Employment Standards TRIBUNAL

An appeal

- by -

Dean Bardon
(the "Employee")

- 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: Ib S. Petersen

FILE No.: 2002/8

DATE OF HEARING: April 22, 2002

DATE OF DECISION: May 15, 2002

DECISION

APPEARANCES:

Mr. Dean Bardon	on behalf of himself
Mr. Richard Corewyn	on behalf of the Employer, Wild West Bagging Co.

OVERVIEW

This decision arises out of an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director issued on December 18, 2001.

Bardon worked as a sewer/chucker for the Employer between November 15, 1999 and May 31, 2000. He was paid at the rate of $15.00 per hour. The Determination concluded that Bardon, who had filed a complaint with the Employment Standards Branch with respect to statutory holiday pay, overtime and compensation for length of service, was owed nothing by the Employer.

The Determination rejected his claim because, while the Delegate was of the view that "Wild West may not have paid overtime as per the *Act*", he could not quantify daily hours worked because of a lack of records and did not want to "guess as to the amount owed." He found that the situation was further complicated because of $3,200 received by Bardon. From the Determination it appears that the Employer provided this amount to Bardon for the purchase of a truck for his work. The Delegate seems to have been of the view that, because Bardon did not return the money, he acted in a manner breached the trust of the employment relationship. He concluded that the complaint was filed in bad faith (Section 76(2)).

FACTS AND ANALYSIS

The Employee appeals the Determination. The Employee, as the Appellant, has the burden to persuade me that the Determination is wrong on the balance of probabilities. For the reasons set out below I am persuaded that the appeal succeeds as set out.

At the hearing, Bardon testified on his own behalf. Corewyn testified on behalf of the Employer.

When the hearing commenced, Corewyn requested an adjournment on the basis that the principal of the Employer, David Derksen was engaged in a "business emergency" and could not attend. Corewyn also stated that he was prepared to proceed should I deny the request. Bardon, who had come down from Pemberton opposed the application. He pointed to the fact that the hearing had been scheduled long ago.

After considering the arguments by the parties, I denied the request for an adjournment. In my view, the basis for the adjournment was not clearly articulated or specified. While the Tribunal, in the interests of a fair hearing, will grant an adjournment in the appropriate circumstances, it is for the applicant to satisfy the Tribunal that grounds exist for an adjournment. Corewyn was not able provide any particulars of the "business emergency." In any event, I indicated that I was prepared to entertain a further request if the Employer considered it necessary once Bardon had completed his evidence. There was no further request for an adjournment.

It is an understatement to say that Bardon took issue with the Delegate's conclusions. In his appeal Bardon generally argued that the Delegate placed the onus on him, not the Employer. In his testimony, Bardon explained the relevant documentation on file, which included pay stubs. These pay stubs were part of the Delegate's file. I intend to briefly review this documentary evidence and the testimony related to it:

- A T-4 slip for 1999, which Bardon explained he received from the Employer, indicated that he earned $5,290 between November 15 and the end of December 1999. There was no dispute that his hourly rate at this time was $15.00. This works out to some 353 hours in that period. Bardon testified that he worked 15-16 hour days.

- There is no pay stub for January 2000.

- The pay stub for February 2000, indicates that Bardon worked 213 hours at $15.00 per hour.

- The pay stub for March 2000 indicates that Bardon worked 192.30 hours at the rate of $15.00 per hour.

- The pay stub for April 2000 indicates that Bardon worked 160 hours at the rate of $8.00 per hour and 36 hours at an overtime rate of $12.00. Bardon explained that this was a sham. The Employer appeared to "drop" his hourly rate to $8.00, pay him overtime on that rate plus a "bonus." The total, including the "bonus," works out to $2,942 for the 196 hours worked. This, in turn, works out to $15.00 per hour.

- The pay stub for May 2000 indicates that Bardon worked 171 hours at the rate of $15.00 per hour.

- Bardon says he was not paid statutory holiday pay for Christmas and Easter.

The records referred to are the Employer's records. Bardon accepts that these are the hours worked. In the circumstances it is clear that Bardon worked overtime. I do not accept the statement in the Determination that Bardon "received substantial bonuses." That is simply not borne out by the evidence. I agree with the Delegate that there is no reliable or accurate information as to daily or weekly hours of work. Obviously, this makes the calculation of money owed difficult. All the same, I cannot accept the Delegate's conclusions that the "the evidence cannot support a claim for statutory holiday pay and overtime." Based on the hours worked--and, importantly, agreed to have been worked according to the records--in November-December 1999, and in February-May 2000, Bardon must have worked overtime. That conclusion is inescapable. The Employer's witness agreed that a lot of overtime was worked and records were not kept as required by the *Act*. Under the *Act*, the Delegate is charged with the responsibility to assess, if possible, the amount owed. While I agree that the Delegate is not authorized to "guess" at a number, I do not accept that the Delegate, in the circumstances, was not able to make reasoned conclusions as to amounts owed.

