**BCEST #D211/98**

**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 -

BC & E Light & Power Corporation
("BC & E" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE NO.**: 98/80

**HEARING DATE:** April 8, 1998

**DECISION DATE:** May 21, 1998

**DECISION**

**APPEARANCES/SUBMISSIONS**

| | |
|---|---|
| Mr. Eric Heringa | on behalf of BC & E |
| Mr. Garry Bengert | |
| Ms. Randie Bengert | |
| Mr. Dan Stoica | on behalf of himself |
| Mr. Gary C. Gross | on behalf of himself |

**OVERVIEW**

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on January 15, 1998 which determined that BC & E was liable for statutory holiday pay (Section 45 of the *Act*) and vacation pay (Section 58 of the *Act*) to Mr. Stoica and Mr. Gross; and for wages withheld (Section 18 of the *Act*), compensation for length of service (Section 63 of the *Act*), and for a production bonus to Mr. Stoica. The Director's delegate found that Mr. Gross was owed $3,534.27 and Mr. Stoica $6,190.11.

The Employer argues that the Determination is wrong. The Employer concedes that an amount of $400.00 held back, and the amount of $1,099.40 compensation for length of service, is owing to Mr. Stoica.

**ISSUE TO BE DECIDED**

The overall issue to be decided in this appeal is whether the Tribunal should vary, confirm or cancel the Determination. This boils down to the following:

1. are the employees owed vacation pay and statutory holiday pay; and
2. is Mr. Stoica owed for a production bonus

**FACTS**

The Employer operates an electrical contracting business. Among others, it operates under contract with BC Hydro to replace street lamps. Mr. Gross and Mr. Stoica were both employed as electricians.

On January 6, 1998, an adjudicator of the Tribunal issued a decision with respect to a Determination concerning Mr. Gross (*BC & E Light & Power Corporation*, BCEST #D012/97). He found that the employment agreement between Mr. Gross and the Employer was not enforceable and referred the matter

back to the Director for further investigation. In late August they had settled, and the Employer had paid, an amount on account of vacation pay owing up to August 1996 (There was no argument at the hearing that this amount impacted on the amounts stated to be owing in the Determination). On September 4, 1996, the Employer and Mr. Gross entered into the agreement, set out in part above. This agreement provided, *inter alia*, that BC & E would pay Mr. Gross "the greater of $7.00 per hr. or $10.00 per agreed hook-up including statutory and holiday pay". In particular, the adjudicator found that Mr. Gross was entitled to statutory holiday pay and vacation pay after the agreement had been entered into. The adjudicator found that both the $7.00 per hour or $10.00 per hook up including "statutory and holiday pay" were contrary to Section 4 of the *Act*.

Mr. Stoica was employed under similar terms, though there was no amount paid per unit specified in his agreement with the Employer. He also entered into the agreement on September†4, 1996.

Mr. Gross was employed from December 12, 1995 to July 15, 1997. Mr. Stoica worked from September 3, 1996 to September 23, 1997. According to certain records submitted by the Employer, showing actual monthly payments, in 1996 and 1997, they were paid a total of $40,364.83 and $24,832.31 respectively. These amounts were based on the units done and a monthly "draw" of $500.00 (in case of Mr. Stoica) and $550.00 (in case of Mr. Gross). Mr. Gross and Mr. Stoica both agreed that these amounts were approximately correct.

The Employer admitted that it did not have any records of hours worked per day. The Employer stated that it did not have any knowledge of hours worked in excess of 8 in a day. The Employer initially explained that the summaries submitted by it, and referred to above, were accurate and based on days actually worked. However, in cross examination by Mr. Stoica, Mr. Bengert admitted that the days stated to have been actually worked were, in fact, based on an average number of working days in a month, estimates of units per day or invoices submitted to it from time to time by the employees. The Employer admitted that it was not sure of days worked. In those circumstances, I cannot put a great deal of weight on the Employer's evidence with respect to hours and dates worked.

Mr. Stoica testified that he worked long hours, "from dawn to dusk", most of the time, and on weekends as well. He did not have any records of those hours. In the circumstances, I am prepared to accept that he and Mr. Gross worked at least a 40 hour week during their employment.

Mr. Stoica testified that he was entitled the production bonus of $1,000.00 based on an agreement between him and the Employer that he would work hard, work extra hours and do extra work. He stated that he "worked as hard as he could", practically "non-stop", but that the Employer was difficult and whatever he did was never enough. The Employer agreed that Mr. Stoica was entitled to a bonus, but only if he completed the work assigned to him in a timely fashion. The work was not completed because Mr. Stoica's employment was terminated on September 23, 1997. In cross examination, the Employer was not certain as to when the work would have been completed. When asked directly if the work would be completed in five days, Mr. Bengert stated that he "would be guessing" and did not deny the suggestion put to him. In the circumstances, I am prepared to accept that the work would have been completed within days of the

termination of Mr. Stoica's employment. At the hearing, Mr. Stoica appeared to be a dedicated and hard working employee who provided evidence in a detailed and credible fashion.

