Employment Standards TRIBUNAL

An appeal

- by -

Foresil Enterprises Ltd.
("Foresil" 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.: 2002/245

DATE OF DECISION: July 18, 2002

DECISION

OVERVIEW

This is an appeal by an employer, Foresil Enterprises Ltd. ("Employer"), from a Determination dated April 14, 2002 (the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). This decision is issued together with Tribunal Decision BC EST # D335/02 (*Foresil Enterprises Ltd.*), involving another employee of Foresil Enterprises Ltd., and similar issues.

The Delegate issued a Determination finding the Employer liable to pay overtime wages at double time, vacation pay, statutory holiday pay, and interest, in the total amount of $1,741.23. The Employer alleged that the Delegate erred in failing to find that a "10 day on and 4 day off" schedule was permitted under the Regulations because Mr. Chalmers was a silviculture worker in a remote camp. It is apparent from the facts that the employees were lodged at a motel in Port McNeill and travelled on a daily basis over roads to work sites. The Employer further alleged that the Delegate erred in failing to allow a "set-off" of lodging charges, against wages, which the Employer elected not to deduct from the Employee's last cheque.

The Employer did not provide a sufficient factual basis in its submission for this Adjudicator to assess whether or not the Delegate erred in determining the words "remote camp", as inapplicable. I note further that the Employer did not show that it was in compliance with the requirements of "written approval" of the "majority of the affected employees", which is a requirement under s. 37.9(b) of the *Regulation* before it can impose a "10 and 4" shift schedule. The "10 and 4 shift schedule" is an exception for silviculture workers, from the Act and Regulations relating to overtime pay, and the Employer must prove that it falls squarely within that section, in order to take advantage of the exception.

With regard to the lodging deduction issue, it is apparent that the Employer elected to charge for one night, and raised the issue of "lodging charges" as a set-off after the Employee filed a complaint under the *Act*. In my view, the statutory wage recovery scheme set out in the *Act*, is not available for use by an Employer to "correct" a decision it had already taken with regard to employee deductions. The jurisdiction of the Delegate is triggered by complaint or by an investigation instituted by the Delegate, concerning a contravention of the *Act*. The dispute resolution process under the Act cannot be triggered by an Employer complaining it had "over paid" an employee. The Employer can use the Courts to correct the "mistake", if in fact, its earlier decision was a mistake.

ISSUE

1. Did the Delegate err in finding that the Employer had not complied with the shift scheduling requirements of s. 37.9(2) of the Regulations?

2. Did the Delegate err in failing to deduct "lodging costs", raised by the Employer as an off-set or set-off against wages, after the Employee filed the Employment Standards complaint?

FACTS

I decided this case after considering the submission of the Employer, Employee and the Delegate. Brian Chalmers was an employee of Foresil Enterprises Ltd. Foresil is engaged in the silviculture business.

After receiving and investigating two complaints from Mr. Chalmers, the Delegate determined that Foresil had not scheduled the work shifts in accordance with the regulations relating to silviculture workers. The Employer had scheduled shifts involving 10 days on and 4 days off, for work on the Northern portion of Vancouver Island. The Delegate considered the issue of whether the work was performed at a camp in a remote setting and determined that the crew was lodged in a motel and drove to work at various locations, on a daily basis. The Delegate determined that the Employees were not working in a remote camp. The Delegate therefore determined that 37.9 (2)(b) of the *Regulation*, did not apply. The Delegate further determined that, if the camp was a "remote camp", the provisions of s. 37.9(2)(b) dealing with the implementation of "10 and 4" shift schedules were not followed by the Employer. The Employer did not establish that it had the written consent of the majority of the affected employees for a "10 and 4" shift schedule.

The Delegate calculated an entitlement to overtime, at double time for the 7 days off that the Employee worked. The Delegate preferred the evidence of the Employer, and calculated the overtime on the basis of a "piece rate" as opposed to an "hourly rate" as alleged by the Employee. The Delegate further found, that the Employer did not attempt to pay any statutory holiday pay.

The Delegate found an entitlement to overtime in the amount of and statutory holiday pay, and interest in the amount of $1,786.23. The Delegate ordered that the Employer cease contravening Part 3, Section 18(2), Part 5 Section 45(a) and (b) of the *Act*, and Part 7, Section 37.9 of the *Regulation*.

The Delegate rejected the Employer's argument that it was entitled to "set-off" an amount of money for motel charges, which the Employer says it could have charged Mr. Chalmers, but it elected not to. On the Employee's last pay cheque, the Employer deducted the sum of $45.00. Since the filing of Mr. Chalmers complaint, the Employer has sought to "set off" the sum of $1,165.89 as additional costs of rooms.

Mr. Chalmers signed a document entitled " Conditions of Employment" dated September 8, 2001. The agreement provided for a piece rate or hourly rate on the job. The agreement also provided for room and board deductions, and provided:

> If an employee terminates employment or is discharged for just cause prior to contact completion than full room and board charges (Company actual costs) will be deducted from pay for every day the employee received room and board.

It is not entirely clear from the Determination how the employment relationship came to an end. The Employer appears to have discharged Mr. Chalmers after an episode of drinking. On the Employee's last pay cheque, the Employer deducted the sum of $45.00 room and board charged to Mr. Chambers, for a day that he spent in accommodations following his discharge. The Delegate allowed the deduction for room and board in the amount of $45.00 deducted, but did not allow further motel bills to be deducted, on the basis that the Company had apparently made a choice not to deduct this money, and should not be permitted to claim an additional amount, after the Employee filed an Employment Standards complaint.

Employer's Argument:

The Employer says that the employees worked in a remote setting, and therefore the Employer was entitled to impose a 10 day on and 4 day off shift schedule, without incurring any liability for overtime pay. The Employer says that the crew was in a remote setting on north Vancouver island, because the crew was based in Victoria and dispatched from Victoria. The Employer says that because of the remote setting it was entitled to operate on a " 10 and 4" system. The Employer says that it was entitled to deduct the sum of $1,165.89 as the cost of rooms, and it now wishes to "exercise this option".

Employee's Argument:

The Employee supports the finding of the Delegate. The Employee further says that the silviculture industry is based upon competitive bidding and if an Employer does not adhere to the *Regulation*, the Employer has an unfair advantage which permits "low bidding".

Delegate's Argument:

The Delegate submits that the matters raised on appeal were contained in the Determination.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer to show that there is an error in the Determination, such that the Determination should be canceled or varied. The Employer has raised two issues in this appeal, which I shall deal with below.

Shift Scheduling Issue:

The first issue in this appeal concerns shift scheduling of workers in the silviculture industry and the application of section 37.9 of the *Employment Standard Regulation*, to the facts of this case. Section 37.9 reads as follows:

> 37.9 (1) Sections 33, 35, 36 (1), 37, 40, 41, and 42(2) of the Act do not apply to a silviculture worker.
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> (2) An employer of a silviculture worker must
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> (a) implement a shift schedule that consists of
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> (i) no more than 5 consecutive days of work followed by a day off, a
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> (ii) within each month a t least 2 consecutive days off or at least 8 non-consecutive days off, or
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> (b) an employer may implement an alternative shift schedule that costs of up to 9 consecutive days of work followed by at least 2 consecutive days off, or no more than 10 consecutive days of work followed by at least 2 consecutive days off, or no more than 10 consecutive days of work followed by a minimum of 4 consecutive days off as long as
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> (i) the work is being done at a remote camp to which there is no ready access,

(ii) written approval has been received from the majority of the affected employees, and

(iii) employees receive at least 8 days off in a month

I note that the Employer has not set out any information concerning the work locations, the methods of access to the work, or the proximity of the job sites to settlements, in its appeal submission. I am not able to assess the Employer's argument that the "work was in a remote camp", without this information. Given that the burden is on the Employer to demonstrate error, the absence of a factual foundation for the argument is fatal to this appeal. The Tribunal has not yet decided any case involving the interpretation of "remote camp" in the context of silviculture workers. In my view, this is not a proper case for me to determine the scope of the words "the work is being done at a remote camp to which there is no ready access", given the inadequacy of the material before me, which does not describe the job site, or details of the access. Nevertheless on the facts of this case, the exception contained in 37.9(b)(ii) of the Regulation does not apply. The job sites appear to have been within a daily commuting distance of Port McNeill. A motel in the town of Port McNeil cannot qualify as a "remote camp" within the context of s. 37.9(2)(b), just because it is some distance from the City of Victoria.

I note further, that the appellant has not demonstrated that it had written consent from the "majority of affected employees" which is required for the "10 and 4" shift schedule in the *Regulation*. While the Employer adduced evidence of an agreement of the Employee to work a variety of shift schedules including a 10 and 4 schedule, it has not brought itself within the ambit of s. 37.9(2)(b)(ii) demonstrating written approval from the majority of the affected employees. The Delegate was correct in the determination of the overtime issue for the above reasons.

For the above reasons, I therefore dismiss this appeal as it concerns the overtime issue.

Lodging Charges:

The Employer alleges that the Delegate erred in failing to offset against the wage claim of the Employee, lodging charges which it could have, but did not, charge the Employee.

Section 37.9(7) of the *Regulation* indicates as follows:

> An employer may charge a silviculture worker a fee for lodging, but may not charge more than
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> (a) $25 per day for camp costs, or
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> (b) if the worker is lodged in a motel, the actual cost for that individual to stay at the motel.

In my view, the *Regulation* and Conditions of Employment signed by the Employee permit recovery by the Employer, through a payroll deduction, of lodging costs for silviculture workers as set out in the Regulation. The Employer, however, elected not to deduct the full costs lodgings, particularly motel charges, from Mr. Chalmers. Having made that election, in my view, it is not open to the Employer to raise this issue in responding to an employee's complaint under the *Act*. The *Act* is not set up as a mechanism to resolve all disputes between Employers and Employees during the course of a work relationship. The scheme in the *Act* is set up to resolve complaints made by an Employee (or investigations initiated by the Director) that an Employer has contravened a provision of the Act or Regulations. The Delegate investigates the complaint of the Employee, or proceeds with the investigation the Director initiates.

The Delegate's jurisdiction with regard to complaints is set out in section 74 and section 76 of the Act:

> 74 (1) An employee, former employee or other person may complain to the director that a person has contravened
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> (a) a requirement of Parts 2 to 8 of this Act, or
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> (b) a requirement of the regulations specified under section 127(2)(l)
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> and
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> 76 (3) Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.

If the Director finds that the *Act* or *Regulation* was violated by the Employer, the Delegate can issue a Determination, which can include amounts due and owing for wages. Here the Employer appears to have elected to deduct certain lodging charges, and elected to forego certain other lodging charges that it could have deducted.

In the absence of a complaint that the *Act* was contravened, the *Act* does not contain any mechanism which permits the Delegate to investigate an Employer's claim or complaint against an Employee that the Employee has received an overpayment of wages. In the course of the investigation, the Director can determine the amount of wages that are owing to the Employee, taking into account relevant matters. The wage recovery scheme set up in the *Act*, is not a mechanism which an Employer can use to correct its "error" in paying an Employee, if in fact it erred. In this case, it is clear that the Employer did not err, but in fact made a conscious choice to forego certain of it contractual and regulatory rights. The Employer's decision to forego its contractual and regulatory rights by not deducting lodging charges, cannot be characterized as a "contravention of the *Act*", nor can it be said to be dispute falling within the purposes section of the *Act* (section 2(d) - "fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*".) If the Employer wishes to raise a claim that it erred in the payments made to the Employee, it may be open to the Employer to proceed in Court, but it is not open to the Delegate to accept an Employer claim as an "offset" or "set-off" against a claim for wages due and owing under the *Act*. The Delegate did not err in failing to allow the Employer's claim for additional lodging charges, claimed by the Employer, after the filing of the Employee's complaint under the *Act*.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated April 14, 2002 is confirmed, with interest calculated in accordance with s. 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal