

An appeal

- by -

Fred Berg  
("Mr. Berg")

- 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 (as amended)

**TRIBUNAL MEMBER:** Shafik Bhalloo

**FILE No.:** 2016A/94

**DATE OF DECISION:** September 30, 2016



Determination was being made. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing, of any kind for any of the reasons listed in section 114(1) of the *Act*. If satisfied, the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Tribunal may request submissions on the merits of the appeal from the Director and Lime Creek. Mr. Berg will then be given an opportunity to make a final reply to those submissions, if any.

## ISSUE

10. The issue at this stage is whether this appeal should be dismissed under section 114(1) of the *Act*.

## FACTS

11. Lime Creek operates a logging company and employed Mr. Berg as a log truck driver from June 16, 2015, to January 19, 2016.
12. On February 9, 2016, Mr. Berg filed his complaint against Lime Creek alleging that the latter contravened the *Act* by failing to pay him overtime wages in the amount of \$16,830.00 for overtime worked between July 2015 to December 2015 and vacation pay in the amount of \$673.20 for a total of \$17,503.20 (the “Complaint”).
13. In the Reasons, the delegate of the Director notes that both parties were served with advance notice of the hearing date of April 27, 2016, and both attended at the hearing by telephone on the said date. However, Mr. Berg, at the outset of the hearing, advised that he did not have time to participate in the hearing on that day as he was working. He indicated that he would be available for an alternative hearing date on May 2, 2016, and agreed to advise his witness of the change in the hearing date. The delegate accommodated Mr. Berg’s request for a new hearing date and rescheduled the hearing to May 2, 2016. The delegate also issued hearing notices to both parties reflecting the new hearing date.
14. On the same date as the original hearing date, April 27, 2016, a representative from the Employment Standards Branch (the “Branch”) left a voicemail message for Mr. Berg on behalf of the delegate requesting Mr. Berg to review the monthly pay summaries submitted by Lime Creek in advance of the May 2, 2016, hearing date and advise if he was owed any further wages based on the “cycle time compensation system” that Lime Creek employed to pay him.
15. The delegate notes that on April 29, 2016, Mr. Berg sent in a three page written submission by facsimile stating, among other things, that he was putting his “full trust” in the delegate “to make a fair and honest decision on this complaint” and decided not to attend the reconvened hearing on May 2, 2016, nor address the delegate’s query regarding the accuracy of Lime Creek’s payroll records.
16. On May 2, 2016, the delegate proceeded with a telephone hearing of the Complaint in Mr. Berg’s absence. The hearing was attended by Shaun McIver (“Mr. McIver”), a director and officer of Lime Creek, and Katy Allen, legal counsel for Lime Creek.
17. While Mr. Berg did not attend at the hearing, the delegate notes in the Reasons that she considered his written submission of April 29, 2016, noting particularly the following passage in Mr. Berg’s submissions that delineated his rationale for the Complaint:

... The Act states a[n] employer has to fairly compensate an employee for all hours worked in a day. Non[e] of us drivers signed or agreed to the way we were being paid ... we were being paid on cycle time at \$30.00 dollars an Hr. A day of driving logging truck does not just involve cycle time. It involves pre-

trip, fueling up, log book, post trip at the end of the day. Flat tires, 15 – 30 min[ute]s at the tire shop. Waiting to get loaded in the bush when there's a foul up. Sitting in the mill yard waiting to unload. Driving the speed limit set out [by] Lime Creek Logging and also driving according to road conditions. All this adds up to Lime Creek not paying us fairly and for all the hours we work in a day. As an hourly employee. At \$30.00 per hour. This is why I have filed this complaint. Because of hours that I've worked and the fact that I am an hourly employee.

