

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 -

Qualified Contractors Ltd.
("Qualified")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

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| ADJUDICATOR: | Mark Thompson |
| FILE NOS.: | 98/730, 98/734 |
| DATE OF HEARING: | February 10, March 1, 1999 |
| DATE OF DECISION: | May 6, 1999 |

DECISION

APPEARANCES

| | |
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| Donovan Hill | For Qualified Contractors Ltd. |
| Louis Pelletier | For himself |
| Kevin Molnar | For the Director of Employment Standards |

OVERVIEW

This is an application filed by Qualified Contractors Ltd. ("Qualified" or the "Employer") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against a Determination issued on November 2, 1998 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Qualified had violated Sections 17(1), 21(1), 34(2), 36(1), 40(1) and 40(2) of the *Act* in connection with a silviculture contract on behalf of the Ministry of Forests in Hazelton and Terrace, B. C. The Determination further found that Qualified owed 23 former employees unpaid wages under various provisions of the *Act*. The main issues for most of the former employees were discrepancies between hours worked and hours paid and a deduction from wages for room and board expenses. The Employer maintained that it had instructed its employees not to work more than 40 hours per week or more than 6 days per week. Employees had agreed to payroll deductions for room and board that Qualified provided. The Determination found that the Employer had not paid Louis Pelletier ("Pelletier") for travel time and had not paid him the hourly rate to which he and Qualified had agreed. Qualified argued that it had never agreed to pay Pelletier for travel time.

Shoker, Harkamaljit Sekhon and Gurpreet Singh testified with the assistance of an interpreter.

ISSUE TO BE DECIDED

The issues to be decided in this case are: whether Qualified was legally entitled to deduct the costs of room and board from certain employees' pay, whether other former employees were entitled to overtime pay or compensation for minimum hours worked and Pelletier's status while travelling to work.

FACTS

The first hearing in this case was scheduled for February 10, 1999. Mr. Hill, counsel for Qualified, applied for an adjournment on the grounds that his client could not attend for medical reasons. Mr. Molnar, who participated by telephone, argued that the issues in the case were legal and did not require witnesses to test the credibility of the evidence in dispute. In addition, a large number of employees were affected by the outcome of the hearing.

After hearing arguments from both parties, I granted an adjournment until March 1. While a number of persons had an interest in the hearing, none appeared at the February 10 hearing. Parts of the case rested on the credibility of witnesses, so all parties who wished to attend should have the opportunity.

It was common ground for the parties that Qualified is a farm labour and silviculture contractor. It had contracts with the Ministry of Forests in the vicinity of Hazelton and Terrace in June and July 1998. A delegate of the Director conducted an audit of its operations pursuant to Section 76(3) of the *Act*. In addition, five complaints were filed. Two were withdrawn, leaving three to be decided in the Determination, Harminder Sidhu ("Sidhu"), Pelletier and Julliette Melquist ("Melquist"). Although the Director's delegate had reservations about the veracity of the payroll information submitted, none other was available, so the Determination was based on Qualified's records.

Harbhajan Shoker ("Shoker"), president of Qualified, testified at the March 1 hearing that he had made verbal agreements with all the employees to withhold \$15 per day from their pay for room and board. He further maintained that it was common practice in the silviculture industry to make such arrangements and that the true cost of the facilities provided was \$25 per day. After the audit began, he obtained written agreements from a number of employees to withhold \$15 per day. Some employees were not available to sign the authorizations, but none who was contacted had refused to agree to the deductions.

Shoker emphasized that he had instructed his employees not to work more than 40 hours per week and more than 6 days per week. Specifically, Shoker told his employees not to work on Sundays. He was not present at the work site to supervise them, but assumed that some employees had worked extra hours because they were living in a camp setting. On some days, payroll records indicated that employees worked for only three hours. In those cases, workers had stopped because of the weather, again without his instruction or supervision.

Shoker produced records of hours worked from June 16 through July 18, 1998, which were not available during the investigation. He explained that the documents submitted at the hearing were copies prepared by his bookkeeper. Shoker stated that one of the complainants involved in the Determination, Sidhu, started on June 16, but did not work steadily and was terminated for drinking on the job on June 30. In his complaint, Sidhu alleged that his agreed rate of pay was \$14.00 per hour and that he had worked a total of

10 days at 8 hours per day. Shoker testified that no worker received \$14.00 per day, not even the best employees. In Sidhu's case, he received a cash advance before he started work and another advance before his termination. Molnar stated that he had not been able to reach Sidhu since issuing the Determination.

Mr. Hill stated on behalf of Qualified that the Employer accepted the amounts owed to Wallace and Steward Morgan based on the payroll records.

Shoker stated that he hired Pelletier through a "Hire a Logger" program for \$15.00 per hour as a first aid attendant, pursuant to instructions from the Ministry of Forests. According to Shoker, he never agreed to pay Pelletier travel time, which was not necessary for the work operation. In addition, the Employer's appeal stated that Pelletier's pay records were incorrect in that he had received vacation pay for the time worked.

Harkamaljit Sekhon ("Sekhon") testified through an interpreter. He worked for Qualified during the period in question and agreed to pay \$15.00 per day for room and board. At the time, the agreement was verbal, but Sekhon signed a written statement in November. He confirmed that the Employer's instructions were to work only 40 hours per week. The foreman did not tell employees which days of the week to work, nor the hours to be worked in a day. Neither the foreman nor the Employer told him not to work over 8 hours in a day. According to the Employer's payroll records, Sekhon worked only 3 hours on June 27, and he testified that he stopped working because of the weather. On other days when he worked fewer than 8 hours, the cause was weather or a vehicle breakdown. In some weeks, he worked every day without a break because he was at the site to work, and there is was no purpose in being idle there. During his employment, he received \$12.00 per hour, the highest rate in the crew except for the first aid attendant.

Pelletier testified by telephone. He stated that he agreed to work for \$15.00 per hour as a first aid attendant and a tree spacer. While he was riding to the Ministry of Forests office, Shoker and the foreman agreed to pay him for travel time. He and the Employer agreed that he would work 45 hours as a tree spacer and after that only as a first aid attendant. When his 45 hours were complete, he stayed in the van, although Qualified gave him the option of working overtime. On his last day of work, June 27, 1998, he was told that he would be paid for 8 hours per day.

While he was employed, Pelletier rode in a vehicle owned by Qualified to the work site. According to Pelletier, a first aid attendant must render assistance to workers if they are injured while travelling to work. Shoker stated that the first aid attendant is only required at the work site.

Gurpreet Singh, a former employee of Qualified, testified that he worked during the time in question and injured himself on June 26. He went to the van to find Pelletier at about 11:00 a.m. He found Pelletier lying down and sleeping. Previously, Pelletier had not worked with the crew.

Roderick Very, who was not a complainant in the original proceeding, filed an appeal against the Determination on the grounds that he agreed to work for \$15.00 per hour. In addition, he challenged the Employer's records of the time he worked. However, he did not appear at either of the hearings for this case or communicate with the Tribunal, although he and all other employees concerned received notice.

The Director's delegate was unable to contact Julliette Melquist, one of the complaints, and she did not appear at either hearing or contact the Tribunal.

The Employer presented a petition for a flexible work schedule signed by a number of employees after the Determination was issued.

ANALYSIS

Counsel for the Employer acknowledged that Sections 21 and 22 of the *Act* permit deductions for room and board from employee pay only with written authorization from the employee. In this case, a number of employees had provided such authorizations after the fact, i.e., after the investigation had begun and in fact after the Determination had been issued. Counsel did not dispute that the Employer was obligated to pay employees who had not provided written authorizations, but argued that no payments were due to employees who had authorized them, especially in the absence of any findings of bad faith. The Director's delegate stated that withholding payments for room and board without authorization was not industry practice and that the *Act* applied.

Qualified's case on this point is substantial, but the *Act* is clear that deductions can only be made pursuant to a written authorization from an employee. Deductions in this case were made without such an authorization. The authorizations in question were obtained after the Determination was issued. The Tribunal has held on numerous occasions that an employer cannot rely on evidence not produced during the investigation of a complaint in support of an appeal. In this case, the evidence was created after the investigation. While I accept Sekhon's evidence that he agreed to pay for room and board, it would be contrary to the intent of the *Act* to rely on evidence created for the purpose of an appeal.

The Determination relied on the Employer's records as the basis for calculating minimum hours of work and overtime payments. Qualified argued that employees were told not to work overtime and short workdays were due to the weather. Under the *Act*, responsibility for assigning work rests with the employer, and Section 4 states that minimum standards cannot be waived. Section 34(2)(a) grants an employer relief from minimum daily hours if work is suspended because of unsuitable weather. In this case, no evidence was presented

about the weather on specific days on which employees did not work for the minimum daily hours. While Shoker may have instructed employees not to work more than 8 hours in a day or 40 hours in a week (and the evidence on his instructions regarding maximum hours per day was ambiguous), it was Qualified's responsibility to ensure that instructions were obeyed. Counsel for the Employer acknowledged that his client had violated Section 36(1) of the *Act*.

One of the complainants, Sidhu, claimed that he had contracted to work for \$14.00, and the Director's delegate accepted that claim. Payroll data attached to the Determination indicated that only two other employees received more than \$12.00 per hour, including Pelletier, who was a first aid attendant. Sidhu did not appear for either hearing, and Shoker testified that he began work for the minimum wage and was terminated for cause. Based on the balance of probabilities, I find that Sidhu's rate of pay was \$7.44, including vacation pay. Sidhu's status under the Determination with regard to payments for room and board is not affected by this Decision.

Roderick Very appealed the Determination on the grounds that he had agreed to work for Qualified for \$15.00 per hour, and claimed compensation at that rate. Very did not appear at either hearing and offered no evidence in support of his appeal. Counsel for the Employer acknowledged that he would be entitled to reimbursement for payments for room and board.

The Determination stated that the Director's delegate had been unable to locate a third complainant, Juliette Melquist. She did not appear at either hearing.

The appeal regarding Pelletier involved only his claim for overtime compensation.. In this case, Pelletier was responsible for providing first aid services to other employees while en route to work. After analyzing essentially the same facts, the Director's delegate concluded that it was more probable that Pelletier's contract of employment provided for travel time. No evidence to refute that conclusion was presented. Therefore, he is entitled to compensation for travel time. Shoker stated, without providing specifics, that Pelletier spent part of his time sleeping or staying in the van. Pelletier denied that statement. In the absence of any evidence of just how Pelletier did spend his time, I cannot reduce his entitlement to pay for his work spacing trees. Similarly, the Employer argued on appeal that Pelletier's vacation pay had been calculated incorrectly. Evidence presented was ambiguous at best, so no grounds to vary the Determination exist.

The Employer presented an application for a variance to the requirements of the *Act* regarding hours of work. The application was prepared after the Determination and did not fall within the requirements of the *Act* for a flexible work schedule, i.e., regularly scheduled hours of work.

ORDER

For these reasons, the Determination of November 2, 1998 is varied, pursuant to Section 115(1) of the *Act*, as follows: the portions of the Determination that deal with daily minimum hours of work, minimum periods between shifts and reimbursement for monies withheld for room and board are confirmed; the portion of the Determination concerning Sidhu is varied to reflect his rate of pay at \$7.44; the portion of the Determination concerning Pelletier is confirmed with respect to his travel time and vacation pay. The Determination is confirmed with respect to Roderick Very and Julliette Melquist.

Mark Thompson
Adjudicator
Employment Standards Tribunal