

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 -

AGI Pacific Service Corporation
("AGI Pacific")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/118

HEARING DATE: May 13, 1996

DATE OF DECISION: May 21, 1996

- Determination CDET #000792 was issued by a delegate of the Director on January 17, 1996 following an investigation in which both Sorken and AGI Pacific submitted different records concerning hours of work and wages paid.
- The Reason Schedule attached to the Determination explains that the total amount of wages owing (\$2,780.65) consists of \$434.15 vacation pay plus \$2,346.50 unpaid overtime wages.
- AGI Pacific acknowledges in its appeal that Sorken is owed vacation pay, but objects to the delegate’s finding that overtime is owed.
- The amount of vacation pay owing to Sorken depends on this Tribunal’s findings concerning his total earnings during his employment with AGI Pacific during July/August, 1995.
 - Sorken was paid vacation pay when he was employed by AGI Pacific during May, 1995.

In addition to these undisputed facts, John Smeltzer (“Smeltzer”) gave the following evidence on behalf of AGI Pacific.

- AGI Pacific made the following wage payments to Sorken:

| <u>DATE</u> | <u>CHEQUE #</u> | <u>AMOUNT</u> | <u>EXPLANATION</u> |
|----------------|-----------------|---------------|--|
| July 21, 1995 | 0232 | \$578.00 | Living allowance 11 days x \$55.00/day less \$27.00 owed to AGI |
| July 28, 1995 | 0234 | \$1,000.00 | Living allowance |
| July 31, 1995 | 0235 | \$2,472.00 | 203 hours plus 19 days living out allowance. Week ending July 29, 1995 |
| August 8, 1995 | 0249 | 970.85 | 2 weeks ending August 12, 1995 |

- In addition, AGI Pacific arranged for Sorken to be paid \$2,602.07 by Kingsgate Excavating. This payment was made on or about August 30, 1995 for the period ending August 27, 1995.

- This evidence was given by Smeltzer to demonstrate that initially payments were made to Sorken irregularly, whenever he needed money. However, Smeltzer's evidence was that by the end of July, 1995 he agreed with Sorken to make regular bi-weekly wage payments. The payroll period would end on every other Saturday and wages were to be paid on the following Wednesday.
- Smeltzer also gave evidence that if Sorken worked overtime hours, he would convert those hours to "regular hours" to calculate wages owing. Thus, AGI Pacific's payroll records show Sorken worked 176.75 hours during July, 1995 and was paid for 203 hours. The difference, Smeltzer said, reflects the overtime hours worked by Sorken.
- Smeltzer also gave evidence that he worked on site with Sorken in Kamloops and discussed hours of work regularly with him. However, Smeltzer did not keep a permanent record of the hours worked by Sorken; he made a note in a notepad which was destroyed subsequently. The normal hours of work at the site were from 7:00 a.m. to 5:00 p.m. Smeltzer would relieve Sorken, on request, for rest breaks or meal breaks. There were no scheduled breaks. During Smeltzer's brief absences, Cece Kaban would relieve Sorken, on request.

Sorken's evidence was that he kept a diary in which he entered his daily hours of work. He said that this is his normal practice at each job site because hours of work typically vary each day. A copy of these diary entries were submitted to the Employment Standards Branch during the investigation which the Director's delegate conducted. Sorken also gave evidence, consistent with Smeltzer's evidence, that he was relieved by Smeltzer, on request, for these breaks were not scheduled. Sorken stated that he stopped working for AGI Pacific because he was not receiving pay cheques regularly.

ANALYSIS

Overtime hours and wages

Part 4 of the *Act* sets out the requirements concerning hours of work and overtime. The following sections of the *Act* are particularly relevant to this appeal:

| | | |
|---------|-----|-----------------------|
| Section | 31: | Hours of work notices |
| | 32 | Meal Breaks |
| | 35: | Maximum hours of work |
| | 40: | Overtime wages |

Section 31 requires an employer to display an hours -of - work notice at the workplace where it can be read by all employees.

Section 32 requires an employer to ensure that no employee works more than 5 consecutive hours without a meal break which lasts at least 1/2 hour.

Section 35 requires an employer to pay overtime wages to an employee who works more than 8 hours per day or 40 hours per week.

Section 40 sets out the overtime wages rates which must be paid to employees who work overtime hours.

In this appeal the evidence of both Smeltzer and Sorken establishes that AGI Pacific did not comply with Section 31 (Hours of Work Notices) and Section 32 (Meal Breaks). As Smeltzer testified, the employment relationship was informal and casual. Smeltzer's evidence was that AGI Pacific does not normally have employees and, therefore, its record keeping systems are not what the Employment Standards Branch typically expects of employers.

AGI Pacific acknowledges it is required to pay overtime wages under Section 35 and Section 40 of the *Act*. However, it says that it has paid Sorken ..."in full for all work performed".... and argues that its payroll records support that view.

Sorken relies on the hours of work recorded in his diary to challenge the accuracy of AGI Pacific's payroll records.

The Reason Schedule attached to the Determination notes the discrepancy between the two sets of records and prefers those provided by Sorken. At the hearing, the Director's delegate argued that AGI's payroll records are difficult to understand and that the earnings statements given to Sorken do not show overtime pay. For those reasons, she argues, AGI's records are not reliable.

Smeltzer argues on behalf of AGI Pacific that the reasons supporting the Determination are wrong when they state:

- The employee worked in Kamloops and the employer was not on site with him when he worked
- The employee provided his record of hours to the employer on a weekly basis who then forwarded his cheque to him.

- The employer did not have a record of daily hours worked but submitted what he claimed was a record after receiving a copy of the employee's record.

From the evidence given at the hearing I conclude that Sorken and Smeltzer worked together at the work site in Kamloops. I also conclude from the evidence that Smeltzer's method of record keeping was informal. While I accept that he kept notes in his truck, he was unable to produce those notes at the hearing. Similarly, he was unable to produce "trip sheets" as a record of how many truck loads were taken from the work site. In addition, while I accept that Smeltzer converted some work hours to overtime hours, he did not offer an acceptable explanation of the differences between AGI's payroll records and the earnings statements given to Sorken. I conclude from the evidence that

AGI Pacific did not comply with the requirements of Part 4 of the *Act*. Specifically, AGI Pacific did not comply with Section 31 (Hours of work notices), Section 35 (Maximum Hours of Work), Section 32 (Meal Breaks) and Section 40 (Overtime Wages). For the reasons set out above, it was reasonable for the Director's delegate to prefer Sorken's hours of work records over those submitted by AGI Pacific.

Vacation Pay

AGI Pacific acknowledges in its appeal that it owes vacation pay to Sorken. However, the amount owing is in dispute. AGI Pacific argues that the vacation pay owed to Sorken should be calculated on the basis of its payroll records. The Director's delegate argues that the calculation of vacation pay as set out in the schedules attached to the Determination is correct.

I have concluded that Sorken's hours of work records should be preferred to AGI Pacific's records. The Director's delegate based her calculations on Sorken's records. It is, therefore, reasonable to prefer the calculation method set out in the Schedules attached to the Determination.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination CDET# 000792 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal