**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 -

Seel Forest Products Ltd.
("SFP")

\- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

**ADJUDICATOR:** David Stevenson

**FILE NO.:** 1999/92

**DATE OF HEARING:** May 27, 1999

**DATE OF DECISION:** June 14, 1999

# DECISION

## APPEARANCES

| | |
|---|---|
| for Seel Forest Products Ltd. | Barnim Kluge, Esq.<br>Eugen Seel |
| for the individual | in person |
| for the Director | J. LeBlanc |

## OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Seel Forest Products Ltd ("SFP") of a Determination which was issued on January 26, 1999 by a delegate of the Director of Employment Standards (the "Director"). In that Determination the Director found SFP had contravened the *Act* in respect of the employment of A.J. (Jay) Seel ("Seel") and, pursuant to Section 79 of the *Act*, ordered SFP to cease contravening the *Act*, to comply with the *Act* and to pay an amount of $8373.47.

SFP says the Determination is wrong for three reasons:

1. The Director failed to give effect to an agreement between SFP and Seel that the employee would receive certain benefits in lieu of overtime pay;

2. The Director failed to properly assess the credibility of Seel's claim in light of alleged defects in the overtime hours claimed by him; and

3. The Director was wrong to add an interest component to the amount alleged to be owing because of the delay

## ISSUE TO BE DECIDED

The issue is whether SFP has demonstrated the Determination is wrong because the Director erred in fact, in law or in some combination of mixed fact and law.

**FACTS**

There were two witnesses who gave evidence at the hearing of this appeal, Eugen Seel, the President of SFP and the uncle of the complainant, and the complainant. Mr Kruge, appearing on behalf of SFP, also provided me with two unsworn statements, one signed by Wanda Seel and Carl Seel and the other signed by R. Seel. I will address those in due course. Much of the evidence given by Eugen Seel was based on information and belief and he was not directly involved in any discussions that took place at the time Seel was hired, relying in his evidence on what he was told by Wanda Seel and Carl Seel. Mr. Kruge said that Wanda, Carl and Rodney Seel were unable to attend the proceedings because they were needed at the business.

Most of the facts are not in dispute.

SFP operates a full phase sawmill near Edgewater. Eugen and Wanda Seel are its principal officers and a number of other family members, including Carl and Rodney Seel, have positions in the company and jobs at the sawmill. Seel is the nephew of Eugen and Wanda Seel. In early 1996, Seel was living in Prince George and working in construction. For a variety of reasons, he decided to contact SFP about possible employment in the mill. He talked to Carl Seel and was told there were no positions available at that time. Some months later, he received a call from Carl Seel and was asked whether he was still interested in employment with SFP. Seel made a trip to Edgewater to check out the offer. He had some discussion with Carl Seel and was offered a job, which he accepted, either immediately or very shortly after the offer was made.

There is some divergence on the facts about discussions and agreements between Seel and SFP at the time he was hired. The parties agree there was a discussion about terms of employment. Seel was told he would receive $14.00 an hour. It is alleged by SFP that Seel asked whether he could work extra hours and was told he could but that he would not be paid overtime for the extra hours. Seel says he was told that "certain employees", meaning family members, were expected to work extra hours at straight time. He also says there was never any discussion, let alone agreement, about being given, or compensated by, "fringe benefits" in return for the extra hours worked at straight time.

There was no direct evidence from SFP on the last point. Eugen Seel, as indicated above, was not directly involved in any discussion relating to Seel's employment. In his evidence he could only say that Wanda and Carl told him Seel wanted more hours and was told that was OK but SFP would not pay more than straight time for overtime. He also said that, "he needed money to get established and it was felt that there were benefits that would more than compensate for the overtime he worked".

The written statement of Wanda Seel and Carl Seel referred to above, says in part:

> He then said that he would like to work more hours than the regular hours in order to strenthen [sic] his financial position. He was therefore advised that he could but, any hours in excess of 8 hours would be paid at the regular hourly rate and that any time and a half would be more than compensated by benefits he would receive other than direct cash or loans, etc.

I conclude from the evidence that Seel asked for and was told that he could work extra hours but would not be paid overtime for any extra hours worked and he accepted that arrangement. If it were necessary to this decision, I find that Carl Seel indicated not only that he could work the extra hours but also that, as a family member, he was expected to work extra hours. I also conclude that while Seel may have been told there were "benefits" to being a family member, he was never told, and consequently never agreed or acknowledged, that those "benefits" would be viewed as compensation for extra hours worked. The reasons for this conclusion will become apparent as I continue to review the facts.

Seel began working for SFP in August, 1996. For the first few months of his employment he lived with Wanda and Eugen Seel and paid room and board. In November his family joined him from Prince George. He was allowed to use a company credit card to move the family's belongings to Edgewater. He repaid to SFP the charges incurred on the cards. Seel and his family moved to a rental house in November, 1996. In January, 1997 he began to consider buying and moving into a mobile home. Later, he had an opportunity to purchase a mobile home but needed some money to complete the purchase. He was provided with a $5000.00 interest free loan by SFP. There was no plan to purchase a mobile home at the time Seel commenced his employment. A location for the mobile home was provided by SFP on the company's property and he received help from fellow employees and family to prepare and service the site and place the mobile home. Over the period of his employment he was allowed to use SFP's filing and mechanics shops, tools and equipment. He had two horses that were allowed to graze on the company's property and he was allowed to water around his mobile home and irrigate a pasture from the company's water system. He also received other incidentals, such as firewood, lumber and electrical material. The purpose of setting out these facts is to identify some of the matters that have been identified by SFP as the "benefits" provided to Seel during his employment and which SFP says should be accepted as compensation for the extra hours he worked.

Seel recorded his own hours of work each day and periodically passed that record to Wanda Seel who, consistent with the statutory obligation of an employer outlined in Section 28 of the *Act*, recorded that information. Seel was paid at straight time for all the hours he recorded. During his employment no issue ever arose that he was "padding" his record of hours worked. Seel terminated his employment with SFP on April 18, 1998.

SFP received the complaint on September 4, 1998. Following receipt of the complaint, Eugen Seel, Wanda Seel, Carl Seel and Rodney Seel compiled a list of the “fringe benefits” received by Seel during the course of his employment. The list identified the “fringe benefits”, allocated a rate to each and reached a total “value” for the “fringe benefits”. As a result of this exercise, SFP showed $11,773.72 worth of “fringe benefits” were provided to Seel during the period of his employment.

Mr. Kruge argued the value of all the “fringe benefits” come within the definition of “wages’ under the *Act*. There is no apparent relationship between the items listed and Seel’s work, hours of work, productivity or efficiency. For example, the list sets out the following:

| FRINGE BENEFITS | | RATE | TOTAL |
|---|---|---|---|
| 12. | Room and board | 3 ½ months at 68 | $2100.00 |
| | plus laundry | less amount paid | <300.00> |
| | (as part of the benefits<br>the employee was permitted to stay with the employer’s<br>family until arrangements were made to move his mobile to<br>Edgewater and to install septic) | | |

While Eugen Seel gave evidence describing each of the items on the list, none of that evidence tied the “fringe benefits” directly to Seel’s employment. In fact, most of the “fringe benefits” relate to matters that no one could have contemplated occurring when the Seel was hired. Seel did not contemplate purchasing a mobile home until January, 1997. He started work in August, 1996. The loan was provided to him in April, 1997 and was directly related to the purchase of the mobile home. Preparation and rehabilitation of the trailer site and several other incidental “fringe benefits”, were also directly related to the purchase of the mobile home.

On the evidence, the only “benefit” that was identified and discussed at the time Seel was hired was a medical/dental plan that Carl Seel said was being considered and which, it turned out, was never put in place while Seel was employed.

## ANALYSIS

The principal argument made by Mr Kruge on behalf of SFP is that effect ought to be given to the agreement between SFP and Seel at the time Seel was hired. He says the agreement was that Seel would work extra hours at straight time rates and, in return, would be compensated by numerous financial benefits that were provided to family members. He says the value of the benefits must be viewed as wages and included as part of the total compensation package.

I do not accept that argument for several reasons. First, even if such an agreement could be given effect under the *Act*, I do not accept the characterization of the employment agreement suggested by SFP. Specifically, I do not agree, as a matter of fact, that Seel agreed, acknowledged or even understood that any extra hours he worked would be compensated by undefined benefits, financial or otherwise, that he would receive as a family member. The assertion that he was told this and agreed to it is the key factual element of SFP's appeal. Their burden on that point requires more proof than what is contained in the written statement of Wanda and Carl Seel submitted to me (which incidently, was signed by a person not involved in the discussion where this agreement was alleged to have been reached) and the hearsay evidence given by Eugen Seel. In his evidence, Seel denied any agreement relating to benefits as compensation for overtime. No basis has been established that would lead me to disbelieve that evidence. I accept there may have been some general reference in the discussion between Seel and Carl Seel about employment benefits, including a discussion about medical/dental benefits for employees, but no indication that the kind of "fringe benefits" listed by SFP would form any part of Seel's compensation.

Second, and even if I had accepted the agreement was as characterized by SFP, I would not give effect to it. I do not accept that the value assigned by SFP to the alleged "fringe benefits" can be treated as wages under the *Act*. The definition of wages in Section 1 of the *Act* reads:

> ***"wages"*** *includes*
>
> *(a) salaries, commissions and money, paid or payable by an employer to an employee for work,*
>
> *(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,*
>
> *(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,*
>
> *(d) money required to be paid in accordance with a determination or an order of the tribunal, and*
>
> *(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an*

*employee's benefits, to a fund, insurer or other person,*

*but does not include*

*(f) gratuities*

*(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,*

*(h) allowances or expenses, and*

*(I) penalties.*

Mr. Kruge correctly points out that this definition is inclusive rather than exclusive. Notwithstanding, the burden on SFP in this appeal is to persuade me that these "fringe benefits", as a matter of law under the *Act*, fall within that definition. No record of these alleged "fringe benefits" was ever kept by the employer. At the time the so-called benefits were provided to Seel, no value was placed on them. They were, in every sense that word is commonly understood, "gratuitous". It was only after the complaint was received by SFP that the list was drawn and up and the "fringe benefits" valued. Eugen Seel said in his evidence that the list would never have been created had Seel not filed a claim for overtime pay. SFP has failed to overcome the obvious conclusion that these alleged "fringe benefits" were gratuitous and in many instances were personal favours done by one person for another and were unrelated to any work performed by Seel for SFP.

There is another reason why these "fringe benefits" cannot be treated as wages. As the Tribunal noted in *Clint Heichman operating as Blue Ridge Ranch*, BC EST #D184/97:

> While the definition [of wages] is inclusive, rather than exhaustive, it would be unreasonable to extend the definition to include the value of a *gratuitous benefit* provided by the employer. That conclusion is reinforced by Section 20 of the *Act* which requires all wages to be paid in negotiable Canadian currency. Such an interpretation would also destroy the certainty of the minimum wage provisions of the *Act* and would seriously undermine administration of the annual holiday provision, the length of service provisions and other parts of the *Act* that depend on finding an hourly rate in assessing whether there is compliance or the remedy in the absence of compliance.

The third reason for rejecting SFP's argument is found in Section 4 of the *Act*, which says:

> 4. *The requirements of this Act or regulations are minimum requirements, and any agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*

Mr. Kruge says the *Act* should be interpreted and applied in such a way to allow arrangements to trade overtime pay for other financial benefits, particularly in the context of this case, where a family business and a family employee are involved. It not simply the statutory requirement to pay overtime that is affected by the agreement alleged, but also substantial parts of Sections 27 and 28. Also, I agree with the Director that the *Act* is not a "fluid" document, whose requirements may be tailored to the peculiarities of the business or the employer/employee relationship. The *Act* sets the minimum requirements for all employers and employees in the province, unless those employees are specifically or constitutionally excluded. There is no exemption from all or part of the *Act* for family run businesses employing family members.

The fourth reason for not accepting the argument is contained in Section 21 of the *Act*. That provision reads:

> 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.*
>
> (2) *An employer must not require an employee to pay any part of the employer's business costs except as permitted by this regulations.*
>
> (3) *Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.*

Mr. Kruge argues that Section 21 has no application because no money was ever deducted or withheld from Seel nor does the employer seek to "set-off" the value of the "fringe benefits" against wages payable. He says that, properly characterized, the conclusion sought by SFP would notionally recognize the value of the "fringe benefits", deem that Seel had been compensated an amount equivalent to that value and apply that compensation against Seel's overtime entitlement.

Mr. Kruge relied heavily in his argument on *Gateway West Management Corp.*, BC EST #D356/97. That case does not support his argument. The circumstances of that case are quite different from this one. The central relevant facts are found in the following statement:

> In consideration of managing the two complexes, Ball and Brown were each paid the monthly sum of $850 and were provided with a suite in the Ashbury complex. The value of the accommodation was *fixed* at $450 per month (in fact, the actual "market rent" for the suite may have been higher) and this amount was *added to their pay* ($225 each) *and then deducted at the end of each month.* Thus, both Ball and Brown were paid $1075 per month against which a $225 payroll deduction on account of rent was charged to each of them at the end of the month.
> (emphasis added)

In the *Gateway West* case the individuals knew what the value of the personal benefit would be and had expressly agreed that amount would be included as part of their overall compensation package. The agreed value of the benefit was shown on the individuals' payroll cheques and then identified as a deduction. Also, in the context of the employment relationship, where the individuals were being employed as on-site property managers of a residential complex, the provision of an apartment is an essential aspect of the work done by the employee. That situation was also implicit in *Khalsa Diwan Society*, BC EST #D114/96, another case relied on by SFP and referred to in *Gateway Management*. There was no issue in the case about whether the deduction violated Section 21 of the *Act*, although the adjudicator concedes such a conclusion was "arguable".

That is not the case here, where the "fringe benefits" were never valued at the commencement of, or during, the term of Seel's employment, were never shown as either wages or benefits in any payroll record or on any payroll cheque and were never set up as an authorized deduction from wages. Section 21 prohibits an employer from *directly or indirectly* withholding, deducting or requiring payment of all or part of an employees wages for any purpose. The argument of Mr. Kruge simply asks me to do indirectly what SFP would not be able to do directly. Clearly SFP could not have deducted or directly set-off the alleged value of these "fringe benefits" from Seel's wages. That much is conceded by Mr. Kruge.

The second reason for appeal is that the claim made by Seel lacks credibility. SFP says the employer's records, which were relied on by the Director in reaching a conclusion about the amount of overtime owed, are suspect because they are based on a daily record of hours kept by Seel which, at the time, were not checked for accuracy. SFP says an analysis of those records done more than two years after the fact raises some concerns about the claim. In a submission made to the Director by Mr. Kruge on October 5, 1998, SFP states:

> . . . the time records as submitted are likely incorrect in at least one respect. At page 6, the employee claims overtime for the weeks of December 15-21 and December 29 - January 4th, 1997.
>
> Upon checking its records the employer notes that at this time Mr. Seel was working in the tie mill. This is a machine that is located in the open, and used for the production of railroad ties. There is no general lighting in the area, except for the light on the machine itself. The tie mill runs from 8AM until 5PM due to shortened daylight hours at that time of year. This mill is not run overtime because of the shortened hours. For example, it would not be run after 5PM on December 17th. Yet, the employee has claimed he worked until 7PM (2 hours overtime). Therefore this claim for December overtime should be disallowed.
>
> The employer simply took down whatever hours Mr. Seel told them about without much scrutiny at the time as to their accuracy.

The above assertion is, in effect, an allegation of fraud or theft against Seel. In such a case, SFP would have to establish this allegation on clear and cogent evidence and SFP has not provided any real evidence to support this assertion. There was a suggestion that Seel wrote down all the extra hours during this period as being worked at the tie mill. No evidence was produced to support that suggestion. Specifically, Seel's time sheet for that period was never produced. However, in reply to the suggestion, Seel did say the extra hours worked in December, 1996 and January, 1997 could have been worked in locations other than the tie mill, but he wrote them down on his time sheet against the tie mill as he was told to record his hours that way. He had also made a statement to that effect in a submission to the Tribunal. Mr. Kruge challenged that statement in cross-examination by reference to Seel being told by "Denise" how to record his time, but it was left vague about what he was told by her and when or that whatever he was told was inconsistent with his evidence.

Seel submitted his time sheets to Wanda Seel. She recorded them as an accurate reflection of time worked and paid him based on those hours. If SFP's assertion of dishonesty is correct and Seel claimed he worked 56 ½ extra hours in a 2 week period when he did not, I am surprised this transgression went undetected by the employer, particularly in light of the evidence of Eugen Seel that even though employees do not "punch" their time, the employer generally knows who is there and who is not. When I add to this concern the evidence that it is primarily a small number of family members who work extra hours, I am even more surprised that a bogus claim for extra hours worked would have gone undetected during that period. Even at straight time pay, the extra hours would have amounted to almost $800 wages, which is not an insignificant amount. Eugen Seel said, in respect of Seel's hours, that he reviewed them once and "didn't notice much", but "later" it became apparent that what he says he did was not

correct. In my opinion, it is also telling that although Eugen Seel looked at Seel's record of hours worked at least twice after the complaint was filed, this two week period was the only period where SFP challenged the correctness of those hours.

In the final analysis, the employer's records say Seel worked the extra hours during that period and it was reasonable and fair for the Director to rely on those records to determine the hours worked by Seel. No better record was available. The Director had no reason to disbelieve the employer's record and SFP has provided no reason in this appeal why the Director should not have accepted it. The allegation that the employer's record of hours worked were possibly incorrect is weakened by the failure of SFP to challenge Seel at the time he submitted his time sheet for the period. There is no adequate explanation given for this failure. In his evidence, Eugen Seel, conceding Seel probably worked some extra hours during the period, said only that he failed to see where he got all the hours and if he "chalked them up" by just stopping and talking to someone, he couldn't accept that. Nothing he said met Seel's evidence that he never submitted more hours than he worked.

SFP has not established that the Director was wrong to rely on the correctness of the employer's record of hours worked and this aspect of the appeal also fails.

Finally, SFP says interest should not have been applied to the amount found to be owing because of the Director's delay during the investigation process. A complete answer to this argument is found in the following comment from *Insulpro Industries Ltd. and Insulpro (Hub City) Ltd.*, BC EST #D405/98:

> Insulpro says if any part of the determination is upheld, there should be no interest charged, since any delays were the fault of the Director, not Insulpro. Section 88 of the *Act* contains the provisions relating to payment of interest. Subsection 88(1) of the *Act* is the relevant part of that provision and it states:
>
> *88. (1) If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of*
>
> *(a) the date the employment terminates, and*
>
> *(b) the date a complaint about the wages or other amount is delivered to the director*
>
> *to the date of payment.*

> The requirement to pay interest on wages or other amounts payable to an employee is mandatory. There is no discretion in the Director or in the Tribunal to alter the requirement nor is there any statutory provision that would allow this requirement to be waived or adjusted for reasons of delay.
> (pages 19-20)

For the above reasons, the appeal is dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated January 26, 1999 be confirmed, together with whatever interest has accrued since the date of issuance pursuant to Section 88 of the *Act*.

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**David Stevenson**
**Adjudicator**
**Employment Standards Tribunal**