

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 -

Via Contracting Ltd.
("Via")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: James Wolfgang

FILE NO: 96/090

DATE OF HEARING May 2,1996

DATE OF DECISION: May 31, 1996

DECISION

APPEARANCES

Paul Manhas	Via Contracting Ltd.
Stanley McKay	Witness for the Appellant
F. Daniel Boulter	Interested Party
Roger Boon	Interested Party
Robert D. Krell	Delegate of the Director of Employment Standards

OVERVIEW

This is an appeal by Via Contracting Ltd. (“Via”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 000679 issued by the Director of Employment Standards on January 8, 1996. In this appeal the employer claims that no wages, overtime or vacation pay are owed to F. Daniel Boulter (“Boulter”) or Roger Boon (“Boon”).

FACTS

Boon was employed by Via as an equipment operator from July 24, 1995 to August 18, 1995. (August 15, 1995 according to Via). His rate of pay was \$8.00 per hour.

Boulter was employed by Via as an equipment operator from August 5, 1995 to the morning of August 16, 1995. His rate of pay was \$8.00 per hour.

They were employed in connection with a parking lot project at the Quadra Island Elementary School and worked under the direct supervision of Stanley McKay (“McKay”), Superintendent for Via.

Both were by McKay through a job posting at the Canada Manpower office in Campbell River for a rubber tire back hoe operator on a John Deere 710 at a rate of \$10.00 to \$16.00 per hour.

Boulter filed a complaint on August 19, 1995 claiming wages, overtime and vacation pay.

Boon filed a complaint on August 23, 1995 claiming wages, overtime, vacation pay and a return of deductions made by the Employer.

The Determination was issued January 8, 1996 against Via, in the amount of \$1,873.20 covering both claims.

ISSUE TO BE DECIDED

The issue to be decided is whether Via owes any further wages, overtime and vacation pay to Boon and Boulter and whether interest is payable on this amount? Also whether deductions made by Via from Boon should be returned.

ARGUMENTS

Via had a contract to do a parking lot for the Quadra Island Elementary School. McKay stated it was difficult to find qualified equipment operators for the project. Via had employed 5 or 6 equipment operators over an eight week period. The project was running behind schedule when they hired Boon and Boulter. This was after they talked to about 16 people without finding qualified operators.

McKay claims the rate of \$8.00 per hour was clearly stated during his telephone conversations with Boon and Boulter when hired, although the job posting indicated higher rates.

McKay said neither Boon nor Boulter were experienced on this particular equipment, a large rubber tire back hoe. They were told: "Come over and try it out, we need laborers at \$8.00 per hour". He further stated: "We need had laborers at \$8.00 per hour operating equipment. In our industry we offer \$8.00 and that is our trap door if we don't get the right person".

Manhas indicated the Company had a policy on wage rates which was to hire as low as possible.

The daily time sheet records were kept by McKay and sent to Via's office in Nanaimo for processing. He indicated there had been some confusion between himself and the office records.

McKay reviewed the records of hours worked by Boon and Boulter provided by the delegate. He crossed out the hours he felt were inflated, but neither he nor the company supplied any record of hours worked.

McKay claimed that Boon had knocked down a basketball post and put a hole in the school wall. He wanted Boon to pay for the repairs. He also said Boon agreed to pay for repairs to the back hoe.

McKay claimed Boulter did not work full night shifts when they commenced August 12. His evidence was Boulter only worked "part shifts".

Boon indicated he had taken the job posting from the UIC computer and called McKay on Friday. He said his experience was minimal but he could run the machine. He was offered \$10.00 per hour and told to start Monday morning. He started by doing some repairs to the machine before operating.

Boon claims he did not receive any pay from Via until his last check. When he received it he phoned McKay regarding his rate. He said McKay stated "that's all you're worth".

Boon claimed that after quitting McKay offered him a job operating a John Deere 310 on the same project. Boon said he would come back when Via paid him what they owed him. Via refused.

Boulter also responded to the UIC posting. He said he had no discussion with McKay on the rate and assumed he was getting \$10.00 per hour. He claimed he had experience on similar type of equipment.

Boulter started night shift on August 12 and was told he would receive a \$2.00 per hour bonus. On August 14 he was informed his rate was \$8.00 per hour.

Boulter went to work for one more night, August 15, and quit in the morning.

Both Boon and Boulter kept personal daily records of hours worked.

ANALYSIS

These complaints fall under Section 128 (3) of the Transitional and Consequential Provisions of the current *Act*.

The file indicates the Delegate had considerable difficulty in obtaining any payroll records which must be retained. Via has indicated they do not have payroll records for neither Boon nor Boulter. The total lack of payroll records from Via gives me no alternative but to accept the records supplied by Boon and Boulter. This includes the claim in respect to August 16, 17 and 18 by Boon.

At the hearing the Delegate produced an amended calculation for both Boon and Boulter. The new calculation was reduced by thirty minutes per day to account for lunch breaks. Both Boon and Boulter had indicated there were no scheduled lunch periods, some days they simply ate in the machine and other days they took varying amounts of time off, up to thirty minutes. As there are no records of these times they agreed to reduce their claim by thirty minutes per day.

The Delegate produced a calculation for the interest on the outstanding amount claimed. The new amounts are \$407.97 for Boulter and \$1,250.30 for Boon. The revised total calculation is \$1,658.27, which is \$214.93 less than the original Determination.

Both McKay and Manhas indicated their difficulty in hiring “good” operators at their wages. Via had one operator which they claim was “good” but he quit as soon as his former job became available again. Having gone through 5 or 6 operators in eight weeks I think the solution should have been obvious.

Section 8(c) of the *Act* states:

“An employee must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting

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(c) the wages, or”.

This case, if not a violation of Section 8(c), comes very close to being so. The posted rate range of \$10.00 to \$16.00 per hour as found at the Employment Standards Center, in my opinion, reflects the skill range. Neither Boon nor Boulter claimed to be the best operator, nor did they expect \$16.00 per hour.

Section 21 of the *Act* limits the type of deduction an employer may make from an employee’s wages. Business costs are not included in that list therefore, the \$250.00 deducted from Boon for repairs to the backhoe is disallowed.

The question of interest was raised at the hearing by the Delegate and was included in the “amended” report. Via objected to that inclusion, arguing they were not given an opportunity to prepare a defense against that claim. This point could have been corrected by the Director under Section 86 of the *Act* at any time before the hearing. I am not allowing the interest to be included at this time. If the Branch wishes to pursue the matter they can file another determination under Section 79 covering the interest payable under Section 88(1).

I find that Boon should receive the amended amount of \$1,230.00 which does not include interest.

I find that Boulter should receive the amended amount of \$402.00 which does not include interest.

Total \$1,634.00

ORDER

Pursuant to Section 115 of the *Act*, the Determination No.CDET 000679 be varied as indicated above.

James Wolfgang

James E. Wolfgang

Adjudicator

Employment Standards Tribunal

LEW:96090