in the calculations attached to the Determination. The evidence given by Gordon Staffen supports the fact that Goldin's employment was terminated before she began work on July 20, 1995. Neither the Director's delegate nor Goldin contested the evidence given by Staffen.

Section 28 of the *Act* requires employers to keep payroll records for each employee. Meredith's payroll records show Goldin was paid for a total of 23.75 days @ 8 hours per day. He argued that I should not rely on that record as he produced it solely to settle Goldin's complaint. The Director's delegate is entitled to rely on payroll records provided by an employer and should not be required to speculate about the reasons why the records have been produced. Having considered all of the evidence on this point, I conclude that Goldin probably did work 8 hours per day.

I have not given any weight to the letters written by Fillion and Peterson because neither person was available for cross-examination on the points where their statements are in conflict. I have relied, instead, on the evidence given under oath by the witnesses at the hearing.

I conclude, based on the written and oral evidence presented to me, that Goldin's period of employment was from June 27, 1995 to July 19, 1995 inclusive. That is, a total of 23 days at a daily rate of \$150.00 per day.

Section 1 of the *Act* defines the term "regular wage". If an employee is paid on a flat daily rate, Section 1 requires regular wages to be calculated in the following manner: "...the employee's wages in a pay period divided by the employee's total hours of work during that pay period."

Section 40(2) of the *Act* requires an employer to pay overtime to an employee who works more than 40 hours in a week. Overtime wages are 1.5 times the regular wage for hours worked in excess of 40 hours in a week, and 2 times the regular wage for hours worked in excess of 48 hours in a week.

Section 4 of the *Act* prevents employers and employees from agreeing to terms of employment that are less than the *Act's* requirements.

Thus, although Meredith and Goldin agreed to a daily pay rate of \$150.00 per day, they cannot agree to waive the overtime wage provisions of the *Act*. Furthermore, Section 1 sets out how the daily wage rate must be converted to an hourly rate to calculate weekly overtime wages under Section 40.

I agree with the Director's delegate that there is reasonable doubt about the number of hours worked each day by Goldin. I doubt that she worked as many as 14 hours or as few as 3 hours

per day. It is reasonable to conclude, based on all of the evidence, that Goldin's daily hours of work probably totalled 8 hours per day.

With the exception of the start date and the end date of Goldin's employment, the calculations made by the Director's delegate reflect a correct application of the *Act* and *Regulation* given the facts of this appeal. I reject Meredith's assertion that the Director's delegate conducted an inadequate investigation.

ORDER

I order, under Section 115 of the *Act*, that Determination #CDET 000484 be varied to reflect my finding that Goldin was employed by Meredith from June 27, 1995 to July 19, 1995 inclusive.

Geoffrey Crampton
Chair
Employment Standards Tribunal

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