

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Wud'at Development Corporation operating as
Fort Babine Silviculture Ventures
("Fort Babine")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator:	Hans Suhr
File No.:	96/459
Date of Hearing:	October 31, 1996
Date of Decision:	November 5, 1996

DECISION

APPEARENCES

For the Appellant	Victor Williams Ron Abraham Sonny West
For the Complainants	Philip Tait Michael LeCouffe
For the Director	John Dafoe

OVERVIEW

This is an appeal by Wud'at Development Corporation operating as Fort Babine Silviculture ("Fort Babine") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination No. CDET 003323 issued by a delegate of the Director on July 16, 1996. In this appeal Fort Babine claims that the Director's delegate incorrectly determined that wages were owed to Philip Tait ("Tait") and Michael LeCouffe ("LeCouffe").

Written submissions were received from Fort Babine and information was provided by the Director. Subsequently, an oral hearing was held on October 31, 1996 at Smithers, B.C.

ISSUE TO BE DECIDED

The issues to be decided in this appeal are:

1. What was the appropriate rate of pay for Tait and LeCouffe for the spacing work performed on Unit "C" at 44 km Nakitwa ?
2. Was LeCouffe paid all wages earned for the work performed on the HFP project ?
3. Did Fort Babine withhold wages from LeCouffe contrary to section 21 of the *Act*. ?

FACTS

I heard testimony from four witnesses, Victor Williams (“Williams”) Economic Development Officer, Lake Babine Nation and Ron Abraham (“Abraham”) on behalf of Fort Babine, and, Tait and LeCouffe on their own behalf.

The work for which payment is in dispute was performed in October 1995 at a location identified as Unit “C” at 44 km Nakitwa and both Tait and LeCouffe were each paid for 2.3 hectares (“ha.”) spaced at a rate of \$300.00 per ha. In addition to the above, LeCouffe is also claiming wages are owed for work performed on a project contracted to Fort Babine by Houston Forest Products (“HFP”)

With respect to the work performed at 44 km Nakitwa, Williams testified that Tait and LeCouffe were supposed to perform work on Unit “B” a 30.4 ha. block and instead performed work on Unit “C”, a 6.9 ha. block which had been spaced the previous year with 5.5 ha. being completed at that time. Williams stated that Tait and LeCouffe would only have worked for a total of 4 hours on Unit “C”. Williams further stated that he just wanted to be a “nice guy” and that is why he paid Tait and LeCouffe for the entire 6.9 ha. instead of only the 1.4 ha. left from the previous year. Williams also stated that while the rate to be paid for spacing Unit “B” was \$400.00 per ha., he directed that Tait and LeCouffe only be paid \$300.00 per ha. for Unit “C” as it had been mostly completed the previous year. On cross examination, Williams conceded that Barendregt had been paid \$400.00 per ha. for the work on Unit “C” but insists that the extra \$100.00 per ha. was payment for acting as supervisor on the project.

With respect to the HFP project, Williams stated that the project manager, Richard Barendregt (“Barendregt”) had advised him that LeCouffe only performed work on 2 days,. 1 day for viewing the block and 1 day of snag falling. Williams further stated that Barendregt advised him that LeCouffe had taken a 45 gallon drum of fuel when he left the work location. Williams also stated that Ron Abraham (“Abraham”) was also aware that LeCouffe had only been engaged in falling snags for one day. Williams also stated that he had been unable to contact Barendregt to appear at this hearing as he, Barendregt, was currently working way out at some mine in the north. Williams also stated that HFP would not pay any extra for snag falling in this contract. Williams finally stated that as LeCouffe had taken the fuel which HFP charged Fort Babine for, the amount of \$200.00 was deducted from LeCouffe’s pay.

Abraham testified that he had also been employed at the HFP project and, in his opinion, judging by the number of snags still standing on the block, that LeCouffe did not fall snags for any more than 1 day. On cross examination, Abraham conceded that he was not employed on the project at the same time as LeCouffe, as he arrived at the worksite around November 15, 1995 and LeCouffe was no longer there at that time. Abraham states he also received information from Barendregt that LeCouffe had only fallen snags on 1 day the previous week.

Tait testified that he and LeCouffe were instructed by the project manager Barendregt to work on Unit "C" at 44km Nakitwa as there already was a crew working on Unit "B". Tait states that Barendregt informed him and LeCouffe that the rate for spacing on Unit "C" was to be \$400.00 per ha. He further states that he worked a total of 2 days on Unit "C", approximately 10 hours in total, and that he, LeCouffe and Barendregt who were all working together, went over the entire 6.9 ha. of the block.

LeCouffe testified that he and Tait were told by Barendregt, the project manager, to do the spacing on Unit "C" at 44 km Nakitwa as there was already a crew working on Unit "B". LeCouffe states that Barendregt advised him and Tait that the rate for the spacing on Unit "C" would be \$400.00 per ha. LeCouffe further states that he and Tait worked for about 10 hours over 2 days on Unit "C" and that the entire 6.9 ha. was treated.

With respect to the HFP project, LeCouffe testified that he spent 1 day engaged in viewing the block, 1 day engaged in ribboning, 4 days engaged in snag falling and part of 1 day engaged in spacing during which he would have spaced 1/4 ha. LeCouffe further stated that as he was required to use his own vehicle because it was equipped with a VHS radio, Barendregt gave him permission to fuel up his truck from the 45 gallon drum kept on site. LeCouffe also stated that he had a verbal agreement with Williams that gas would be supplied.

The delegate of the Director drew my attention to the following payroll records and other documents obtained during the course of his investigation. Specifically he referred to :

a) Document entitled **"Unit "C" Pay schedule for Juvenile Spaceing at 44 km Nakitwa"**

It was conceded by Williams that the top portion of this document was prepared by Barendregt who was the project manager at the 44 km Nakitwa location and further that the handwriting on the bottom portion is Williams' notation to the payroll department.

This document clearly indicates that Tait and LeCouffe, along with Barendregt, completed the 6.9 ha. of Unit "C" on October 24, 1995 and it was to be paid at \$400.00 per ha. as the work was rated 100%. In addition to the pay for the spacing work, this document indicates that Barendregt was to receive \$70.00 per day for 4 foreman days.

b) Document entitled **"Fort Babine Work Summary for FRBC Morrison"**

Williams evidence was that this document was provided by HFP, however he is not sure exactly who at HFP would have prepared it. Williams further stated that he does not agree with all of the information contained in it.

This document clearly indicates that LeCouffe worked as follows:

October 27	- Mike (LeCouffe)	-viewing
October 31	- Mike	-crew worked on safety trail
November 1	- as above (Mike)	-crew worked on safety trail
November 2	- Mike	-Mike sat around camp ... snag fallers didn't want to work as they had no rate
November 3	- Mike	-Mike / Phil worked 3 hours then left for town at 1 p.m.
November 6	- Mike	-crew worked 6 hours
November 7	- as above (Mike)	-crew worked 6 hours
November 8	- as above (Mike)	-crew worked 3 hours as they didn't want to work in the snow.
November 9	- as above (Mike)	-crew didn't work as they didn't want to work in the snow and left for town at noon.

c) Pay statement for period ending December 1995

This statement indicates that the net amount to be paid was \$293.27, however the cheque issued for this period was in the amount of \$243.27 leaving a balance of \$50.00 owing.

ANALYSIS

A central issue in deciding this appeal is the credibility of the evidence provided by all the parties. In assessing credibility, a number of factors are to be considered. These include:

- the demeanour of the witness
- opportunities for knowledge
- powers of observation
- judgment and memory
- ability to describe clearly what has been said and heard
- the probability of the event happening in the manner suggested

The evidence provided by the witnesses for the appellant was, except for the documents provided, based on information given to those witnesses by the project manager Barendregt, who unfortunately, was not available to give evidence.

The evidence of the payroll document prepared by Barendregt clearly shows that the rate of pay for the spacing work at 44 km Nakitwa was to be \$400.00 per ha. for the 6.9 ha. spaced.

The documentary evidence prepared by HFP also clearly indicates the dates on which LeCouffe performed work on the HFP project.

Based on the above and the other evidence provided, I conclude that the evidence set forth in the payroll records and the HFP summary are more likely to accurately reflect the actual events which transpired. This conclusion should not be construed as a finding that the witnesses were not truthfull, rather, that in the year since the actual events transpired, memories have become somewhat confused merely by the passage of time.

With respect to issue #1, I conclude that the rate of pay for the spacing work performed at the 44 km Nakitwa location was to be \$400.00 per ha.

With respect to issue #2, I conclude that LeCouffe performed work on a total of 7 days while on the HFP project. The work performed consisted of 1 day viewing, 2 -1/2 days of snag falling and 4 full days of snag falling.

With respect to issue #3, I conclude that the deduction by Fort Babine of \$200.00 from LeCouffe's pay for fuel is contrary to section 21 of the *Act*.

Tait is therefore owed wages as follows:

6.9 ha. ÷ 3 = 2.3 @ \$400.00 per ha.	= \$920.00
4% vac pay	= \$ 36.80
total wages earned	= \$956.80
less wages paid	= <u>\$690.00</u>
Wages owing	= \$266.80

LeCouffe is therefore owed wages as follows:

6.9 ha. ÷ 3 = 2.3 @ \$400.00 per ha.	= \$ 920.00
1 days viewing @ \$300.00/day	= \$ 300.00
2 x 1/2 days + 4 full days snag falling @ \$200.00/day	= <u>\$1,000.00</u>
Wages earned	= \$2,220.00
4% vac pay	= <u>\$ 88.80</u>
Total	= \$2,308.80
less wages paid	= <u>\$1,410.00</u>
Wages owing	= \$ 898.80
illegal deduction	= \$ 200.00
error on December pay	= <u>\$ 50.00</u>
Total amount owing	= \$1,148.80

In addition to the wages I have determined to be owing, pursuant to section 88 of the *Act*, interest is to be calculated on the amounts owing.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 00332 be varied as set forth above.

Hans Suhr
Adjudicator
Employment Standards Tribunal

HS:sr