

An appeal

- by -

JSDS General Contractors Ltd.
("JSDS")

- 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 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2009A/050

DATE OF DECISION: June 17, 2009

DECISION

SUBMISSIONS

Roger Mace, Barrister & Solicitor on behalf of JSDS General Contractors Ltd.
Amanda Clark Welder on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by JSDS General Contractors Ltd., ("JSDS"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued March 13, 2009.
2. Kenneth Large was employed by JSDS as a Site Foreman and equipment operator for JSDS from June 1, 2007 until his employment was terminated on October 2, 2008. Mr. Large complained that he was owed compensation for length of service and overtime wages. The parties ultimately agreed that JSDS was not liable to pay compensation for length of service by virtue of section 65 of the *Act* because Mr. Large was employed at one or more construction sites by an employer whose principal business is construction.
3. The Director's delegate held a hearing into Mr. Large's complaint on January 15, 2009. The employer was represented by Janet Lettmann and Don Swain. Mr. Large appeared on his own behalf. The sole issue before the delegate was whether Mr. Large was entitled to overtime wages.
4. Following the hearing, the delegate determined that JSDS had contravened Section 40 of the *Act* in failing to pay Mr. Large overtime wages. She concluded that Mr. Large was entitled to wages and interest in the total amount of \$2,556.57. The delegate also imposed a \$500 penalty on JSDS for the contravention of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulation*.
5. JSDS contends that the delegate failed to observe the principles of natural justice by refusing to review evidence submitted by Mr. Swain and Ms. Lettmann during the hearing, misconstrued evidence she did review and failed to give the employer's evidence proper weight.
6. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the *Tribunal's Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUE

7. Whether the delegate erred in concluding that the employee was entitled to overtime wages.

FACTS

8. The relevant facts, as found by the delegate, are as follows.

9. Mr. Large worked at a number of JSDS jobsites, including one in Peachland and four in Westbank. In addition to operating equipment at these sites, Mr. Large was responsible for locking and unlocking gates, overseeing crews, fueling equipment and meeting clients.
10. Mr. Large maintained a journal in which he recorded his daily record of his hours of work as well as the hours he spent operating each of the various pieces of equipment. At the end of each bi-weekly pay period, Mr. Large submitted this information on two separate forms to his supervisor, Mr. Swain, for review and approval. Mr. Swain's signature appeared on all of the time sheets. Mr. Large also recorded which equipment he fuelled as well as the amount of fuel he used and provided this information to JSDS.
11. Mr. Swain testified that he trusted Mr. Large and assumed that the hours were correct. He testified that even though Mr. Large was only supposed to be working eight hours per day, he never questioned Mr. Large's hours of work. Once Mr. Swain approved the forms, they were given to Ms. Lettmann, who was responsible for payroll and invoicing.
12. In May, 2007, JSDS engaged a third party to provide re-fueling services because it was concerned Mr. Large's hours were greater than those of other employees. As a result of the contracting out, there was a slight reduction in Mr. Large's hours. Although Ms. Lettmann still believed Mr. Large's hours to be higher than other employees; she did not raise the issue with Mr. Swain as he had approved Mr. Large's hours.
13. Mr. Large used a company vehicle which he regularly took home each day. In June, 2008, JSDS installed a Global Positioning System (GPS) in all of the company vehicles after one of its vehicles had been stolen. The GSP was installed in Mr. Large's vehicle on June 19, 2008.
14. JSDS said that it began to review the GPS records in some detail after an incident in which Mr. Large damaged the vehicle. JSDS did not accept Mr. Large's explanation for the incident. A subsequent investigation suggested that Mr. Large was under the influence of alcohol at the time the incident occurred and led to the termination of his employment.
15. JSDS submitted the GPS records at the hearing as evidence that Mr. Large's timesheets and equipment logs were not an accurate or credible accounting of the hours he actually worked. Mr. Large's journal was also provided to the delegate at the hearing.
16. JSDS argued that the GPS records indicated that Mr. Large did not actually perform the amount of work he claimed to have performed. It relied specifically on the records for June 20, June 27, June 28 and September 19 in support of its position. It also provided the delegate with their own summary of the GPS records in comparison to the timesheet and equipment logs for the 49 days the GPS records were available, including date, job number, GPS hours, GPS site hours, timesheet hours and unaccounted hours. Ms. Lettmann argued that, according to her analysis, there were 247.69 unaccounted for hours. JSDS argued that even though GPS records were not available for the entire period under review, the discrepancies between the GPS records and timesheets were frequent and severe enough to call into question the credibility of all of Mr. Large's timesheets.
17. The delegate reviewed 218 pages of GSP records for Mr. Large's vehicle for the period June 19, 2008 to October 16, 2008. Those pages covered the following dates: June 20, 2008 to July 10, 2008, August 10, 2008 to August 14, 2008, August 20, 2008 to August 29, 2008, and September 9, 2008 to October 1, 2008. The delegate noted that Mr. Large's vehicle had been stolen and not in Mr. Large's possession between July 11, 2008 and August 9, 2008 inclusive.

18. The delegate found the records to be reliable with respect to date and time, but less so with respect to the precise location. For example, she noted that on June 20, 2008 the first entry (“ignition on”) showed an address of 2777 Riffington Place but the second entry (“start”) indicated that the vehicle was at 2725 Riffington Place. The delegate noted a number of similar discrepancies in the records.
19. The delegate found that Mr. Large’s information corresponded to the “Card Lock Fuel Log” presented by JSDS.
20. JSDS identified five dates in the GPS records as examples of Mr. Large’s inaccurate records. After reviewing those records, the delegate noted that although Mr. Large was the primary operator of the vehicle, because other employees were permitted to use it there was no way to determine who was operating the vehicle at any given time. She further noted that Mr. Large occasionally travelled together to job sites and meetings in Mr. Swain’s vehicle.
21. Mr. Large relied on his daily records, but could not explain on a day to day basis the reasons for the discrepancies between his logs and the GPS records. He argued that he was not paid on the basis of the GPS records but the hours of work recorded on his timesheets.
22. The delegate found that Mr. Large had been paid regular wages for overtime hours. She identified “critical flaws” in the employer’s comparison of the timesheets to the GPS records. She noted that JSDS only considered Mr. Large to be working when the GPS records indicated that the vehicle was stopped at a job site for more than 15 minutes. She found that Mr. Large was entitled to be paid while traveling for the purpose of the employer’s business, which had not been accounted for in the employer’s analysis. She noted that there were numerous GPS entries corresponding to work locations and determined that Mr. Large was entitled to be paid for the time driving to these locations.
23. The delegate also noted that although the GPS records indicated details about the movement of a vehicle, they did not indicate the time Mr. Large spent working or the nature of the work he performed. She further noted that there was no evidence before her indicating who was driving the truck at any given time. Specifically, she noted that although Mr. Large worked on June 29, 2008, the GPS records indicated that the vehicle did not leave his house that day.
24. The delegate further noted that because the GPS did not accurately identify precise street addresses, there was no way to determine the exact location of the truck. She noted, for example, although the employer contended that Mr. Large was often at a pub rather than at work, the pubs were located near other business establishments, including gas stations.
25. The delegate determined, for these reasons, that the employer’s comparative analysis was an insufficient basis for her to conclude that Mr. Large did not work as he claimed on his timesheets.
26. The delegate agreed with the employer’s assertion that the time recorded by Mr. Large for the days June 20, 27 and September 19 were not consistent with the GPS records and noted that Mr. Large could not provide any explanation for the discrepancies. However, she did not find his inability to explain the discrepancies to be unusual, given that the hearing took place almost seven months after the dates in question. The delegate found that there were a number of plausible explanations for the discrepancies between the records and the timesheets, including the fact that the truck may have been used by someone else. The delegate accepted Mr. Large’s evidence that he maintained his hours of work on a daily basis and provided that to his employer at the end of each pay period. She determined that, if Mr. Large had not been completing the work he claimed to have performed it would be reasonable that the employer ought to have been aware of it. Although JSDS

argued that Mr. Large took too much time driving around and doing things other than what was stated on the timesheets, the delegate found that the employer knew what hours Mr. Large was working:

Each pay period the employer was aware that Mr. Large's hours of work were greater than the hours he spent working on machinery and did not take issue with this difference. At one point the employer took action to reduce Mr. Large's hours by contracting out the fuelling of equipment. Even after this change was implemented Ms. Lettmann knew Mr. Large continued to work overtime; however, she did not take any further action because Mr. Swain was authorizing Mr. Large's timesheets.