18. The delegate also considered 29 pages of handwritten notes of Mr. Berg which the latter claimed to be a summary of the hours he worked each day as recorded in his log journal. She notes in the Reasons that Mr. Berg claimed that he was not paid for 374 overtime hours between July and December 2015.
19. As concerns Mr. Berg's witness, a co-worker named Norm Mayert ("Mr. Mayert"), the delegate notes that although Mr. Berg indicated that Mr. Mayert would attend the hearing by conference call and testify as a witness on his behalf, Mr. Mayert was not available when the delegate telephoned him.
20. On the part of Lime Creek, the delegate notes in the Reasons that Mr. McIver testified that when Mr. Berg was hired, he was informed that he would be paid on "cycle time" which was not the same as an hourly rate. Mr. McIver also noted that on the payroll document for Mr. Berg entitled "New Employee Checklist", it indicated, under rate of pay, "\$30 hr. based cycle time".
21. Mr. McIver also testified that during his period of employment, Mr. Berg received, each month, a pay advice or summary that showed a description of the trips he made, the number of such trips, the cycle time allotted for each trip, the rate payable for each hour of cycle time and the total amount payable. He also explained that some of the time is not directly related to the actual hours worked but based on the average time it takes a driver to do a pre-trip inspection of their truck, to travel from their home base to a woodlot, to load the truck and then to drive to a sawmill and to unload, to fuel the truck and to perform a post-trip inspection. The time would also include any down time during the trip, although there is very little down time according to Mr. McIver, as the employer cannot afford to have a vehicle sit idly for prolonged periods.
22. The delegate states that Mr. McIver also explained if a trip is based on a four hour cycle, whether or not it takes the driver more than or less than four hours to complete the trip, the driver will still receive payment for the trip based on a four hour cycle. Therefore, a driver could potentially make more than \$30.00 per hour but never less than the minimum wage rate under the *Act*. However, for non-driving work such as shop time during which a driver can make mechanical repairs to the truck and do routine maintenance and vehicle washing, drivers were paid a different wage rate at \$18.00 per hour, according to Mr. McIver.
23. Mr. McIver also explained that it is not economically feasible for an employer in the logging industry to pay its drivers an hourly rate in light of the employer's expenses and what the saw mills were willing to pay the employer. He explained that the industry operates seasonally and that forestry roads leading to timber lots cannot be accessed during Spring break up, fire season or periods of heavy snowfall in the Winter. In light of the seasonal nature of the business and the distances to many wood lots, drivers have to work long hours.
24. Mr. McIver also testified that Lime Creek did, at one point, pay its drivers 28% of what the truck made or earned. However, this practice was unsafe as it encouraged speeding and overweight loads by drivers. Therefore, Lime Creek changed its practice and now pays its drivers based on cycle time in accordance with industry standards and rates set by the Ministry of Forests in consultation with sawmills.
25. Mr. McIver submitted that if logging truck drivers were paid on an hourly basis, the hourly rate would have to be much lower than \$30.00 per hour. He stated that cycle rates, while acting similar to a flat rate per load, provide more flexibility for payroll purposes because it allows an employer to add on trip extensions where

applicable and to compensate drivers for driving with empty loads which employers do not get compensated for by sawmills. Mr. McIver further submitted that the cycle time compensation system assists drivers by letting them know, on average, how much time each trip should take and it is a compensation system that is permitted under the *Employment Standards Regulation* (the “Regulation”)

26. After considering the evidence and submissions of both parties, the delegate reasoned as follows in concluding that Lime Creek did not contravene the *Act* and did not owe any wages, overtime or vacation pay, to Mr. Berg:

There is no dispute that Mr. Berg worked for Lime Creek as a logging truck driver in the Interior. It is clear in his written submission of April; 29, 2016 that the Complainant was aware he was being paid on a cycle time basis during his employment but believed this was not a “fair” compensation scheme and that he should have been paid an hourly rate for all hours he worked including overtime rates. However, section 37.2 of the Regulation is an exception to the general requirement under the *Act* to pay overtime wages. It permits an employer to compensate logging truck drivers working in the interior on a system other than an hourly rate and if they pay their drivers in such a way, employers are exempt from the requirement to pay overtime wages. Employers are still required to keep a record of an employee’s hours of work each day and ensure that the compensation paid to an employee each pay period, when converted to an hourly rate, does not fall below the minimum hourly wage.

While the Employer relied on the Employment Standards Tribunal’s recommendations to the Lieutenant Governor from 1996 as a contextual background that supports its current compensation system, I am bound to interpret the legislation as it is currently written. I accept the unchallenged evidence of the Employer that cycle time is a compensation system that has evolved in the logging industry and that it does not necessarily reflect the actual hours worked by a driver. It is not the same thing as an hourly rate of pay because when the actual hours worked by a driver in making a trip are considered their hourly rate of pay is variable; drivers could make more than or less than \$30.00 per hour on any given day. Based on the time records provided by the Employer and the Complainant I find no evidence to suggest that the Complainant earned less than the equivalent minimum hourly wage per each pay period under this compensation scheme.

## **SUBMISSIONS OF MR. BERG**

27. In his written submissions, Mr. Berg contends that the Determination shows bias on the part of the delegate and the Determination is “not according to [t]he Employment Standards Act”.
28. He further states that the payroll records Lime Creek submitted at the hearing show that he was not paid “for all the hours” he worked.
29. Mr. Berg also disputes the description of cycle time Mr. McIver gave at the hearing which the delegate set out in the Reasons. He states that the description does not or fails to include “pre and post trips, flat tires, fueling up, log book, down time, waiting time to get loaded and unloaded, [and] minor breakdowns”.
30. He also submits that the \$30.00 an hour rate is below “union rate” and the only flexibility cycle time allows is for “the Employer to pocket more of the employees [sic] hard earned wages and also allows them to manipulate the employment standards act [sic] to their benefit thanks to the provincial government labour board”.
31. He concludes his submission by stating that he and other truck drivers should be paid from the time they start their trucks in the morning until they shut the truck off at night.

32. As indicated previously, Mr. Berg includes with his written appeal submissions (i) motor vehicle operator's daily logs, (ii) handwritten records of hours worked; (iii) some weekly time sheets and (iv) payroll documents. I have reviewed these documents and do not find it necessary to reiterate the content of these documents here. All of this documentation is also contained the Record of the Director.

## ANALYSIS

33. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which provides:

### Appeal of director's determination

- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- (a) the director erred in law;
  - (b) the director failed to observe the principles of natural justice in making the determination;
  - (c) evidence has become available that was not available at the time the determination was being made.

34. In an appeal, the burden is always on the appellant to persuade the Tribunal that there is an error in the determination under one of the above statutory grounds, failing which the appellant's appeal may be dismissed.
35. Having said this, in this case, Mr. Berg has invoked the natural justice ground of appeal. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal explained the principles of natural justice as follows:

The principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and the delegate are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (See *B.W.I. Business World Incorporated*: BC EST # D050/96)

36. Having reviewed the Record and the Reasons, I find that Mr. Berg was provided sufficient opportunity to present his evidence and respond to Lime Creek's evidence. More particularly, the delegate acceded to Mr. Berg's request and accommodated the latter by rescheduling the original hearing date from April 27, 2016, to May 2, 2016, but Mr. Berg chose not to attend on the new date and relied on his written submissions which the delegate considered in making the Determination.
37. Further, in advance of the new hearing date, the delegate also provided Mr. Berg an opportunity to review and make submissions specifically regarding the accuracy of Lime Creek's payroll records but Mr. Berg failed to make any submissions. In the circumstances, I do not find Mr. Berg was denied any opportunity to present his evidence or respond to the Lime Creek's evidence.
38. Having said this, I note Mr. Berg has also made an allegation of bias on the part of the delegate in making the Determination. In *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), the Tribunal noted the test for determining actual bias or a reasonable apprehension of bias is an objective one and the evidence presented should allow for objective findings of fact:

. . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

39. In *Alpha Neon Ltd.* (BC EST # D105/11), the Tribunal also noted:

An allegation of bias or reasonable apprehension of bias against a decision maker is serious and should not be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a “real likelihood” or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

40. In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, the Supreme Court added the following to the concern expressed above:

Regardless of the precise words used to describe the test (of apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.

41. Based on the above decisions, it follows that the burden of proving actual or a reasonable apprehension of bias is high and demands clear and convincing objective evidence. Subjective opinions, however strongly held, are insufficient to support a finding of actual or a reasonable apprehension of bias. In this case, I find Mr. Berg’s allegation of bias is subjective and speculative. He does not adduce *any* evidence or alternatively, clear and convincing objective evidence of bias on the part of the delegate in making the Determination. To make an allegation of bias, in the circumstances, is reckless as it impugns the personal integrity of the delegate as well as the integrity of the system of adjudication of the Employment Standards Branch. In conclusion, I reject Mr. Berg’s allegation of bias against the delegate and his natural justice ground of appeal.

42. Having concluded that Mr. Berg’s appeal cannot succeed under the natural justice ground of appeal, I note that the substance of Mr. Berg’s argument in the appeal and in his written submissions made to the delegate before the Determination was made, calls for the Director to apply the minimum employment standards in the *Act* and particularly, section 40. The relevant part of section 40 reads as follows:

**Overtime wages for employees not working under an averaging agreement**

- 40 (1) An employer must pay an employee who works over 8 hours a day, and is not working under an averaging agreement under section 37,
- (a) 1 1/2 times the employee’s regular wage for the time over 8 hours, and
  - (b) double the employee’s regular wage for any time over 12 hours.

43. While the *Act* is a remedial legislation providing employees minimum employment standards such as overtime pay in section 40 of the *Act*, the legislature has deemed fit, for policy reasons, to make exceptions where the nature of some types of employment does not permit for compliance with the minimum employment standards in the *Act*. In this case, in section 37.2 of the *Regulation*, the legislature specifically excludes some of the hours of work and overtime requirements of part 4 of the *Act* as concerns logging truck drivers which Mr. Berg was during the relevant period in question. Section 37.2 of the *Regulation* states:

**Logging truck drivers**

**37.2** Section 32 to 35, 36 (1), 40 and 42 of the Act do not apply to a person employed as a logging truck driver who is paid on a compensation system other than an hourly rate and who is working in the interior area as defined in section 1 (1) of B.C. Reg. 22/96, the Timber Harvesting Contract and Subcontract Regulation.

44. I find that the delegate correctly interpreted and applied s.37.2 of the *Regulation* in deciding, in this case, that Lime Creek did not owe Mr. Berg overtime wages. More particularly, I agree with the delegate that section 37.2 of the *Regulation* permits Lime Creek, in this case, to pay Mr. Berg based on a compensation system other than an hourly rate and Lime Creek, by employing an alternate system of payment – the cycle time compensation system – is effectively exempted from the obligation to pay overtime wages to Mr. Berg. I also agree with the delegate that Lime Creek, in utilizing the cycle time compensation system did not fall below the minimum hourly wage under the *Act*. Therefore, Lime Creek does not owe Mr. Berg any wages.
45. Having said this, I find that Mr. Berg is essentially attempting to re-argue the merits of his Complaint without presenting any new compelling evidence or arguments on appeal. I find that Mr. Berg's appeal has no reasonable prospect of succeeding and I dismiss it under section 114(1)(f) of the *Act*.

**ORDER**

46. Pursuant to section 115 of the *Act*, I order the Determination dated June 14, 2016, be confirmed.

---

**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**