

An appeal

- by -

Double L Services Ltd.
("Double L")

- 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: Carol L. Roberts

FILE No.: 2003A/196

DATE OF DECISION: August 27, 2003

DECISION

This decision is based on written submissions by Ann Lopeter on behalf of Double L Services Ltd., Tami Wilson on behalf of the Director of Employment Standards, and Patrick Sturgeon.

OVERVIEW

This is an appeal by Double L Services Ltd. (“Double L”) of a Determination of a delegate of the Director of Employment Standards issued May 30, 2003. The delegate concluded that Double L contravened the Act in failing to pay Patrick Sturgeon overtime wages, and annual vacation and statutory holiday pay. The Director ordered that Double L pay Mr. Sturgeon \$3,369.05 in outstanding wages and interest.

Double L seeks to have the Determination cancelled on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. It also alleges that evidence has become available that was not available at the time the Determination was being made.

ISSUES TO BE DECIDED

Whether the delegate

1. erred in law; and
2. failed to observe the principles of natural justice

Also at issue is whether Double L has established that there is new and relevant evidence that was not available at the time the delegate made the Determination.

FACTS

Mr. Sturgeon worked as a truck driver for Double L, a trucking company, from May 17, 2002 until September 30, 2002. He filed a complaint against Double L alleging that he had not been paid overtime wages, statutory holiday and vacation pay. He provided the delegate with a record of hours he had personally maintained.

Double L provided Mr. Sturgeon’s payroll records and daily record of hours to the delegate, and contended that all wages had been paid in full on each payroll cheque. It asserted that the hourly rate of pay of \$17.00 per hour included overtime, statutory holiday pay and annual vacation pay, in order to assist employees to complete Employment Insurance claims. It contended that Mr. Sturgeon agreed to this rate on several separate occasions.

Double L alleged that Mr. Sturgeon did not work the hours he claimed he did. They advised the delegate that he approached the company to perform additional work. It claims that Mr. Sturgeon was told that this job was different than his truck driving job, and would be paid at a different rate. Double L also alleged that Mr. Sturgeon was to submit his extra maintenance hours prior to payday, and that he “padded” his hours. However, it acknowledged that it paid Mr. Sturgeon for the hours he claimed he worked. Double L advised the delegate that it banked Mr. Sturgeon’s hours at a rate that included overtime.

Double L submitted that Mr. Sturgeon was told that he would be paid ½ hour each day for travel time at a rate of \$8.50 per hour, and that Mr. Sturgeon had been paid in full for this time.

Mr. Sturgeon denied that he was told that his travel time or time spent at other work would be paid at a different rate. His records indicated that he was paid 80 hours each pay period at a rate of \$17.00 per hour. Mr. Sturgeon understood that all his additional hours were being banked.

The delegate met with Double L representatives on March 12, 2003 to investigate the claim, and conduct an audit of Double L's accounts. The delegate determined that Mr. Sturgeon worked overtime hours, and provided Double L with a summary of the overtime calculations for its response.

The delegate noted the provisions of section 4 of the Act, and concluded that the parties did not have an agreement that Mr. Sturgeon's hourly rate of pay was to include overtime, statutory holiday and vacation pay. The delegate also noted that the parties had no written agreement regarding a time bank.

The delegate noted that section 4 of the Act did not permit the parties to waive the minimum rights contained in the Act. She reviewed the provisions of s. 40 that entitled all employees to be paid overtime, and s. 42 that required time banks to be established by written agreement. She also set out and considered the provisions of s. 28 that require an employer to maintain specific records, including dates and amounts paid by the employer for statutory holidays, vacation and overtime pay. She further noted the provisions of s. 45 requiring payment of statutory holidays in each pay period, and s. 58 that requires a written agreement to pay vacation pay on each pay period.

The delegate found that Double L's pay records did not identify amounts paid for vacation pay, statutory holiday pay or overtime, and that they did not identify the total hours worked in each pay period.

The delegate concluded that Double L's records did not comply with section 27 and 28 of the Act, and that Double L had not complied with section 58. She further concluded that Mr. Sturgeon worked overtime hours, and that he had not been paid for those hours.

The delegate reviewed and compared the records of hours worked. She noted the discrepancies in Mr. Sturgeon's personal records, and preferred those of Double L, since she concluded that they had been recorded on a contemporaneous basis, while Mr. Sturgeon's had not. She determined that they were the best records available, and used those records to calculate Mr. Sturgeon's overtime wages, statutory holiday pay and vacation pay.

ARGUMENT

Double L contends that the delegate erred in law by concluding that the minimum statutory requirements were waived. It says that they were not.

Double L says that it is a seasonal business, like farming, and that it had a policy of including vacation pay in each paycheck. It contends that, by not treating Double L like a farming operation in this respect, both it and the employee's rights under section 15 Charter of Rights and Freedoms had been violated. Further, it argues, that the rate of pay exceeded the minimum requirements.

Double L asserts that "the calculation for Statutory holiday pay almost requires a Brain Surgeon to complete and discriminates against the Casual, seasonal worker...." Again, Double L contends that it

should be treated like a farming operation, and that the delegate's failure to do so constituted a contravention of its section 15 Charter rights.

Double L contends that, while Mr. Sturgeon may have worked overtime, the overtime work he performed was as an unskilled labourer, not a truck driver. It asserts that he was paid overtime at his lower rate of pay, and that the minimum requirements of the Act were not waived.

Double L further contends that the delegate failed to apply section 2 of the Act in deciding the complaint, and further, by investigating a complaint that it says was not made in good faith. Double L argues that Mr. Sturgeon threatened to go to "Labour Relations" if Double L did not "back his fraudulent WCB claim".

With respect to the second ground, Double L contends that the delegate failed to observe the principles of natural justice in making the Determination by preferring Mr. Sturgeon's word to that of Double L. It contends that Mr. Sturgeon's overtime was banked at his request, and that it "deserves a chance to be heard".

Finally, Double L contends that evidence has become available that was not available at the time the Determination was being made. Double L referred to a Worker's Compensation decision in which Mr. Sturgeon claimed to be making \$17.00 per hour, while with the Employment Standards Branch he claimed to be making \$25.50 or \$34.00 per hour. It also notes that Mr. Sturgeon claimed that one of the principals of Double L did not want him to file a WCB claim.

The delegate submitted the record, consisting of documents considered in making the Determination.

Mr. Sturgeon submitted that Double L's comparison of truck drivers with farmers was inappropriate, that he worked the extra hours he claimed he was, and that he was not paid fairly for those hours. He also contends that he was never advised that his hourly rate of pay included vacation and statutory holiday pay.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- a) the director erred in law
- b) the director failed to observe the principles of natural justice in making the determination; or
- c) evidence has become available that was not available at the time the determination was being made

The burden is on Double L to demonstrate that there has been a breach of natural justice, or that new and relevant evidence that was not available at the time of the Determination has become available, and should be considered. I am unable to find that Double L has discharged that burden.

Error of law

In my view, the delegate properly analyzed and applied sections 27, 28, 35, 40, 45 and 58 of the Act. Although Double L refers to policies that, in its view, assist its workers, the evidence is that Double L's payroll records and method of payment was in breach of these minimum provisions of the Act.

The evidence is that Double L did not prepare provide wage statements that complied with sections 27 and 28, and did not have Mr. Sturgeon's written agreement to maintain a time bank. Those are requirements of the Act. Double L may assert that it had Mr. Sturgeon's verbal agreement, which Mr. Sturgeon disputes, but, if true, such an agreement violates the minimum requirements of the Act. The delegate's duty is to apply the Act. Charter arguments are properly made in another forum.

The evidence is that Mr. Sturgeon's vacation pay and statutory holiday pay was not paid in accordance with sections 45 and 58 of the Act. While Double L may have had a policy to pay its workers differently, such a policy is in violation of the Act.

I find no basis to conclude that the delegate erred in law.

Failure to observe principles of natural justice

Principles of natural justice are essentially procedural rights that ensure that parties have a right to be heard by an independent decision maker.

The evidence is that the delegate advised Double L of the complaint and invited its response. After conducting an investigation, the delegate provided Double L with a preliminary determination that Double L was invited to respond to. There is no evidence Double L was not given an opportunity to respond fully to Mr. Sturgeon's allegations.

While the delegate may have preferred some of Mr. Sturgeon's evidence to that of Double L, the reasons she did so are set out in the Determination. Preferring of one version of events over another does not constitute a breach of natural justice.

New Evidence

Double L also claims that there is evidence available that was not available at the time the Determination was made. That evidence consists of Mr. Sturgeon's WCB claim dated October 16, 2002. The WCB decision was issued October 17, 2003.

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

The delegate met Mrs. Lopeter on March 12, 2003 regarding Mr. Sturgeon's complaint. The WCB document was created October, 2002. I am unable to find that the evidence is new or that it was unavailable at the time the Determination was issued. However, I am unable to discern the relevance of Mr. Sturgeon's WCB claim to the Determination in any event. The delegate examined Double L's payroll records which contained Mr. Sturgeon's wage rate. What Mr. Sturgeon may have claimed he was being paid is not evidence that could have led the delegate to a different conclusion.

The appeal is denied.

ORDER

I Order, pursuant to Section of the Act, that the determination, dated May 30, 2003, be confirmed in the total amount of \$3,369.05, together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal