

**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 -

Dave Byers Operating as LaFencing Crew  
("Byers")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 96/782

**DATE OF HEARING:** February 10, 1997

**DATE OF DECISION:** February 26, 1997

## DECISION

### OVERVIEW

This is an appeal by Dave Byers operating as LaFencing Crew (“Byers”), under Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 004853 which was issued by a delegate of the Director of Employment Standards on November 28, 1996. The Determination found that Byers was required to pay a total of \$929.57 arising out of unpaid overtime wages, minimum daily pay, vacation pay, an unauthorized deduction and interest for two employees, Dan Tate (“Tate”) and Ron Glover (“Glover”). Byers seeks to have the Determination cancelled and denies any contravention of the *Act*.

I have read and considered the Determination (including the Reason Schedule and Calculation Schedule), the written submissions made on behalf of Byers and the written statements made by Glover and Tate.

### ISSUE TO BE DECIDED

Are overtime wages and minimum daily pay owed to Tate and, if so, in what amount?

Are overtime wages and minimum daily pay owed to Glover and, if so, in what amount?

Was \$50.00 deducted improperly from Glover’s wages?

### FACTS

#### Dan Tate

Tate was employed by Byers as a fencing installer from April 23, 1996 to July 30, 1996 at the rate of \$12.00/hour.

Byer’s payroll records show that Tate worked in excess of eight hours per day on several occasions during his employment and that he was paid \$12.00/hour for all hours worked. The payroll records also show that Tate was paid for two hours only on July 23 and July 30, 1996. The Director’s delegate concluded that Tate was not entitled to any additional wages for July 30th.

In the Reason Schedule attached to the Determination the Director’s delegate found that overtime wages had not been paid in accordance with Section 40 of the *Act*. He also found that Byers was not required to pay minimum daily pay (Section 34 of the *Act*) for July 30, 1996 because Byers did not schedule Tate to work on that day.

The wages found to be owed to Tate were calculated as follows:

Overtime wage premium	34.75 hours x \$6.00/hour	\$208.50
	5.5 hours x \$12.00/hour	\$ 66.00
Minimum daily pay	4.0 hours x \$12.00/hour	<u>\$ 48.00</u>
Sub Total		\$322.50
4% vacation pay		<u>\$ 12.90</u>
Sub Total		\$335.40

Interest is payable on this amount.

In a letter to the Tribunal (dated January 9, 1997), the Director's delegate advised that the Determination should be varied to show that minimum daily pay should not be paid for July 23, 1996 because Tate "...acknowledges leaving work on his own volition after two hours."

Byer's appeal to the Tribunal states that Section 40(1) of the *Act* (Overtime wages) was not contravened because "...all employees agreed to work in excess of 8 hours per day on some days in exchange for days off or short work days." However, Byer's payroll records show that Tate was paid for 6.5 hours, 5.5 hours and 4.5 hours on certain days during his employment. The Tribunal did not receive any documents to support Byer's statement concerning a flexible work schedule.

### **Ron Glover**

Glover was employed as a fencing installer from June 28, 1996 to September 5, 1996. He was paid \$10.00 per hour initially and was paid \$12.00 per hour effective July 6, 1996.

Byer's payroll records show that Glover worked more than 8 hours per day on several occasions during his employment and that he was not paid overtime wages for those hours of work.

The Reason Schedule attached to the Determination states that Byers "...has not proven that he did not deduct \$50.00 unlawfully as he had the opportunity to do with the full disclosure of his records." It also states that overtime wages have not been paid in accordance with Section 40 of the *Act*.

The Calculation Schedule shows the following amount of wages owed:

Overtime	\$473.00
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Minimum Daily Pay	<u>\$ 36.00</u>
<b>sub total</b>	<b>\$509.00</b>
4% vacation pay	<u>\$ 20.36</u>
<b>sub total</b>	<b>\$529.36</b>
unlawful deduction	<u>\$ 50.00</u>
<b>sub total</b>	<b>\$579.36</b>

Interest is payable on this amount.

Byers' payroll records show that Glover was paid for 1 hour on August 17, 1996. In his appeal to the Tribunal, Byers states:

“...the 3 additional hours for minimum daily pay should be eliminated since Mr. Glover did not work (no timesheet was completed) on the day in question. Mr. Glover was paid an extra hour in that time period for a calculation error in the previous time period. The bookkeeper wrote 1 hour in the payroll record book for that day only for her own information.”

Glover did not refer to the issue of minimum daily pay in the Complaint and Information which he submitted to the Employment Standards Branch.

On the issue of deductions from Glover's wages, Byers' appeal contains the following statement:

Section 21(1) was not contravened - no deductions from wages were taken without the employees full knowledge and agreement.

Section 21(2) was not contravened - employees were not required to pay part of employer's operating costs. They were required to provide specified tools as a requirement of employment of employment. Mr. Byers offered to rent to purchase these tools to prospective employees. When employment was ended, all payments were refunded if the employee chose to return the tools. Mr. Glover had only made one payment of \$50.00 toward the purchase of his tools and he chose to only return part of his tools. He agreed with Mr. Byers that the tools he chose to keep in his possession was equal to the one payment he had made.

Glover's submission to the Tribunal states:

“Never did Byers ever offer to rent to purchase my tools. When employment ended no payment was ever paid. I did in fact return the tool belt and gave Byers one hammer and one pair of pliers to cover the cost of the pliers I misplaced.

## ANALYSIS

*Overtime wages*

Section 35 of the *Act* requires an employer to pay overtime wages in accordance with Section 40 or 41 if the employer requires or allows an employee to work more than 8 hours in a day or 40 hours in a week. Section 40 of the *Act* sets out the overtime wages for employees who are not on a flexible work schedule. Section 41 of the *Act* sets out the overtime wages for employees who are on a flexible work schedule.

There is no evidence in front of the Tribunal which supports the proposition that Tate and Glover were employed on a flexible work schedule. Therefore, Section 40 of the *Act* applies.

My review of Byers' payroll record confirms that the overtime wages found to be owed to Tate and Glover, as set out in the Determination, complies with the requirements of Section 40 of the *Act*.

*Minimum Daily Pay*

The letter dated January 9, 1997 from the Director's delegate makes it clear that minimum daily pay is no longer an issue for hours worked by Tate on July 23, 1996. The Reason Schedule attached to the Determination shows no liability for minimum daily pay on July 30, 1996. Therefore, no wages are owed to Tate in respect of minimum daily pay.

I accept Byers' explanation of the bookkeeping error which was recorded in the payroll records concerning the 1 hour of wages owed to Glover. Therefore, no wages are owed to Glover in respect of daily minimum pay.

*Deductions from wages*

Section 21 of the *Act* states:

- (1) *Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*
- (2) *An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.*
- (3) *Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.*

It is not relevant whether the deduction made by Byers from Glover's wages was with Glover's knowledge and agreement. Section 21(1) prohibits such deductions. Section 4 of the *Act* prevents an employer and employee from making any agreement which waives the requirements of the *Act*. Therefore, the deduction made by Byers from Glover's wages contravened Section 21.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination be varied to show wages owing to Tate and Glover as follows:

**Tate:**

Overtime wages	\$274.50
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**Glover:**

Overtime wages	\$473.00
Unauthorized deduction	<u>\$ 50.00</u>
	\$523.00

Vacation Pay in accordance with Section 58 and Interest in accordance with Section 88 is payable on these amounts.

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**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**