

An appeal

- by -

Lariat Industries Ltd.
(the "Appellant")

- 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: W. Grant Sheard

FILE No.: 2001/668

DATE OF HEARING: March 18, 2002

DATE OF DECISION: April 4, 2002

DECISION

APPEARANCES:

Ed Zylstra	President of the Appellant Employer, Lariat Industries Ltd.
William Shannon	on his own behalf
Richard MacDonald	on his own behalf
Joe LeBlanc	on behalf of the Director

OVERVIEW

This is an appeal by Lariat Industries Ltd. the (“Appellant”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), of a Determination issued by the Director of Employment Standards (the “Director”) on August 29, 2001 wherein the Delegate ruled that the Appellant had contravened Part 3, Section 18(2) and Part 7, Section 58(3) of the Act for the payment of wages and vacation pay within 6 days after an employee terminates the employment and ordering the Appellant to pay \$3,218.49 to the five employees for wages and interest in the individual amounts set out in the Determination.

ISSUE

Was the Director’s Delegate correct in finding that the Appellant had contravened the requirements of this Act in failing to pay wages and vacation pay within 6 days of the employees terminating their employment?

ARGUMENT

The Position of the Appellant

In an appeal form dated September 19, 2001 with written submissions attached of the same date and filed with the Employment Standards Tribunal on September 21, 2001 the Appellant describes difficulties with their employees including William Shannon (“Mr. Shannon”), who was a foreman they had hired for this particular job. The Appellant notes that it received a fax from Mr. Shannon showing the hours of work for himself and the other employees and that the Appellant did not agree to the wage rates Mr. Shannon had set for a number of the employees or the hours submitted for them. The Appellant complains that Mr. Shannon hired men without authorization, gave raises without authorization and the Appellant says “we were taken advantage of by Mr. Shannon”. In oral submissions at the hearing held on March 18, 2002 the Appellant reiterated these written submissions, gave evidence and submitted that the Appellant

did everything possible to comply with the Act, including retaining a bookkeeper and accountant to pay wages due.

The Position of the Employee, Rick MacDonald

In a written submission dated October 12, 2001 and filed with the Tribunal on October 15, 2001 Mr. MacDonald reiterated the evidence he had apparently given to the Delegate when investigating this matter that he was given a raise from \$13.00 per hour to \$15.00 per hour by the foreman on the job. He did not give evidence at the oral hearing but made a submission supporting the Determination and indicating regret that the dispute had to be resolved through a formal process.

The Position of the Employee, William Shannon

In a three page written submission, undated, filed with the Employment Standards Tribunal on October 15, 2001 Mr. Shannon confirms the evidence he apparently gave to the Director's Delegate who investigated the matter before rendering a determination regarding the rates of pay for himself and the other employees involved and the hours worked which were submitted in time sheets to the Delegate and attached to the Delegate's Determination. At the oral hearing Mr. Shannon gave evidence apparently similar to that which he had given to the Director's Delegate during the investigation which preceded the Determination to the effect that he had prepared the time sheets which were submitted prior to the Determination, that he wrote the rates on the left hand column on one of these sheets which was provided to the Employer, that these figures were correct to the best of his recollection, and that he authority to hire the various employees.

The Director's Position

In a written submission dated October 15, 2001 and filed with the Tribunal October 15, 2001 Joe LeBlanc, the Director's Delegate takes the position that the Employer gave the responsibility for recording and submitting the hours worked by the employees to the foreman and that, as that foreman stands by the hours that he submitted as being accurate, the Employer is vicariously liable for the actions of their agent, the foreman. Further, the Delegate notes that the Employer did not produce any evidence that would establish they took steps to limit the authority of Mr. Shannon to require prior approval with respect to the employees hired or a predetermined starting rate. The Delegate further submits that the Appellant has not provided any evidence which contradicts the evidence of the foreman or other employees. The Delegate notes that a fax letter which was received from a representative of the general contractor of the job could not be verified as he could not reach that person after several attempts to do so. The Appellant did not produce that person as a witness. The Delegate notes that he accepted the foreman's time sheets and evidence as the most credible evidence.

THE FACTS

The Appellant operates a steel construction business out of Kelowna B.C. which is under the jurisdiction of the Act. The respondents are five employees who were hired to work for the Employer on the construction of an expansion of a large retail store in Cranbrook, B.C. The five employees involved worked at various times from May to early June 2001 and all terminated their employment on June 29, 2001. The foreman was hired by the Appellant and there is no dispute with respect to his wage rate. However, the other four employees were hired by the foreman and the Appellant says that the foreman did not have the authority to hire those employees at the rates he did or to provide raises which he did. The five employees all resigned from the Employer on June 29, 2001 over a dispute about getting paid on time.

In a Determination dated October 29, 2001 the Director's Delegate found that the Employer had contravened Sections 18(2) and 58(3) of the Act requiring an employer to pay all wages due to an employee within 6 days after the employee terminates the employment and to pay vacation pay within the same period of time. The Delegate found the employees were entitled to the following amounts:

		Total
Bill Shannon:	Wages \$1,150.50 plus \$12.05 (interest)	\$1,162.55
Steven Hebert:	Wages \$ 769.48 plus \$8.06 (interest)	\$ 777.54
Irving Morey:	Wages \$ 600.86 plus \$6.29 (interest)	\$ 607.15
Robert Morrell:	Wages \$ 244.92 plus \$2.56 (interest)	\$ 247.48
Rick MacDonald:	Wages \$ 419.38 plus \$4.39 (interest)	\$ 423.77
	TOTAL	\$3,218.49

ANALYSIS

Sections 18(2) and 58(3) provide as follows:

18(2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

58(3) Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.

I find that the Appellant has not met the onus upon him to demonstrate on a balance of probabilities an error in the determination. It is acknowledged by the Appellant that the foreman had the authority to hire the other employees involved, although he says in his oral evidence that the foreman also had the authority to set the wage rates "to a point" and "when he discussed it with me". I agree with the Delegate's findings of fact in the Determination that the rates claimed by the various employees are the rates that the Employer must pay as they were the rates

negotiated with the Employer's representative, the foreman, and that the hours recorded and submitted by that foreman stand as the only credible and contemporaneous record of hours worked by the employees. Further I agree with the Delegate's Determination wherein he states "whether the rates conform to the company policy of \$13.00 per hour is something that the Employer should have taken up with (the foreman). The Employer cannot change the rates after the work has been done. If a lower rate is going to be paid, the employee in question must be notified and given the option of working under the new rate or move along to another employer." I further agree with the Delegate's statement in the Determination that "the Employer is vicariously liable for the rates negotiated by their agent and representative".

I further agree with the Delegate's determination wherein he finds that "the notes produced by the Employer that are alleged to have been sent by Don Brun could not be verified by Brun even though the Delegate made numerous attempts to contact him. The general foreman, Serge Charbonneau stated that the crew for Lariat did not report to him so he can not say one way or the other whether the hours are correct for a particular day. Therefore, the hours submitted by Shannon (the foreman) stand as the only credible ones that were recorded by someone who was actually there." I agree that the only credible evidence with respect to the hours worked on the date in question of June 29, 2001 were the time sheets prepared by the foreman and submitted in evidence and the evidence of the various employees themselves. A fax from a representative of the general contractor could not be confirmed by the Delegate and was hearsay evidence that was not produced first hand on the oral appeal either. There was no credible evidence to contradict that of the employees, including the foreman.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated August 29, 2001 be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal