



An appeal

- by -

Larry Urness and Lonnie Urness, operating as L & L Water Hauling
("L&L")

- 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

ADJUDICATOR: Sheila McDonald

FILE No.: 2000/696

DATE OF DECISION: March 5, 2001

DECISION

OVERVIEW

Ms. Debbie Sigurdson issued a Determination on September 18, 2000 to Larry Urness and Lonnie Urness operating as L&L Water Hauling (“L&L”). The Determination ordered them to cease contravening Part five, Section 45 and Section 46(1) and (2) of the *Employment Standards Act* (the “*Act*”) and Part seven, Section 58(1) of the *Act* and to comply with all the requirements of the *Act* and *Regulations*.

She determined that L&L owed Harold Clancey, a former employee the following: Vacation Pay of \$899.70; Statutory holiday pay of \$722.50; and interest of \$57.10.

ISSUE

The first issue is whether L&L owes Mr. Clancey vacation pay.

The second issue is whether Mr. Clancey’s employment falls under the scope of the *Employment Standards Regulation* (the “*Regulation*”) Section 37.6 : oil and gas field workers.

THE FACTS AND ANALYSIS

On June 26, 2000 Mr. Clancey wrote to L&L requesting that they pay him his vacation pay and statutory holiday pay. In his letter he indicates that his vacation pay should have been paid in addition to his wages, not as part of his wages.

On June 29, 2000 Ms. Helen Scott representing L&L responded to Mr. Clancey stating the L&L had paid him his vacation pay as part of his daily rate of \$150.00 with the following breakdown \$144.23 wages and \$5.77 (4% holiday pay). She stated that this was the verbal agreement between L&L and Mr. Clancey. She went on to state in the letter that she had talked to an accountant at that time and they said as long as it was agreed upon and he understood that holiday pay was included, it was okay.

On July 7, 2000 Mr. Clancey filed a complaint with the Employment Standards Branch. He alleged that L&L owed him statutory holiday pay and vacation pay on gross wages. He stated that he worked for L&L as a truck driver at the rate of \$150.00 or \$175.00 per day and L&L had included vacation pay in his wages. Mr. Clancey said that he received the day rate for all days worked. Mr. Clancey denies that he agreed to inclusion of vacation pay in the day rate.

When Ms. Sigurdson investigated the complaint she talked to Ms. Scott the bookkeeper of L&L who acknowledged that L&L had not paid statutory holiday pay in accordance with the *Act*. Ms. Scott further stated that L&L pays a daily rate for wages and that Mr. Clancey had agreed to

Vacation pay of \$5.77 times 22 days is \$126.94. However, the statement indicates it was \$135.58.

If you look at the daily rate the stub shows Mr. Clancey earned \$3525.00 which included vacation pay of \$135.58. If you deduct \$135.58 and then overtime of \$225.00 you get \$3164.42 which divided by 22 days gives a daily rate of \$143.83 not \$150 as shown on the stub.

A copy of the pay stub for Pay Period February 2000 shows 15.5 days worked @ \$150 = \$2325.00. It shows 79 hours overtime @ \$22.50 = \$1777.50 with a total of \$4102.50. It shows vacation pay as \$157.79.

Vacation pay of \$5.77 times 15.5 days is \$89.44. However, the statement indicates it was \$157.79

If you look at the daily rate the stub shows Mr. Clancey earned \$4102.50 which included vacation pay. If you deduct \$157.79 and the overtime of \$1777.50 you get \$2167.21 which divided by 15.5 days giving a daily rate of \$139.82 not \$150 as shown on the stub.

A copy of the pay stub for Pay Period March 2000 shows 18.5 days worked @ \$175 = \$3237.50. It shows 90 hours overtime @ \$22.50 = \$2025.00 with a total of \$5262.50. It shows vacation pay at \$202.40.

Vacation pay of \$5.77 times 18.5 days is \$106.74. However, the statement indicates it was \$202.40.

If you look at the daily rate the stub shows Mr. Clancey earned \$5262.50 which included vacation pay of \$202.40. If you deduct \$202.40 and the overtime of \$2025.00 you get \$3035.10 which divided by 18.5 which gives a daily rate of \$164.05 not \$175 as shown on the stub.

Ms. Scott stated that L&L was paying per day as \$144.23 as wages and \$5.77 as vacation pay and 4% vacation pay on overtime wages, however, I have not been able to find any evidence to support that based on the pay stubs.

From the analysis of the pay stubs it is clear that the daily rate varies from month to month. Further, when you compare the August 1999 and the February 2000 pay stubs it shows that working overtime results in a lower daily rate. I could not conclude that Mr. Clancey would ever have agreed to a fluctuating daily rate and further that the rate would be lower when he worked more.

In BC EST # D163/98, the employer, National Signcorp, was including vacation pay as part of the commissions, however, the adjudicator found that the system the employer was using to be completely transparent; it was agreed (in writing) between the employer and the employee at the outset of the employment relationship; and it separately identified "regular" commission earnings and vacation pay on each payday wage statement.

This is not the case here. There was no agreement in writing between the parties as to the daily rate of pay, the system the employer was using is not transparent and although vacation pay is shown as a separate item on the pay stub there is no indication as to how it was calculated. Nor does analysis of the pay stubs provide any evidence on how L&L was calculating vacation pay owing.

With respect to whether Mr. Clancey's employment falls under Section 37.6 of the *Employment Standards Regulation* I do not find a water truck driver as one of the occupations listed. Further, Section 37.6 does not permit an employer to vary or alter the requirements of Section 58(1) of the *Act*.

I find that L&L's method of calculating vacation pay is in violation of Section 58(1) of the *Act*.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination be confirmed.

SHEILA MCDONALD

**Sheila McDonald
Adjudicator
Employment Standards Tribunal**