27. The delegate further noted that JSDS had the opportunity to monitor Mr. Large's hours during the course of his employment and discipline him if necessary:

Given that the timesheets and equipment logs were completed in a contemporaneous manner and that the employer accepted these as accurate throughout Mr. Large's tenure, and given that there are a multitude of plausible reasons for the apparent discrepancies between the GPS records and these documents, I am not satisfied that the employer has met the burden of proving that the hours of work recorded on the timesheets are not reliable.

ARGUMENT

28. JSDS submits that the delegate failed to review the evidence it provided and misinterpreted the evidence she did review. It contends that the GPS records confirm that Mr. Large was not at the work sites or travelling to the work sites at the times he reported he was at work. JSDS says that it has taken the GPS information and cross referenced it to non-work related addresses, including Mr. Large's wife's place of work, five different pubs and the residence of one of Mr. Large's friends. JSDS says that the GPS records confirm that it was physically impossible for Mr. Large to be performing the hours of work he recorded in his journal.
29. JSDS says that the dates for GPS analysis were randomly selected by the delegate. It says that, of the 49 days recorded, Mr. Large made 41 trips to a pub or pub/vendor and on some days, multiple trips were made. JSDS says it would have chosen different dates for analysis and that the delegate's analysis of the GSP records for the days she did select is so flawed that her conclusions ought to be rejected.
30. The delegate contends that not all of the evidence submitted on appeal was before her at the hearing. In particular, she submits that the appellant's analysis of the records, with an examination of the GPS records in relation to various addresses, was not provided to her. She submits that because the employer has not provided any explanation or reason for not submitting the documents at the hearing, the Tribunal should not consider it.
31. The delegate further submits that the new evidence relating to the interpretation of the GPS records does not have high probative value. She says that it is presented to corroborate the evidence and argument presented at the hearing and which was addressed in the Determination. She argues that an appeal is not an opportunity to rectify perceived deficiencies in the presentation of the party's position during the investigation process.
32. The delegate further submits that a court record of the civil proceedings between the parties does not relate to the issues in dispute between the parties and is of no probative value. Although she submits that the documents relating to the accuracy of the GPS are of probative value, she says that the employer has provided no explanation why this information was not presented at the hearing.
33. Finally, the delegate submits that the appellant has not explained what evidence it feels she has refused to review.

34. In reply, counsel for JSDS submits that the “new evidence” does meet the test of new evidence and that, even if it did not, it is an explanation of the evidence available to the delegate at the hearing that she either chose to ignore or dismiss. Counsel submits that the information is both credible and probative to the issue of Mr. Large’s overtime claim. Counsel asserts that the delegate stated that she would not consider using the GPS records as evidence and that “she would not spend the time to go through” the records. Counsel submits that if the delegate had requested further information to clarify the GPS records, JSDS would have done so. He submits that the delegate ignored the data because she chose not to have the time to review it.

ANALYSIS

35. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

the director erred in law

the director failed to observe the principles of natural justice in making the determination; or

evidence has become available that was not available at the time the determination was being made

36. An Appellant bears the burden of providing persuasive and compelling evidence that there were errors of law in the Determination or that the delegate failed to observe the principles of natural justice.
37. Principles of natural justice are essentially procedural rights that ensure that parties know the case against them and have full opportunity to respond to it. I am not persuaded the delegate denied JSDS any procedural rights. JSDS appeared at the hearing and responded to the complaint, both in writing and orally. However, I find that the delegate erred in law in arriving at her conclusion.

Error of Law

38. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:

1. A misinterpretation or misapplication of a section of the Act;
2. A misapplication of an applicable principle of general law;
3. Acting without any evidence;
4. Acting on a view of the facts which could not be reasonably entertained; and
5. Exercising discretion in a fashion that is wrong in principle

39. The information submitted on appeal is not, for the most part, new evidence. The only truly “new” information consists of a Provincial Court settlement conference record, information on the Global Positioning System which was downloaded from an internet site, a listing of JSDS ongoing jobs and some photographs. I agree that the settlement conference record is not relevant to the issue before the delegate and ought not to be considered. Similarly, photographs of what I understand to be Mr. Large’s truck parked in front of various drinking establishments constitute information that, with due diligence, could have been presented to the delegate. However, the accuracy and reliability of Global Positioning Systems is a matter of public knowledge and was not a fact that ought to have been necessary to prove before the delegate.

40. Although the employer's analysis of the GPS records was not before the delegate at the hearing, it does not constitute new evidence. It is simply a detailed analysis of information that was before her. It is, in my view, the analysis that could, and should, have been performed by the delegate in light of the employer's arguments at the hearing.
41. The record shows that the employer argued that Mr. Large claimed to be working when the GPS records demonstrated otherwise. The arguments on appeal do not vary from the initial argument made before the delegate. They are simply a more precise argument, demonstrating, in my view, that the delegate acted on a view of the facts that cannot be reasonably entertained.
42. It is unclear to me why the delegate preferred Mr. Large's records over the GPS records submitted by the employer. Notwithstanding the fact that Mr. Swain had reviewed and approved Mr. Large's time records, subsequent information obtained by the employer demonstrated that those records were, in many cases, inaccurate. That information, in the form of GPS records, was put before the delegate at the hearing. The delegate agreed that the GPS records were not consistent with Mr. Large's journal for at least three of the days under review. While noting that Mr. Large could not provide any explanation for those discrepancies, she nevertheless appears to prefer his records over the GPS records for what appears to be entirely speculative reasons, including the possibility that someone else used Mr. Large's truck while he remained at the job site or that Mr. Large used another vehicle to go to the job site. Although it appears JSDS accepted Mr. Large's explanation that he did not use the employer's truck on one of the days under review, there is nothing in the Determination that indicates there was any evidence led on these matters.
43. Having reviewed the information, I conclude that the delegate erred in law in her conclusion. Having been presented with credible and reliable information that Mr. Large's time sheets were suspect, a fact the delegate appeared to accept, she had a duty to carefully review the entire record to determine whether the employer's arguments were valid. The employer's allegation that the delegate refused to review the documentation was made in reply and I have not had the benefit of the delegate's response on this point. However, while I agree that 218 pages of GPS records is a significant amount of material to review, if the delegate was of the view that highly probative and relevant material was unmanageable, she ought to have asked the employer to synthesize the information in more detail. For example, the delegate found that while the employer contended that the several addresses in the GPS records corresponded to pubs, it did not provide any evidence to corroborate this. The record shows that the employer argued that the employee made 41 total trips to pub/vendor and identified those addresses in the GPS tracking records. If the delegate was unclear as to what the GPS records referred to, how they were to be interpreted or what addresses each of the notations referred to, in my view, she ought to have asked the employer to clarify the information, particularly given that the employer was self-represented. If the delegate was intending to make adverse inferences in the absence of further clarification of those records, the employer ought to have been given the opportunity to clarify them.
44. Furthermore, I note that although the employer alleged that Mr. Large was visiting drinking establishments while at work, the delegate found that the drinking establishments were located near other business establishments including gas stations. She found that because the GPS records were not completely accurate with respect to street addresses, the burden of proving this point had not been discharged. While GPS records may have a margin of error, the margin is so slight that the delegate ought to have sought the employee's explanation for repeated lengthy visits to specific non-job related sites. It is implausible in my view, for the employee to spend one hour refuelling his vehicle at the same gas station on a regular basis. I find the delegate's failure to carefully scrutinize all of the information before her and assess the veracity of Mr. Large's journal in light of that information to constitute an error of law.

45. I allow the appeal.

ORDER

46. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated March 13, 2009, be cancelled. I refer the matter back to the Director for a new hearing.

Carol L. Roberts
Member
Employment Standards Tribunal