

An appeal

- by -

Thomas Lea
("Lea")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2003A/50

DATE OF DECISION: April 23, 2003

DECISION

INTRODUCTION

This is an appeal filed by Thomas Lea (“Lea”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Mr. Lea appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “delegate”) on January 24th, 2003 (the “Determination”). At the outset I should note that the Determination is actually dated January 24th, 2002, however this is clearly a typographical error. Appended to the Determination is a document entitled “Reasons for the Determination” that was also issued on January 24th, 2003. The “Reasons” were issued following an oral hearing held on January 17th, 2003.

The Director’s delegate determined that James Prince, operating as Tsal’ Ts’ul Forest Services (the “Employer”), owed Lea the sum of \$464.18 on account of unpaid regular wages, overtime pay, vacation pay and section 88 interest. Further, by way of the Determination, the Director also assessed a \$0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

By way of a letter dated April 7th, 2002 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

GROUND FOR APPEAL

Mr. Lea’s position is that the Director’s delegate ought to have awarded him nearly \$4,400 in unpaid wages rather than the substantially lesser sum actually awarded. Mr. Lea seeks an order varying the Determination on the basis that:

- i) The Director’s delegate erred in law [section 112(1)(a)]; and
- ii) The Director’s delegate failed to observe the principles of natural justice in making the Determination [section 112(1)(b)].

I shall address each of these grounds in turn, commencing with the second ground.

FINDINGS AND ANALYSIS

Failure to Observe the Principles of Natural Justice

With the exception of one matter--dealing with Mr. Lea’s First Nations’ status and his possible exemption from taxation flowing from that status--this appeal does not raise an allegation that the Director breached the principles of natural justice. I will deal with the taxation issue more fully under the heading “Errors in Law”.

In essence (and subject to the foregoing comment), Mr. Lea’s appeal is primarily founded on allegations of error, both legal and factual, and does not raise issues with respect to natural justice.

Errors in Law

Mr. Lea says that the Director's delegate made several errors, specifically:

- Lea's hourly rate was incorrectly calculated;
- the delegate erred with respect to the number of overtime hours worked;
- the delegate erred with respect to the number of days worked--both in total number and consecutively;
- allowing the Employer's improper deduction of federal taxes and other remittances; and
- a \$0 penalty assessed against the Employer was too low.

In my view, Mr. Lea's only one of the alleged errors has been made out. I will briefly address each issue.

Hourly rate: Lea worked as a "brusher" for a three-week period commencing in mid-June 2002. The delegate determined that Lea's employment agreement called for a form of "piece rate" compensation on the basis of \$175 per hectare. This finding is not challenged nor is the delegate's finding that 22.56 hectares were completed. I might add that there was conflicting evidence on both of these matters and that the delegate's findings on these points are not reviewable since there was some evidence to support them.

Lea says that his "regular wage" rate should be based on an 8-hour day. However, the "regular wage" for employees paid on a "piece work" basis must be based on the *italicized* formula set out below which, in turn, is based on the "total hours worked in the pay period" (see section 1 of the *Act*):

"regular wage" means

- (a) if an employee is paid by the hour, the hourly wage,
- (b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period,
- (c) if an employee is paid a weekly wage, the weekly wage divided by the lesser of the employee's normal or average weekly hours of work,
- (d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work, and
- (e) if an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work;

The delegate correctly calculated Lea's regular wage in accordance with the above statutory mandate.

Days and Hours Worked: It is not clear to me how it can be asserted that the delegate erred in this regard since the delegate determined these issues based on the record of days and hours worked provided by Mr. Lea. Further, during the hearing before the delegate, Mr. Lea confirmed the accuracy of his own records. The delegate's calculations were, as noted, based on Mr. Lea's own records and, in my view, an entirely

correct application of subsections 39.7(2) and (5) of the *Employment Standards Regulation* which governed silviculture workers' work schedules.

Overtime: As for the overtime calculations, Lea's entitlement was governed by section 37.9 of the *Employment Standards Regulation* in force during June and July 2002. Mr. Lea appears to suggest that his overtime ought to have been based on 1.5 or 2 times (depending on the number of hours) his "regular wage" as derived from his piece rate (note I have already found that Mr. Lea has erroneously calculated this latter figure). However, pursuant to the previously-noted regulatory provision, the usual overtime provisions of the *Act* governing overtime (typically, time and one-half or double-time based on the employee's regular wage and number of overtime hours worked) do not apply to a silviculture worker such as Mr. Lea. The *Regulation* states that where a silviculture employee worked 3 hours or less of daily overtime, he or she is only entitled to be paid "at least the equivalent of minimum wage times 1.5 or the applicable piece rate, whichever is greater" [section 37.9(3)(b)]. If more than 3 overtime hours were worked in a day, the correct rate was "double the piece rate". Mr. Lea's daily overtime was correctly calculated by the delegate on this latter basis.

Monetary Penalty: As noted at the outset of these reasons, the Director levied a \$0 penalty against the Employer. Mr. Lea says that the amount of the penalty ought to be significantly increased so that it is a "hefty" penalty. There are two points that should be made with respect to this aspect of the appeal. First, in my view, Mr. Lea does not have the legal authority to appeal the penalty. The matter of the penalty is strictly an issue as between the Employer and the Director. Second, the amount of the penalty is fixed by *Regulation* and was properly levied in accordance with the *Regulation*.

Income tax and other remittances: Mr. Lea claims that: "...when I filled out the TD-1 for [the Employer], who is a first nation contractor, I claimed tax-exemption by providing my first nation status number on the form". Mr. Lea says that given his status he is exempt from "having income tax and CCP deductions taken from [his] earnings".

Without accepting the correctness of the above assertions, I find that the delegate improperly fettered his jurisdiction with respect to this issue which, in turn, amounts to an error of law. With respect to this matter, the delegate's position (March 3rd, 2003 submission to the Tribunal, at p. 4) is as follows:

A pay stub submitted by the Employer indicates that he made statutory deductions from the appellant's wages (see attachment #2). The appellant claims he is of First Nation status and objects to these deductions.

Matters relating to taxes are outside the jurisdiction of the Employment Standards Act.
(my italics)

I do not agree that "matters relating to taxes" are beyond the ambit of the *Act*. Section 21(1) states that an employer is not entitled to withhold or deduct all or part of an employee's wages for any purpose except as permitted or required by the *Act* or some other provincial or federal statute. Income tax and pensions are governed by federal statute law. If (and I make no finding in this regard) the Employer improperly deducted income tax and pension payments from Lea's wages, then section 21(1) is implicated. Since the delegate made no finding on this point--by reason of his, in my view erroneous, conclusion that he had no jurisdiction to do so--this matter is referred back to the Director for determination.

I might further add that this issue was specifically raised by Mr. Lea before the delegate--see the bottom of page 3 of the delegate's Reasons (Part V, second subheading)--but was not, so far as I can tell,

specifically addressed in the Determination. The delegate's position on jurisdiction was gleaned from a subsequent submission to the Tribunal. The delegate's failure to formally address an issue that was put before him could, as well, arguably be characterized as a failure to observe the principles of natural justice.

ORDER

Pursuant to section 115(1)(b) of the *Act*, I order that the matter of Mr. Lea's "exemption" from federal taxation or other obligations (and the related matter of the Employer's allegedly unlawful wage deduction on these accounts) be referred back to the Director for determination.

In all other respects, the Determination is confirmed as issued.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal