

BC EST #D116/99

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, C. 113

- by -

Brian Tait dba BMT Contracting

(“Tait or employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Paul E. Love

FILE NO.: 1998/789

DATE OF HEARING: March 16, 1999

DATE OF DECISION: April 14, 1999

DECISION

APPEARANCES

Brian Tait

Joseph Armstrong

Kevin Molnar, for the Director of Employment Standards

OVERVIEW

This is an appeal by Brian Tait (the “employer”) of a Determination dated November 20, 1998 . The Delegate found that the sum of \$ 1,028.44 was due and owing for work performed, and a further \$87.36 for unpaid vacation pay. Mr. Tait filed an appeal. There was no error demonstrated in the Determination, and I confirmed the Determination.

ISSUES TO BE DECIDED

Did the Director’s delegate err in his Determination that Mr. Armstrong was entitled to payment for 2.93 hectares of work performed?

FACTS

Mr. Tait is engaged in the silviculture business as BMT Contracting. Mr. Tait’s business involved providing tree planting and spacing services to private sector firms as well as the Ministry of Forests. Mr. Armstrong was an employee who was engaged in an intensive silviculture for the period of July 9, 1998 to August 5, 1998 by Mr. Tait. The employer assigned work to the employees based on strips or areas within a block which were laid out by an engineer. It was the practice of BMT to permit employees to work with other employees on the same strip as “partners”. The parties dispute how the work relationship came to an end. Mr. Armstrong says he stopped working because he remained unpaid by the employer for work that he performed. Mr. Tait says that Mr. Armstrong was terminated because of unsafe work habits, in particular use of alcoholic beverages. It is unnecessary for me to decide how the relationship can to an end, in order for me to resolve this appeal.

Mr. Armstrong was paid on a piece work basis at the rate of \$675.00 per hectare of area, treated with the silviculture prescription. Mr. Armstrong prepared and submitted to the Delegate a map which showed the areas that he treated, in particular an area of 2.93 hectares. This was filed as Exhibit “2”. The employer’s map, Exhibit “1”, is identical but it shows other employees

BC EST #D116/99

performing work in the area claimed by Mr. Armstrong. There were time records before me which I reviewed with the assistance of Mr. Tait. The records were not useful in determining whether Mr. Armstrong or some other employee performed the disputed work.

The Delegate determined the issue on the basis of a balance of probabilities relying on the map which was tendered by the employee, which had been signed off by the site foreman. The map was signed off by the foreman by printing his name, together with the making of a unique mark (an animal footprint).

The Director determined that Mr. Armstrong was entitled to wages in the amount of \$1,028.44 plus vacation pay in the amount of \$67.36, plus \$22.01 in interest.

ANALYSIS

In this appeal the burden is on the employer to demonstrate that the Delegate made an error such that I ought to vary or cancel the Determination. The employer gave evidence in this proceeding and he asks me to rely on a plan that was drawn by an engineer, and on which work performed was noted by his foreman. This was filed as Exhibit "1". Mr. Tait was not the field supervisor and has no personal knowledge of who performed the work.

It is my view that the employer kept inadequate records of the work performed by each employee. It is clear that Mr. Tait was paid all monies due and owing to him pursuant to his contract with Skeena Cellulose. I accept his evidence that he disbursed all the funds that were due and owing to employees under the contract. The record keeping of the employer is such that the employer cannot establish whether Mr. Armstrong performed certain work under the contract or whether other employees performed the work. This is not Mr. Armstrong's problem. The employer has a duty under the *Act* to maintain accurate records. The employer was unable to point to any errors made by the Delegate in his assessment of a rather confusing set of facts.

The employee provided to the Director's delegate a map which was filed before me as Exhibit "2". This map shows the work that was performed by Mr. Armstrong and others. Mr. Armstrong had his co-workers initial the map. He also filed as Exhibit "3" a copy of Exhibit "2" which was initialled by another co-worker. It is my view that the employee has better knowledge and records than Mr. Tait concerning his work. Neither party called the foreman to give evidence.

I have decided this case strictly on the basis of the evidence adduced and burden of proof. I have not made any findings concerning credibility of witnesses in this case. It was unnecessary to do so, as any conflict in the evidence can be resolved on the basis that the employer's records are inadequate, and the employer's personal knowledge inadequate for me to be persuaded of an error in the Determination.

ORDER

BC EST #D116/99

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated November 20, 1998 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal