An appeal

- by -

Your Landscape Construction Centre Inc.
("the appellant")

- 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: E. Casey McCabe

FILE No.: 2001/741

DATE OF HEARING: January 16, 2002

DATE OF DECISION: January 30, 2002

DECISION

APPEARANCES:

Mr. Larry Justeson and Ms. Jill Schindel	For Your Landscaping Construction Centre Inc.
Mr. R.G. (Greg) Goldie and Ms. Jenny Deering	For the Respondent

OVERVIEW

This is an appeal pursuant to Section 112 of the "*Employment Standards Act"* (the "*Act"*) by Your Landscape Construction Centre Inc. (employer) from a Determination dated October 1, 2001, which found the employer liable for overtime wages commencing March 22, 1999, and ending March 22, 2001.

ISSUE

Did the director's delegate correctly determine that the complainant's salary was $3,500.00 per month?

BACKGROUND

Your Landscape Construction Centre Inc. is a wholesale retail landscape supply yard. Mr. R.G. (Greg) Goldie, the complainant was employed from December 1996 to March 22, 2001 as a crane truck driver. The delegate in the course of his investigation determined that the complainant's salary was $3,500.00 per month for the relevant period.

The employer bases its appeal on the argument that the delegate erred in finding that the complainant's salary was $3,500.00 per month. The employer contends that the complainant's salary was $3,100.00 per month with an additional $400.00 monthly allowance. This allowance was meant firstly to provide extra remuneration in anticipation that the complainant would work additional hours during the busier summer months; secondly to provide compensation for performing extra duties such as truck maintenance; and thirdly as a safe driving bonus.

The difference in the monthly salary to the employer is substantial. The delegate used the $3,500.00 per month salary figure. After determining the number of overtime hours that the complainant worked in the relevant period he found that the complainant had an hourly wage of $20.07. If the employer's contention that the monthly salary was $3,100.00 rather than $3,500.00 is correct the hourly rate becomes $17.88 for a difference of $2.19 per hour. The net effect to the

employer would be the reduction of the principal amount of the determination from $6,755.55 (plus interest) to $3,230.76 (plus interest).

It is significant that the employer does not challenge the delegate's findings regarding the number of hours worked and which of those hours constitute overtime hours. The sole issue on appeal is whether the complainant's salary was $3,100.00 per month or $3,500.00 per month.

The evidence on the point consisted of a written contract and the negotiating history that produced the contract. I quote from the written contract:

> "Salary: $3,500.00 per month based on a "work until job is finished" basis, no record of time or days worked will kept as suggested by Ronald G. Goldie, plus 4% holiday pay (shown on each pay stub). From approx. March 15 – October 31, our business hours are 6:30am – 5:30pm, with the remainder of the year the hours being 8: 00am-4:30pm. Salary remains the same 12 (twelve) months of the year, excluding your holidays. Pay days are the 5th & 20th of every month. Vacations can only be taken in our slower season between the end of October until mid March. Four (4) percent vacation pay will be included on every cheque. Vacations are to be authorized by January 31st for vacations taken that year. (sic)

The contract was dated and signed on January 30, 1997.

Both parties tendered evidence of the negotiations leading to this contract. Mr. Justeson for the employer testified that the complainant had, prior to December 1996, worked for the employer. There was a period of approximately 10 months during 1996 when the complainant did not work for this employer. However, the replacement driver's employment was terminated and the employer made an offer to have the complainant return to his former job.

Mr. Justeson testified that the employer wanted to have the terms of employment in writing. The primary concerns of the employer were to outline the wages that the complainant would receive and the employer's expectations regarding fines, accidents, damage caused by operator carelessness, tickets for overloads, traffic violations, and customer relations. Those concerns are listed in the contract. Mr. Justeson testified that he had presented the complainant with the contract about mid January, 1997. He testified that the complainant looked at the contract at that time and asked for a few days to review it. Mr. Justeson agreed with that request.

The employer's original proposal called for a salary of $3,100.00 per month based on a 50 hour work week maximum, plus 4% holiday pay, plus $100.00 safe driving bonus plus $100.00 maintenance bonus. This proposal stipulated that from approximately March 15 to October 31st work hours would be 6:30 a.m. to 5:30 p.m. with the remainder of the year's business hours being 8:00 a.m. to 4:30 p.m. The proposal called for a 50-hour week with overtime to be paid after 50 hours. However, salary would remain the same for all 12 months for the year. The 4%

vacation pay would be included on every cheque with vacations to be authorized by January 31 for that year.

Mr. Justeson testified that after making this initial proposal to the complainant he was not involved in further negotiations. Indeed, the employment contract was executed by Mr. Lance G. Schindel who concluded negotiations with the complainant and was authorized to sign on behalf of the employer.

Mr. Justeson testified that prior to Mr. Schindel executing the employment contract he had discussed the $3,500.00 salary figure with him.

Mr. Goldie testified that he was approached by the employer to return to work for the company. He stated that he replied that he would have to think about it because at the time he was operating his own truck in his own business. He testified that Mr. Schindel called him approximately 3 days after the initial contact to ask if he had made a decision. Mr. Goldie stated that he had found a driver for his truck and that he was interested in talking to the employer about returning to work.

Mr. Goldie testified that he discussed salary with Mr. Schindel. He testified that he had initially requested a salary of $4,000.00 per month to which Mr. Schindel replied "too much". Mr. Schindel offered $3,100.00 per month. Mr. Goldie testified that that was less than what he was making in his first employment term with the employer and countered with an offer of $3,800.00 per month. He testified that Mr. Schindel then offered $3,200.00 per month plus the safe driving and maintenance bonuses. Mr. Goldie then stated that "we arrived at $3,500.00 per month and at no time was the extra $400.00 in bonuses mentioned as suggested for overtime pay". Mr. Goldie testified that he and Mr. Schindel then signed the contract.

Ms. Deering testified that during the few days that Mr. Goldie was considering the employment contract she faxed a copy of the employer's original proposal to the Employment Standards Branch. She testified that she had a discussion with a person at the Branch who told her that the employer's overtime proposal would not be binding because the Branch did not recognize more than a 40-hour week. Ms. Deering testified that the Employment Standards Branch indicated that the complainant could sign the contract but that the provision allowing overtime after 50 hours rather than 40 would not be recognized by the Branch.

Extrinsic evidence such as negotiating history can be used as an interpretive aid to a contract but cannot be used to amend, vary or alter the plain meaning of the words of the contract. In this case Mr. Justeson testified that the employer sought to accomplish, by reducing the terms of employment to writing, a goal post for determining its labour costs and conveying the expectation regarding client relations to Mr. Goldie. Mr. Justeson stated that in his view the $400.00 per month difference between the $3,100.00 proposal and the $3,500.00 amount specified in the written contract was to compensate the complainant for the safe driving and maintenance bonuses as well as overtime during peak months.

The complainant on the other hand testified that in his mind his salary was to be $3,500.00 per month and that any overtime worked in excess of 8 hours a day would be paid at overtime rates. Mr. Goldie points to the removal of the reference to the 50-hour workweek that was contained in the employer's original proposal and is not contained in the executed employment contract. Mr. Goldie testified that in his mind the removal of those words coupled with his promise to the employer that he would work more than 8 hours per day if it were necessary to finish the day's tasks inferred that he would receive overtime pay for hours worked in excess of 8 per day.

The evidence about the back and forth of negotiations is not helpful. The evidence does not disclose a consensus ad idem or an agreement between the complainant and the employer. The law of contracts is meant to protect reasonable expectations. The negotiating evidence disclosed unilateral intention of the parties rather than a meeting of their minds. I therefore must turn to an interpretation of the plain wording of the employment contract against the background of the *Act*. The relevant section of the *Act* is Section 4 which reads:

> "Requirements of this *Act* cannot be waived –
>
> > The requirements of this *Act* are the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect subject to Sections 43, 49, 61 and 69."

In this case the employer has attempted to contract out of the provisions of the *Act* by stipulating a 50-hour week at straight time. The employer in its view has compensated the employee for potential overtime by providing an increase in his monthly salary from $3,100.00 to $3,500.00.

I am unable to agree with the employer's argument on this point. The employment contract clearly states:

> "$3,500.00 per month based on "work until job is finished" basis, no record of time or days worked will be kept as suggested by Ronald G. Goldie, plus 4% holiday pay (shown on each pay stub). From approximately March 15 – October 31, our business hours are 6:30 a.m. – 5:30 p.m. with the remainder of the year the hours being 8:00 a.m. – 4:30 p.m. Salary remains the same, 12 (twelve) months of the year, excluding your holidays.

I find that the complainant's salary is $3,500.00 per month. The following sentences which refer to no record of time or days worked being kept and the hours upon which the business will be open do not, in my view, provide a basis for the employer to argue that the $3,500.00 per month is qualified. Furthermore, Section 4 of the *Act* does not allow the parties to contract out of the overtime provisions of Section 35 and 40.

In his submission, Mr. Justeson argued that the complainant having worked under the terms of the contract from January, 1997 through March, 2001, should not be allowed, upon the termination of the employment relationship, to rely on his interpretation of the agreement and

claim the overtime pay. In effect Mr. Justeson is arguing that the complainant, having sat on his rights for the term of the employment relationship, should not be allowed to advance a claim retroactively. In the employer's view, the complainant had been treated fairly throughout the employment relationship. The employer asserts that it is being treated unfairly if the claim is allowed retroactively back to March 22, 1999. The employer argues that it has based business decisions and projections on what it feels were defined terms in the employment contract. The requirement to pay two years' overtime is inequitable and to base the calculation on $3,500.00 per month salary is unjustifiable in the circumstances.

I cannot accept that argument. I am again constrained by the *Act*. Section 80(1) of the *Act* reads as follows:

> **"Limit on amount of wages required to be paid**
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> **80** (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning
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> > (a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment, and
> >
> > (b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination,
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> plus interest on those wages.

The *Act* states that a complainant whose employment has been terminated has a period of six months in which to file a complainant and, if the complaint is valid, compensation can reach back for twenty-four months as specified above. The Legislature intended this and I am bound, upon the wording of the section, to render a decision in accordance with that intent. Therefore, I cannot use the employer's argument which is based on the perceived unfairness of allowing a complaint to apply retroactively to modify the effect of the delegate's decision.

In closing, I wish to add that the Determination dated October 1, 2001, dealt with four issues. Those issues were whether the complainant was entitled to reimbursement for overweight fines paid by him; whether he was entitled to two weeks wages as a result of a pay period change; whether he was entitled to compensation for length of service; and whether he was entitled to the overtime wages. The employer, as stated previously, appealed on the narrow ground that the delegate had erred in determining the monthly salary upon which the overtime calculations were subsequently based. The complainant in his written submissions on appeal raised issues that challenged the other aspects of the Determination. At the hearing I stated that I would not entertain what amounted to a cross appeal of the October 1, 2001 Determination because the complainant had not formally appealed those findings under Section 112 of the *Act.* I ruled that

my jurisdiction was limited to the questions on appeal that were raised by the employer in its October 22, 2001, written submission. The hearing proceeded on that basis.

ORDER

For the above reasons the Determination dated October 1, 2001, is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal