

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-

Frank's Camp Catering Ltd.
(the "Employer")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE NO.: 97/36

DATE OF HEARING: May 16, 1997

DATE OF DECISION: May 28, 1997

DECISION

Mrs. Hewlin testified that she hired the complainant and held an interview with him prior to his hiring. At that interview she went over his duties, which included bed making, dish washing and general camp clean-up. The complainant was a qualified first aid attendant and was to perform those duties if called upon. In recognition of that qualification he was paid an additional eighty-five cents per hour.

Mrs. Hewlin testified that she explained to the complainant that in performing duties he would not be directly supervised. She also explained that the work day was a split shift requiring him to commence work at approximately 4:00 a.m. working through to about 9:00 a.m. and returning at approximately 3:00 p.m. and working to approximately 6:30 p.m. She explained to him that his pay would be calculated on the basis of eight hours per day minimum and one or two hours of overtime paid according to the number of men that were in the camp. For example, if the number of men in camp ranged from 0-26 the complainant would be paid eight hours at straight time. If the number of men in camp ranged from 27-31 the complainant would be paid eight hours straight time and one hour overtime at time and one-half. If 32-37 men were in camp the complainant would be paid eight hours at regular and two hours of overtime at time and one-half. His regular rate of pay was \$19.90 per hour plus the eighty-five cents per hour for his first aid qualifications. Mrs. Hewlin testified that this method of pay is consistent with what other camp caterers pay, in other words, Mrs. Hewlin testified that this is an industry standard. Mrs. Hewlin further testified that the complainant at the time of the interview stated that it might take him longer because he hadn't done this type of work before. Mrs. Hewlin testified that she responded that he could work at his own pace but that she had explained how his pay would be calculated. She testified that the complainant said that he understood and it would be okay if it took him longer.

Mrs. Hewlin testified that the employer was signatory to a union collective agreement. She candidly admitted that the terms that she negotiated with the complainant regarding a pay scale based on the number of men in camp was not part of that collective agreement. However, as stated previously, she testified that the method of calculating pay was common in the industry. The employer's invoices indicate that on July 28 and 29 there were twenty-six or less men in camp. On July 25 there were thirty men in camp, on July 26 there were thirty-one men in camp and on July 27 and 31 there were twenty-nine men in camp. She testified that the complainant's pay was calculated on the basis of the aforementioned schedule which is predicated on the number of men in camp.

Mr. Frank Hewlin testified that he was the cook in camp while the complainant was employed. Mr. Hewlin testified that because he worked in the kitchen he was not able to supervise the complainant who worked mainly in other areas of the camp. Mr. Hewlin was not able to confirm or deny that the complainant worked the hours that he did. Mr. Hewlin testified that the complainant would not fill out a daily time card as his method of payment had been determined accordingly to the schedule which was discussed at the point of hire. Mr. Hewlin also testified that an issue has arisen between the complainant and the employer regarding payment for the return air fare. However, that matter is not part of the complaint that was filed with the Employment Standards Branch and I therefore have no jurisdiction to deal with that matter.

ANALYSIS

Mr. Lechkobit complains that he was not paid properly for the overtime hours he worked while employed by Frank's Camp Catering Ltd. Since no time cards are kept the best evidence available is the individual record kept by the complainant. The employer was not able to refute that the complainant had worked those hours. I therefore accept that the complainant worked the hours that he did on the days he claims.

The employer argues that it should not be held liable for those hours because the employee negotiated in good faith a pay scale that was based upon a schedule that was governed by the number of men in camp. The employer argues that it explained the schedule in good faith to the employee and that the employee understood the schedule. The employer further argues that payment by this schedule is an industry standard and that this is supported by inspection of the employer's invoices which shows that it bills its contractor on a per diem basis according to the number of men in camp. The employer further argues that the method of paying under the schedule is a two way street in the sense that an experienced bull cook may well be able to complete his days' work in less than the allotted time under the schedule but in any case would receive full payment according to the schedule rather than hours actually worked.

The requirements under the *Act* and its Regulations are minimum requirements and pursuant to Section 4 of the *Act* cannot be waived. Section 4 states:

The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no affect, subject to Sections 43, 49, 61 and 69.

Employers and employees are not allowed to contract out of the minimum requirements of the *Act*. In this particular case Sections 43, 49, 61 and 69 do not apply. Likewise, although no copy of the collective agreement was produced in evidence, the employer stated that the schedule under which it was paying the employee is not part of the collective agreement. I must deal with the evidence before me which did not include a copy of the collective agreement. In these circumstances I find that the *Act* applies. There is no doubt in my mind that the employer believes that it explained the terms and conditions of employment to the complainant and that the complainant acknowledged those terms at the point of hire and when the complainant signed for his pay cheque upon termination. However, even though negotiations were conducted in good faith the parties are not allowed to contract out of the minimum requirements of the *Act*.

I have been informed that the monies have been paid into trust which adequately addresses the issue under Section 18.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination dated December 27, 1996 be confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal