

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 -

Nelson Morrell operating as Nelson's Firewood Sales
("Nelson's")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 98/271

DATE OF H_EARING: June 30, 1998

DATE OF D_ECISION: July 29, 1998

DECISION

APPEARANCES

for the appellant	in person
for the individual	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Nelson Morrell operating as Nelson’s Firewood Sales (“Nelson’s”) of a Determination which was issued on April 8, 1998 by a delegate of the Director of Employment Standards (the “Director”). In the Determination, the Director found that Nelson’s had contravened Section 16 and subsection 18(1) of the *Act* in respect of the employment of Jocelyn Boily (“Boily”) and ordered Nelson’s to cease contravening the *Act* and to pay an amount of \$1449.07.

Nelson’s disputes the Director’s conclusion that Boily is owed any further wages. There are two points in dispute: first, whether Boily, who agreed to a rate of pay based on the number of loads of wood he could buck and split, was fully compensated for the work he performed; and second, even if his rate of pay is calculated by the hour, whether Boily exaggerated the number of hours worked.

ISSUES TO BE DECIDED

There are two issues. Both are found in the above description of the areas of dispute raised by Nelson’s. The first is whether Boily agreed to be paid by the load as is not owed any more wages by Nelson’s and the second is whether the hours claimed by Boily have been exaggerated.

FACTS

Nelson’s is, among other things, in the business of selling firewood. Boily was employed by them on or about September 15, 1997 to buck and split logs of wood into firewood. On hiring, Mr. Morrell, the owner of Nelson’s, offered, and Boily agreed, to perform the required work for an amount of \$60.00 a load. There was ten loads of wood for him to buck and split.

Boily was inexperienced in the work required. He was assisted in obtaining this employment by the Ministry of Human Resources which, because of his circumstances at the time, also helped him obtain a chain saw to perform the work. The work was very difficult and for Boily was made more difficult because of his inexperience with the work and lack of knowledge about how to sharpen and maintain his chain saw. Several times Mr. Morrell had to sharpen it because he was unable to perform that task.

Nelson's claimed Boily was paid at least \$1010.00 for the work he performed and also argued it was entitled to recover \$1060.00 in respect of alleged damage to equipment and loss of property attributed to Boily. The Director properly concluded that recovery for the alleged damage and loss was not allowed under the *Act* and rejected that argument.

ANALYSIS

First, there is nothing in the *Act* that prohibits an employee being paid wages that are based on piecework or the amount of production achieved by the employee. Part of the definition of wages reads:

"wages" includes

- (a) *salaries commissions or 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.*

...

However an employer chooses to pay an employee, the *Act* contains a formula for converting that pay to "regular wages". In the context of piecework or wages based on production, that formula is stated as follows:

"regular wages" means

...

- (b) *if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period.*

For the purposes of the *Act*, the compensation paid or payable to an employee is required to be converted to an hourly rate, regardless of the method of payment. This allows the compensation paid to an employee to be tested against the obligation on an employer to pay the minimum wage prescribed in the Regulations to the *Act*, which in the circumstances of this case is prescribed as an hourly rate.

Nelson's argued that Boily agreed to work for a fixed amount per load not an hourly rate. There is no dispute about that. However, the amount received by Boily for the work performed must be at least minimum wage for the hours worked and, for the purpose of determining that question, the piecework rate must be converted to an hourly rate and tested against the obligation on an employer found in Section 16 of the *Act*, which is to pay at least minimum wage. Except in limited circumstances, which do not apply here, Section 4 prohibits parties contracting out of the minimum requirements of the *Act*

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

The Director committed no error when the piecework rate, or the rate per load, payable to Boily was divided by the total hours of work to reach an hourly rate. That conversion was necessary in order to determine whether the minimum wage obligations of Nelson's had been met.

That part of the appeal is dismissed.

The second part of the appeal challenges the conclusion of the Director about the number of hours worked by Boily during his employment. The Director concluded that Boily had worked a total of 299 hours between September 15, 1997 and October 27, 1997. In reaching that conclusion the Director accepted the representations of Boily in respect of the number of hours he had worked. However, in his evidence Boily said the hours of work given to the Director had been inflated by 10%. He did this because, he said, he felt he was "getting screwed" by Nelson's. He also said he had kept a daily record of the actual hours of work on a calendar in his residence, but it was not made available at the hearing.

In light of this evidence, the Determination cannot stand. The appeal succeeds on the second issue. I find the number of hours of work claimed by Boily have been exaggerated. The Determination is canceled and the matter referred back to the Director. I encourage the Director to seek to examine the calendar when it re-assesses the conclusion about the total hours worked by Boily.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 8, 1998 varied and the matter referred back to the Director.

David Stevenson
Adjudicator
Employment Standards Tribunal