The Employer explained that he terminated Mr. Stoica's employment on September 23, 1997 because of his perception that Mr. Stoica deliberately dropped productivity during Mr. Bengert's absence from the province. Mr. Stoica did this, according to Mr. Bengert, because he was upset with Mr. Bengert for refusing to pay him "extra money". The Employer stated that Mr. Stoica's productivity dropped from 100 units per day to 30-40. Mr. Bengert also explained that he asked why the work was not being completed in a timely fashion and that Mr. Stoica told him that he was angry with Mr. Bengert. Mr. Bengert warned Mr. Stoica that "he would be fired if productivity was not increased". The Employer did, in fact, terminate Mr. Stoica's employment. In other words, the Employer's explanation is that Mr. Stoica deliberately and intentionally reduced his productivity to harm the Employer. The Employer did not produce any documentary evidence to support this allegation. Moreover, according to the Employer summaries of payments to Mr. Stoica, which were based on productivity, the payments to Mr. Stoica actually increased in September compared with the previous months. The Employer was not able to explain this. Finally, since Mr. Stoica's payments were based on the units produced, he would be reducing his own income if he slowed down. In the result, I do not accept the Employer's explanation for the termination of Mr. Stoica's employment.

**ARGUMENTS**

The Employer's argument boils down to the following proposition: the contract between the Employer and Mr. Stoica and Mr. Gross was not enforceable as it did not comply with the *Act.* However, the Employed had paid in accordance with those contracts. As the agreements were not enforceable, the employees were only entitled to minimum standards provided for in the *Act*. In the result, the Employer argues, the employees have been paid substantially more than minimum wages plus vacation pay and statutory holiday pay and, therefore, they are owed nothing.

The employees do not agree that they are only entitled to minimum wage if the contracts are held to be unenforceable.

**ANALYSIS**

The issue of the enforceability of the agreements, and the inclusion of vacation pay and statutory holiday pay in the agreements, was not before me. This issue has been decided by the earlier decision of the Tribunal.

In my view, this case turns on the proper interpretation of Section 1 "wages" and "regular wage" in the *Act.* The definition of "wage" includes money paid or payable by an employer as an "incentive and relates to hours of work, production or efficiency". It is clear that an employer may pay on a unit basis as long as the employer does not contravene minimum wage standards or otherwise contravenes the *Act* and *Regulation*.

An employer must also, however, comply with Sections 27 and 28 of the *Act*. Section 27 (Wage statements) requires, *inter alia*, that the employer on every payday must give the employee a written wage statement which includes the hours worked by the employee during the pay period and how the wages were calculated (where the employee is paid other than by the hour or salary). Section 28 (Payroll records) requires the employer to keep records which includes "the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis" (Section 28(1)(d)) and the "dates of statutory holidays taken and the amounts paid by the employer". In this case, the Employer did not keep records of dates and hours worked as required by the *Act*.

The Employer has chosen to organize its affairs in a certain manner. However, in my view, the Employer cannot benefit from its failure to comply with the *Act* and *Regulation*. In this case, the Employer did not keep records of dates and hours worked as required by the *Act*. We do, however, have the remuneration paid to the two employees in the evidence submitted by the Employer. Similarly, the evidence of the Employer is that the employees worked a 40 hour week. As mentioned above, I am prepared to accept this. There was no evidence that the employees took any vacation time or statutory holidays, other than as stated in the Determination.

Section 1 defines "regular wage" to mean:

> "(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 employees total hours of work during that pay period;"

I do not accept the Employer's argument that the employees are only entitled to minimum wages where, as here, their employment agreement has been found to be unenforceable for failing to comply with the *Act.* It follows from the Employer's argument that the employees actually owe money to the Employer. In my view the correct method of calculating the wages in these circumstances is simply to follow the *Act*. The payroll information submitted by the parties indicate payments on the basis of pay periods. As the evidence is that the employee worked a 40 hour work week, the "regular wage" of the employees can easily be ascertained.

Section 45(a) provides that employees who are given a day off on a statutory holiday must be paid "the same amount as if the employee had worked regular hours on the day off". Section 46(1) and (2) provide that an employee who works on a statutory holiday must be paid 1 1/2 times, or double, the employee's "regular wages" for the time worked and receive another day off with pay. In the circumstances of this case, the entitlements to statutory holiday pay of the employees is simply a matter of calculating the proper amounts based on their regular wages.

Similarly, in the circumstances of this case, vacation pay may be calculated once the "total wages during the year of employment entitling the employee to the vacation pay": it is simply a percentage of the total wages (Section 58). As noted above, the definition of "wage" includes money paid or payable by an employer as an "incentive and relates to hours of work, production or efficiency" (Section 1). In this case, the parties

agree on the amounts paid by the Employer. There was no dispute over any amount of vacation taken by the employees. When employment is terminated, the Employer must pay according to Section 18 of the *Act*.

I accept that Mr. Stoica is entitled to the production bonus. The definition of "wages" in Section 1 of the Act includes money paid or payable by an employer as an "incentive and relates to hours of work, production or efficiency". Section 18(1) provides that "an employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment". In my view, this includes a production bonus. In this case I am concerned that the terms of the "production bonus" were somewhat vague. Mr. Stoica testified that he was entitled the production bonus of $1,000.00 based on an agreement between him and the Employer that he would work hard, work extra hours and do extra work. He stated that he "worked as hard as he could", practically "non-stop". The Employer agreed that Mr. Stoica was entitled to a bonus, but only if he completed the work assigned to him in a timely fashion. Nevertheless, the parties agreed to these terms. The work was not completed because Mr. Stoica's employment was terminated on September 23, 1997, only a few days before completion. In my view, Mr. Stoica would have completed the work and would have received the bonus but for the termination of his employment. The employer conceded from the beginning of the hearing that it did not have cause for terminating Mr. Stoica's employment. In the result, I am of the view that the production bonus is payable.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated January†15, 1998 be confirmed in the amount of $9,724.38 together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

_____

**Ib Skov Petersen**
**Adjudicator**
**Employment Standards Tribunal**