

An appeal

- by -

Selder Bay Contracting Ltd.
(the "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: Mark Thompson

FILE No.: 2001/281

DATE OF DECISION: June 15, 2001

DECISION

OVERVIEW

This is an appeal by Selder Bay Contracting Ltd. (the “Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards on March 15, 2001. The Determination found that Selder Bay Contracting Ltd. had made deductions from the pay of a former employee, Timothy O. Brown (“Brown”) without written authorization, that it had failed to compensate Brown at overtime rates and that Brown had not received vacation pay as required by the *Act*. The Employer appealed the Determination on the grounds that Brown’s daily wage included statutory holiday pay and overtime and that the deductions from Brown’s pay were pursuant to a private agreement to assist him in the purchase of a truck. This decision was based on written submissions from the Employer, Brown and the Director’s delegate.

ISSUE TO BE DECIDED

The issues to be decided in this case are whether Brown was entitled to vacation and overtime pay and whether the Employer was authorized to make certain deductions from his pay.

FACTS

Brown worked for the Employer as a loader operator for four periods between March 1997 and April 17, 2000. He received a daily wage of \$400 when production was below 700 meters and \$450 when production exceeded 400 meters. Brown’s first period of employment ended in December 1997, when he was laid off. He resumed work in April 1998 and was subject to a layoff in July 1998. He began employment again in April 1999 and worked until a layoff in December 1999. His final period of employment began on March 28, 2000 and ended April 17, 2000 when he was laid off.

Brown filed a complaint on October 10, 2000. The Director’s delegate concluded that the only the final period of employment subject to a remedy under the *Act* on the grounds that the complaint was out of time with respect to previous employment. That conclusion was not appealed by either Brown or the Employer.

The Employer deducted two “truck payments” of \$829.55 each from Brown’s wages during the period of employment relevant to this case. The Employer did not produce any written authorization to make the deductions. The Employer stated that it had agreed to obtain a loan so that Brown could purchase a truck in 1997. In turn Brown agreed verbally that the Employer could deduct loan payments from his wages. According to the Employer, it made deductions from Brown’s wages in 1997 through 1999. When Brown came back to work in March 2000, it made two deductions with Brown’s agreement. Brown stated that he had met his obligations for

the loan to purchase the truck during his employment. The Employer filed a number of allegations regarding the condition and disposition of the truck that were not relevant to this decision.

Brown complained that he did not receive overtime pay as required by the *Act*. Neither Brown nor the Employer maintained records of the hours that Brown worked. The Employer did have records of the days on which Brown worked and acknowledged that he worked at least 9 hours per day except on days when he traveled to and from camp. The Director's delegate based his Determination on the Employer's statement of hours that Brown worked.

The Determination found that Brown had not received annual vacation pay as specified in the *Act*. This fact was not in dispute. The Employer maintained that Brown's daily rate included vacation pay.

ANALYSIS

The basic facts in this case were not in dispute, so the decision must rest with interpretations of the *Act*.

The Employer argued that the two deductions from Brown's pay were made pursuant to an unwritten agreement between the two parties to assist Brown in meeting his installment payments for the purchase of a truck. Section 21 (1) of the *Act* states:

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.

Section 22(4) of the *Act* includes a condition under which an employer may make deductions from an employee's wages as follows:

An employer may honour an employee's written assignment of wages to meet a credit obligation.

Accepting the Employer's statement of the facts in this case, it still was not entitled to deduct any sum from Brown's wages without a written assignment. Section 22(4) provided an avenue for the Employer and Brown to arrange for the installment payments to be made in a legal manner. The Employer did not obtain a written assignment from Brown and thus was not entitled to make the two deductions in 2000.

The basis of the Employer's argument with respect to overtime pay and annual vacation pay was that the daily wage Brown received included these two entitlements. Section 40(1) of the *Act* covers overtime payments as follows:

An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38

(a) 1 ½ times the employee's regular wage for the time over 8 hours, and

(b) double the employee's regular wage for any time over 11 hours.

No dispute existed between the parties about Brown's "regular wage," which is defined in Section 1 of the *Act*. Arguably, Brown's regular wage was \$400 per day, and Section 40(1) of the *Act* required the Employer to base overtime payment on that amount. The *Act* does not permit an employer to pay a flat wage that purports to incorporate overtime entitlements. See *Re Master Pool Coatings Inc.* BCEST #D569/98.

The same analysis holds for the annual vacation pay. Section 58 of the *Act* states:

(1) An employer must pay an employee the following amount of vacation pay:

(a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;

The *Act* does not allow the inclusion of vacation pay as part of an hourly or daily rate of pay. *Re Golden Sikh Cultural Society*, BCEST #D357/98.

ORDER

For these reasons, the Determination of March 15, 2001 is confirmed, pursuant to Section 115 of the *Act*. Brown is entitled to the \$4,902.26 as specified in the Determination, plus additional interest under Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal