

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 -

Olympic Forest Products Ltd.
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE No: 1999/749

DATE OF HEARING: January 31, 2000

DATE OF DECISION: March 3, 2000

DECISION

APPEARANCES:

Barry Kurdziel	For the Employer
Ian Carmichael	For himself

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *Act*) by Olympic Forest Products Ltd. (the “Employer”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 18, 1999. The Determination found that the Employer owed Ian Carmichael (“Carmichael”) \$13,654 for overtime wages, vacation pay and interest under a contract of employment between the two parties.

The Employer appealed the Determination on the grounds that the Director’s delegate incorrectly calculated the number of hours Carmichael had worked and that daily rate in his contract of employment covered all duties and responsibilities for the position he filled.

ISSUES TO BE DECIDED

The issues to be decided in this case were what hours did Carmichael work and whether his contract of employment entitled him to be paid for overtime he might have worked.

FACTS

Certain facts in this case were not in dispute. The Employer employed Carmichael from March 11, 1997 until April 16, 1998 as a timekeeper/first aid attendant at a camp located on Louise Island, one of the Queen Charlotte Islands. Carmichael and the Employer agreed that he would be paid \$225 per day for his work. Carmichael was the timekeeper for the Employer’s operation at Louise Island and was the designated first aid attendant as required by the regulations of the Workers’ Compensation Board. Workers at Louise Island were engaged in logging and road building. According to the Determination, 45 persons were in the camp when logging was underway. When only road building was carried out, 8 persons were employed. The senior manager at the camp was Dave Jepson (“Jepson”), the superintendent. He spent much of his time in the office. If logging was going on, a woods foreman was at the work site. Jepson assigned employees to their duties and could reside in the camp for seven days unless relieved. When Jepson was away from the camp, he could assign his responsibilities to another manager.

Carmichael’s duties consisted of collecting time cards each morning, processing the data the cards contained, completing production records and sending them to Vancouver, handling travel arrangements and meeting or dropping persons off for an air plane. He started his day in the cook house around 6:10 a.m., worked through the day and remained on duty until Jepson told

him that everyone had returned safely to camp, generally an hour after work ended. According to Carmichael, he did not have a normal time to finish work, but he ate his evening meal between 5:30 and 5:45 p.m., after which he opened the commissary from 6:00 to 6:30 to sell toiletries and other personal items to employees in the camp. He was responsible for all first aid in and around the camp and coordinated first aid in other areas where work was performed. If an injury occurred near the camp, he drove the ambulance to provide assistance to the injured worker. He was never relieved of his first aid duties. As timekeeper, he was responsible for ordering goods for the commissary and keeping records of employees' purchases. He believed that both the loggers and the road crews worked 9 hours per day, with travel time ranging from a few minutes to over an hour each way. He worked in the office on Sundays, which he stated were no different than other days of the week except that the telephone was less likely to ring. Employees frequently worked in the shop on Sundays, in addition to staff in the cookhouse, so his presence as a first aid attendant at least was required.

The parties agreed that the Employer had not maintained any payroll records for Carmichael's time worked. The Employer pointed out that Carmichael was the timekeeper, so he would have maintained records of time worked. After examining the Employer's pay records, the Director's delegate found that Carmichael was paid his daily rate for each day he was in camp. After discussion with Carmichael and the Employer, the delegate and the parties agreed on the days when Carmichael was in the camp, and the Determination reflected that agreement.

The Employer's position was that its payroll only recorded attendance, not hours worked. From March 11 through June 18, 1997, Carmichael recorded his hours of work in a diary. Carmichael testified that he kept the records in his diary because of changes in the *Employment Insurance Act*. He wanted to know when he qualified for benefits, so he stopped keeping records when he had worked the required number of hours. The delegate used that information in calculating the number of hours Carmichael worked during his period of employment. Carmichael entered a "1" in the Employer's payroll record for each day he worked. Carmichael stated that Jepson told him that the camp ran six days each week, and he would not get Sundays off. Heather Holbrook, the Employer's bookkeeper, stated that she told Carmichael that he was responsible for keeping his own hours and that he would be paid for each day he was in camp. After Carmichael's employment ended, the Employer issued a Record of Employment that stated he worked 1910 hours during 1997.

The Employer's position was that it had agreed with Carmichael that he should be paid \$225 for each day he was in camp except for Sundays, which was a day of rest for all employees. The daily rate would cover the job to be done, without regard to hours. It acknowledged that on some days Carmichael would have worked more than 8 hours, but on other days, he would have worked fewer hours. The agreement for Carmichael's pay was made in good faith, and he did not raise any issue about his hours of work while he was employed at Louise Island. Moreover, the Employer believed that Carmichael had engaged in personal business during normal working hours.

ANALYSIS

An appellant in these proceedings must persuade the Tribunal that the Determination ought to be varied or cancelled because it contained an error of fact or law. In this case, the Employer argued in effect that the Determination contained errors both of fact and law.

The major element of the Employer's argument was that the delegate had computed Carmichael's hours of work incorrectly. The delegate relied on the Employer's payroll records to conclude that Carmichael was paid for each day he was in camp. He did not accept the Employer's contention that Carmichael was paid on Sundays when he did not perform any work. The Employer argued that Carmichael should not be compensated for overtime work on Sundays. The delegate found on the balance of probabilities that Carmichael worked an average of 10 hours per day, based on payroll records of other employees, Carmichael's own diary, and the Record of Employment the Employer submitted for Carmichael after he ceased to be an employee. The Employer presented no evidence to contradict that conclusion, apart from its assertion that practice in the industry was to pay timekeepers/first aid attendants on a daily basis, without regard to hours. Carmichael testified about his normal work schedule, and the Employer did not produce any evidence to contradict Carmichael's statements. Jepson was in or near the camp most of the days during Carmichael's employment and could have relieved Carmichael from his duties as first aid attendant.

The Employer argued that *Re Gondor v. British Columbia (Director of Employment Standards)*, BC EST #D300/98 supported its position. In *Gondor*, the adjudicator found that the employer had a clear policy of paying for preparation work done by part-time employees and had paid the complainant for preparation when time was submitted. However, in the case before the adjudicator, the employee had worked at home, and the employer had no knowledge that work was being performed. In this case, Carmichael was working in a camp with a member of management in close proximity. Although management at headquarters in Vancouver was not aware of Carmichael's activities, at least one manager and possible other superintendents knew or could have known whether he was working or not.

The parties agreed that the Employer had no records of the time Carmichael worked, so it is not open to the Employer to overturn the Determination based on unsupported allegations that Carmichael did not work. The delegate examined payroll records for other employees and the Employer's records of the days Carmichael spent in the camp. The Employer did not produce any better evidence of the time Carmichael did or did not work. When an employer does not maintain payroll records, the Director's delegate is entitled to rely on employee records of time worked (see *Re Heinz Benecken v. British Columbia (The Director of Employment Standards)*, BC EST #D101/99 and *518820 B. C. Ltd. v. British Columbia (Director of Employment Standards)*, BC EST #D244/98).

I accept that the Carmichael entered freely into a contract with the Employer that may well have reflected common industry practice. However, neither the *Act* nor the *Regulation* provides for an exemption from the hours of work provisions for nonmanagerial employees who are paid a daily rate, as Carmichael was. The requirements of the *Act* are clear, and the Determination accurately

concluded that the Employer had violated sections 36(1), 40(1) and 40(2) of the *Act*. In addition, the Employer failed to maintain payroll records as required by Section 28 of the *Act*.

ORDER

For these reasons, the Determination of November 18, 1999 is confirmed. The Employer is obligated to pay Carmichael \$13,654.90, plus any additional interest due under Section 88 of the *Act* from the date of the Determination.

Mark Thompson
Adjudicator
Employment Standards Tribunal