In the circumstances, and based on the evidence before me, I conclude that Bardon is entitled to overtime payable at the rate of time and one half for the hours worked in excess of 40 in a week for February to May 2000. While I understand that there may have been weeks where Bardon worked less, there were weeks where he worked more. There may, as well, have been days where Bardon worked in excess of 11 hours in a day (and be entitled to double time), just as there may have been days where he did not work an 8 hour day. In my view, it is reasonable in the circumstances to base the award on "average" weekly

hours. The documentation and oral evidence does not support more. This means that Bardon is entitled to overtime pay at the rate of time and one half for 53 hours in February, 32.3 hours in March, 36 hours in April and 11 hours in May. I do not accept that the Employer actually reduced his hourly rate in April. I agree with Bardon that the hourly rate, the overtime stated to be paid and the "bonus", was little more than creative bookkeeping. The overtime hours in 2000 comes to 132.3. From this, of course, must be deducted what Bardon was paid at straight time.

For the period November-December 1999, the evidence was that Bardon worked from November 15 to December 23. This is equivalent to five work weeks, or 200 hours at the regular wage rate. Bardon worked 353 hours, or 153 hours at overtime rate. In my view, Bardon is entitled to 5 times 8 hours at time and one half, 40 hours, and the balance, 113 at double time (see Section 40). From this must be deducted what Bardon was paid at straight time.

Bardon testified that he was not paid for statutory holidays. In his testimony, he mentioned Christmas and Easter. While the Employer's witness, Corewyn, testified that--from February 2000, when he started working as a consultant with the Employer--8 hours was added to compensate for statutory holidays, there was no documentary evidence to support that. Bardon denied that was the case. In my view, Bardon is entitled to be paid for these two statutory holidays and I refer the calculation of the amount owed back to the Director.

Another issue relates the payment of $3,200 to Bardon (the cheque was made payable to Bardon's father, a car dealer). There is no dispute that the amount was ultimately paid to Bardon or for his benefit. His evidence--in direct testimony--was that it was given to him to "buy a truck to get to work" and was "a gift for hard work." In cross examination he stated that the money was "a gift, a loan, I have no idea." While the Delegate found that no truck was purchased, Bardon stated under oath that he did, in fact, purchase a truck, but that he was laid off about two weeks later. Bardon testified that he was instrumental in increasing the Employer's revenues from some $4,000 per month to $30,000. The Employer says that I must take this amount into consideration if I find that Bardon was entitled to overtime wages as claimed. In the circumstances, I disagree. The is no written assignment of wages in this case. Section 21(1) of the *Act* is quite unequivocal:

> 21.(1) except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

Perhaps the $3,200 was a gift, or a loan, perhaps not. The Employer did not lead any evidence at the hearing explaining the nature and circumstances of the payment of the $3,200. What is clear on the evidence, however, was that it was not--at the material time--a "payment" for overtime hours worked. According to the Determination, Wild West "attempted to have the money returned by Bardon without success." In a letter the Employer explained to the Delegate that the amount was "still owed." This, in my view, is more consistent with a loan. In my view, therefore, the Employer cannot now seek to offset that for the purposes of Bardon's overtime and statutory holiday pay entitlements under the *Act*. If the Employer is of the view that it is entitled to re-payment, it has recourse to the courts.

The Delegate concluded that the complaint was filed in bad faith. I do not accept this conclusion. It appears that the conclusion was based on the dispute between the parties with respect to the $3,200 (and whether that amount ought to be taken into account in calculating amounts owed). The nature and circumstances of the payment of the $3,200, and the parties' legal obligations in that regard, if any, are far

too circumspect. In my view, the Delegate erred when he failed to consider this. In short, I do not accept the Delegate's conclusion that Bardon breached his duty of fidelity to the Employer such that it entitled to discharge him without compensation for length of service. Bardon did not file his complaint until November 2000, long time after the lay off. Both Bardon and Corewyn stated that he was laid off. The real dispute is whether he was offered recall. On the available evidence, cause for termination did not appear arise until the Delegate's investigation and subsequent Determination. At the hearing, Corewyn explained that the $3,200 was not a factor in the termination. I reject the Delegate's conclusions on this point.

Is Bardon entitled to compensation for length of service? Bardon's evidence was that he was laid off on May 31, 2000 and never recalled. The Delegate did not--expressly anyway--deal with this claim. At the hearing, the Employer agreed with Bardon that he was laid off at the end of May. The Employer's evidence was that he was offered work "in the spring and was not available" to return. Bardon's testimony was that he was available (though he was working up in the interior) and offered to return and that he made that offer to Derksen, the principal of the Employer. In fact, he said that he approached Derksen for a recall and was told that there was no work. At that point, Bardon requested the severance pay he felt he was entitled to, and the relationship soured, and he, later, filed a complaint with the Branch. I accept the evidence that Bardon was laid off and, unfortunately, it was not clear to me on the evidence when and what circumstances, if at all, Bardon was offered a recall. If he was not recalled as required under the Act, he is entitled to compensation for length of service. I refer this issue back to the Director.

I refer the calculation of amounts owed plus interest and the issue of recall to employment back to the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated December 18, 2001, be referred back to the Director.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal