Employment Standards TRIBUNAL

An appeal

- by -

Lawrence Taylor operating as L & L Trucking
("L & L" or "employer")

- 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: Paul E. Love

FILE No.: 2001/196

DATE OF DECISION: May 24, 2001

DATE OF DECISION: June 11, 2001

DECISION

OVERVIEW

This is an appeal by the employer, Lawrence Taylor operating as L & L Trucking ("L & L "or "employer"), of a Determination dated February 12, 2001 (the "Determination"), issued by a Delegate of the Director of Employment Standards (the "Delegate") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the *"Act"*), concerning payment of wages to Gordon C. McDougall. The Delegate relied on the records of the employee, as the employer failed to keep adequate records, and submitted two different documents outlining the hours worked by the employee. Further, the employer failed to answer critical questions posed by the Delegate and supply information to the Delegate which could have had a bearing on the investigation of the hours worked. Further, the evidence given by the employer at the hearing concerning starting hours could not be reconciled with the evidence given by his witness. Credibility was an important factor in the Delegate's Determination, and in this Decision. The employer failed to show any error in the Determination.

ISSUE TO BE DECIDED

Did the Delegate err in the findings concerned the hours of work and overtime hours worked by Gordon C. McDougall?

Did the Delegate err in the findings concerning travel time?

FACTS

Gordon C. McDougall (the "employee") worked for Lawrence Taylor operating as L & L Trucking ("L & L "or "employer") as a log loader between June 14, to July 14, 2000 near Hazleton, British Columbia. The employer operates a stump to dump logging operation. For the time period in issue, the employer was engaged in sub-contracting to another timber harvester. The logs were yarded out to the road by another operator. This particular job required the employer to have the logs bucked, loaded, and delivered to the mill by truck. McDougall was paid $2,898.00 in wages, and was paid at a rate of $22.00 per hour. At the hearing, the dispute was concerning hours of work, and travel time.

During the course of the investigation, the Delegate made some attempt to settle the employee's claim, however, the employer was not inclined to settle the claim, as the employer believed that the employee was fully paid for work. The employer characterized the Delegate's actions as an order that the employer pay monies to the employee, however, I find this to be an exaggeration of the actions of the Delegate.

On August 11, 2000, Mr. McDougall filed a complaint with the Employment Standards Branch concerning unpaid wages, consisting of regular wages and overtime. The wages were paid by the employer on August 28, 2000, after McDougall signed an acknowledgement that he was paid in full for 134 hours at a rate of $22.00 per hour. At no time did the employer pay any vacation pay as required by s. 58 of the *Act*.

I note that "infused" with this appeal, is an allegation that the employee did not perform at the loading rate which the employer expected. There is also some suggestion that the employer did not reach that level of anticipated profit from this job.

> The total payment for this job that Mr. McDougall did was $10,000. If he was paid the $1927.44 in addition to the monies he has already been paid, it would be $4,919.44. This doesn't include pay for the buckerman, the machine or myself.

These are factors, not directly relevant to the entitlement of the employee to be paid wages, which cause me some concern when I evaluate the evidence given by the employer at the hearing, as it is a "motive" for this employer to minimize the entitlement of Mr. McDougall.

During the course of the investigation the Delegate interviewed another employee Phil Trombley, the "buckerman" who worked with Mr. McDougall. Mr. Trombley explained that he was at this hearing because of the allegations made by McDougall, and noted by the Delegate, that he was "sleeping on the job". I note that the employee did not make any improper allegations but rather submitted that Trombley came out earlier than he was required to come out to the job site, and slept until he started work. Trombley noted that at the time of the investigation, he was reluctant to speak to the Delegate as he wished to preserve connections to McDougall, and his present employer. He hopes to continue an employment relationship with this employer in the future. The Delegate noted in the Determination that "The impression he left was that he was uncomfortable at being involved in the investigation."It was apparent to me that Mr. Trombley was not a neutral witness, and had an axe to grind with the Delegate, and McDougall. Given that Mr. Trombley has "an axe to grind" with regard to Determination, I treat his evidence with a higher degree of scrutiny than I would otherwise give to evidence of a third party to a dispute.

I do accept the following evidence given by Mr. Trombley. Mr. Trombley was required to start at 6:00 am. He indicated that there were two days, when the employee was at the worksite before him. He indicated that there may have been a couple more days when the employee started earlier. Mr. Trombley indicated that travel time to the Laura Creek area was ½ hour from South Hazleton and 1 hour to the "Helen". Mr. McDougall did not challenge the evidence on travel time. Mr. Trombley indicated that the distance between his home and McDougall's home was about 20 km. I find that this would have added about 15 minutes to McDougall's work day for each portion of the trip. On most working days, McDougall would have travelled 45 minutes in each direction to the job site. On the date(s) worked on the "Helen" job, McDougall would have

travelled an hour and 15 minutes in each direction. I note that the Delegate found that Trombley confirmed a 4:00 am start time for McDougall on at least two occasions.

The Delegate reviewed time sheets, and a calendar prepared by the employee, and noted that the time sheets submitted by the employer, to the Delegate did not contain a week, which was noted on the employee's calendar. The Delegate found on the basis of a calendar submitted by the employee that the employee worked 192 hours. The Delegate determined that McDougall was paid for 134 hours at straight time. The Delegate noted that there was an individual time sheet missing for one week (June 19 - 23, 2000). I am not able to decide on the material before me if McDougall failed to record his time, or whether the employer has mislaid that time sheet.

The employer did not keep records for the employee's daily hours of work, and claimed that it was the employee's responsibility to keep the records. The employer supplied the employee with a booklet to record his time. The employer worked with the crew in the bush, and did not travel with the employees. The employer says that most of the time he was at the job site before the employees arrived and remained after the employees left. I note that the employer's evidence cannot be reconciled with the evidence given by Mr. Trombley which indicates that on at least two occasions McDougall came early to the job site, nor can it can be reconciled with the evidence of McDougall. I prefer the evidence of Mr. McDougall, as it is confirmed, in part by the evidence of Trombley, with regard to early starting hours.

There is a strong suggestion by the employer that Trombley and McDougall worked the same hours because they travelled to and from work together. I, however, do not find this to be the case. While the loaderman, buckerman and driver work together to deliver logs to the mill, it does not follow that the hours of work are the same for each employee. There is some suggestion in the written materials before me that Trombley did not work the same hours as McDougall. McDougall says that once the skidding machine stopped working, there was nothing for the buckerman to do. McDougall said that he would start before Phil Trombley, the buckerman, because there was wood bucked up and reading for loading from the day before. He said that Trombley would not commence working until it was light out. There is some evidence that McDougall worked in the early morning hours when it was too dark for bucking. McDougall indicated that he worked hours similar to Mr. Trombley up until July 6, 2000.

On November 9, 2000, the Delegate wrote to the employer, noting the evidence obtained from Mr. McDougall, and asking for a response from the employer. It appears that the employer did not respond to the information requests. In particular the Delegate noted:

- hours of work included travel time
- he picked up Trombley and drove him to work at the employer's request
- the complainant started work earlier than Trombley because Trombley had to wait until it was light

- Trombley was paid a day rate rather than an hourly rate, which made a difference to the hours he claimed;
- the complainant would start work at 4 am. when he was loading because the buckerman had bucked logs the day before. These were ready for loading when he got work
- the employer left instructions for the trucks to start loading at 4 am
- you would know his hours because you were there when the complainant and buckerman arrived at work and when they quit for the day
- the load tickets would show when the first truck was loaded in the morning. This would show the days on which he started early.

McDougall indicated that the times of loading could be found on the delivery slips. The employer did not produce these slips to the Delegate, and at the hearing explained that he could not produce them because the slips were not his property. I note that the Delegate anticipated this problem in his letter of November 9, 2000 and asked for a consent to obtain the information, however, the employer did not provide a consent to the Delegate. The load slips may have been some assistance in determining Mr. McDougall's hours of work.

In the absence of complete and accurate employer records, the Delegate accepted the complainant's documents and submissions and found that the employee worked 193 hours. Further, the Delegate found that the wage statement submitted by the employer to the Delegate was misleading and inaccurate. The Delegate requested from the employer and obtained a wage statement from the employer that he had paid McDougall $2,989.80 for 120 hour and straight time and 10.6 hours of overtime. The "acknowledgment document" signed by McDougall, and prepared by the employer was that McDougall had worked 134 hours at $22.00 per hour.

The Delegate found that the employer paid wages in the amount of $2,992.50, and that the employee was entitled to the sum of $1,927.44 calculated as follows:

156 hours @ $22.00	$3,432.00
37 hours @ 1.5 x $22.00	$1,221.00
Total	$4,653.00
Vacation pay @ 4 %	$186.12
	$4,839.12
Wages paid	$2,992.50
Outstanding wages	$1,846.62
Interest	$80.82
Determination amount	$1,927.44

There were many dates on which the employee worked in excess of 8 hours per day. This should be contrasted with the "acknowledgement" prepared by the employer which does not reference any overtime hours.

Employer's Argument:

The employer argued that the employee had changed his story on the hours worked, and particularly the start time, so many times. In particular the employer argues that the employee had variations in the starting time from 3:30 to 5:30 am. The employer argued that he did not pay for travel time, that he told the employees of this, and the amount of travel time was ½ hour from his house to the worksite. He argues that 1.5 hours for travel time as alleged by the employee is incorrect. The employer says that he has never paid travel time unless the job was 45 minutes out of town. The employer says that the crew would leave Hazleton at 5:30 am. for a 6:00 am. start.

The employer said that he was at the job site supervising, unless he went into town. The employer also points out that the Forsythe Job and the "Helen" job were not as long as claimed by the employee. The employer says that he has paid fully all monies outstanding to the employee.

McDougall drove the crummy, and there is an allegation that he used the crummy during non-working hours. There is, however, no proof of that allegation. The unchallenged evidence of Mr. McDougall was that the employer asked him to drive the crummy to and from the workplace.

ANALYSIS

The burden rests with the appellant, in this case the employer, to establish an error in the Determination such that I should vary or cancel the Determination.

Mr. Taylor also commented that there was time that the mills were shut down, yet he kept his men working, on the basis that they would wait for payment until he got payment for delivery of the logs. While it is laudable for an employer to consider creative methods of keeping employees working during periods of economic slow down, this general approach does not help me in looking at the particulars of this wage claim. Generally, wages are due when they are due, and an employer cannot expect the employees to forbear on their wage claims. Employees are not obliged to "finance" the employer's receivables by forbearing on wage claims which are otherwise due and owing.

I note that an employer is obliged to pay wages within 48 hours after the date of termination. Mr. Taylor did not do this, and before he would pay the wages to Mr. McDougall, he required Mr. McDougall to sign an acknowledgement of full payment of wages. The wages were not

paid until August 28th, after the signing of the acknowledgement. This is a substantial delay in the payment of wages which violates the *Act*.

Hours of Work:

I note that the Delegate has a discretion whether to proceed with an investigation in the light of an alleged settlement(see s. 76(2)(g) of the *Act).* The delegate concluded that this settlement was contrary to s. 4 of the *Act*, and therefore decided to proceed with an investigation. This Tribunal will not interfere with the discretion of the Delegate, unless that discretion is exercised unreasonably. In any event, in my view, the Delegate found correctly, that the "agreement" was of no force and effect.

It is difficult for an employer to demonstrate an error in the Determination where the employer fails to keep proper records, and fails to respond to requests from the Delegate for information. The function of the Tribunal is to hear and determine whether the Delegate erred in a way that would have effected the outcome of a Determination. I note that the duty rests with the employer to keep track of the hours worked by an employee. Section 28 of the *Act*, requires that the employer must keep accurate payroll records, and particularly s. 28(1)(d) which obliges the employer to keep records of the hours worked by an employee. I note that the employer's evidence concerning starting times, always at 6:00 am, is contradicted by the evidence of Mr. Trombley and Mr. McDougall, and this is troublesome to me. On Mr. Trombley's evidence there appears to be at least 4 occasions when the employee had an early start. It is apparent from the evidence before me that there was some variation in the startup time. In my view, the employer was not candid in his evidence with regard to the starting times of Mr. McDougall.

I note, further that the "acknowledgement" misrepresents the true situation concerning the overtime, which is only apparent after examining the time cards and the employee's calendar.

Given the employer's failure to keep proper records, the load slips may have been of assistance, and some objective evidence of the times involved, however, the employer did not consent to the Delegate having access to this information. While the employer alleges that the Delegate could have better investigated this matter, it is clear that the employer did not provide information or access to information that the Delegate needed to make the Determination. . A Delegate is required to extend to the employer a reasonable opportunity to participate in an investigation (s. 77). The Determination was made on the evidence available to the Delegate. In my view, the Delegate sorted out the evidence, as best he could, and determined that there was wages owing to Mr. McDougall I am not inclined to interfere with the Determination made regarding the hours of work, including overtime entitlements.

Travel Time:

While the employer says that he does not pay for travel time, and makes this clear to employees at the start of the employment relationship, it is also clear that the employer requested Mr.

McDougall to drive the crummy. Ordinarily employees who commute to work are not paid by the employer for the commute because it is not work: *Norton, BCEST #D406/98*. Here the employer assigned the duty to McDougall to pickup another employee, and to fuel the vehicle, and drive the vehicle to an out of town job site. While the job site was proximate to the town, there was no evidence before me of whether there was any practical alternative to transportation provided by the employer. In the circumstances of this case, the Delegate did not err in including travel time within the Determination. The request of the employer to drive the truck, coupled with the obligation to pickup other employees, and fuel the vehicle, makes the drive to the remote jobsite "work", within the meaning of the *Act*, for Mr. McDougall. The driving time to work is included properly within the employee's wage entitlement, in the circumstances of this case.

While the employer calculates the travel time on a different basis than calculated by the employee, the employer's calculation of time, also differs from how Trombley calculated the time. It is not apparent to me, how, the travel time calculation would have effected the Determination. I am not inclined to refer this back to the Delegate on the travel time issue for an adjustment, because it is not apparent that any adjustment needs to be made, based on the evidence before me.

For all the above reasons, I am not persuaded by the employer that the Delegate made any error in the Determination.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated February 12, 2001 is confirmed, with interest in accordance with s. 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal