EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Gulbranson Logging Ltd.
("Gulbranson")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/198

DATE OF HEARING: June 25, 1997

DATE OF DECISION: July 23, 1997

DECISION

APPEARANCES

Howard Ehrlich, Esq.	on behalf of Gulbranson Logging Ltd.
Mel Gulbranson	
Betty Hurtado	
Donald Douglas	all appearing in person
Trevor Howell	
Kelly Jones	
Dennis Landstrom	
Phillip Quock	
Marlon White	

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Gulbranson Logging Ltd. ("Gulbranson") from a Determination of a delegate of the Director of Employment Standards (the "Director") dated March 10, 1997. In the Determination the Director concluded Gulbranson had contravened Section 40 of the *Act* in respect of the employment of six persons: Donald Douglas ("Douglas"), Trevor Howell ("Howell"), Kelly Jones ("Jones"), Dennis Landstrom ("Landstrom"), Phillip Quock ("Quock") and Marlon White ("White"); and ordered Gulbranson to pay to an amount of $87,412.82. Gulbranson says the Determination is wrong to the extent it concludes he contravened Section 40 of the *Act* during a period of time which he identifies as commencing May 16, 1994 and ending July 15, 1995 ("the relevant period"). There is no issue or appeal concerning any part of the Determination relating to Dennis Landstrom or to periods of time outside the relevant period

ISSUES TO BE DECIDED

There are two issues. The first issue is whether Gulbranson contravened Section 40 of the *Act.* The second issue, which arises only in the event I confirm the conclusion Gulbranson contravened Section 40 of the *Act*, is whether the defense of "officially induced error" is available to Gulbranson.

FACTS

In May, 1994 a former employee of Gulbranson, Clayton Koehmstedt, filed a complaint with the Director of Employment Standards. Koehmstedt claimed he had not been paid overtime as required by the *Act.* An Industrial Relations Officer investigated and concluded the claim had merit. He found Gulbranson paid Koehmstedt a fixed hourly rate for all hours worked in a day or week. No overtime premiums were paid on any hours worked. The investigation also showed this practice was generally applicable to all of Gulbranson's operation. The parties agreed to settle the Koehmstedt complaint. In discussions between Mr. Gulbranson and the Officer during the process, Gulbranson was told he was in non-compliance with the *Act* and he would be required to pay the overtime required by the *Act* to its employees. Mr. Gulbranson indicated a concern that he could not afford to pay overtime on the hourly rates he was paying to his employees. He was told he should then consider reviewing the hourly rate and adjusting it downward if he felt the resulting labour costs were too high. Mr. Gulbranson also contends he was advised he could "top up" the wage of employees if applying the overtime provisions of the *Act* to the reduced hourly rate resulted in less wages to the employees than they had received under the "old system".

Following the settlement of the Koehmstedt complaint, Gulbranson adjusted all of the hourly rates for its employees. This adjustment appears to have been made in the first pay period following the date of settlement, May 20, 1994. At the time the adjustment was made three of the individuals, Douglas, Jones and White, were employed. They knew of and agreed to the adjustments. The position of these three individuals about the adjustment was consistent: provided their wage in any wage period worked out to an equivalent of their "old rate" at straight time hours, they were content.

Quock was hired in August, 1994 and Howell was hired in September, 1994. The evidence is conflicting about what each of these individuals was told at the time they were hired and I am not satisfied they agreed to the hourly rate which is shown on their wage statements.

Quock worked for more than a week before he even asked what his rate was. When he asked he was told by Dave Klassen it would be $15.00 an hour. Quock had no discussions concerning his hourly rate with either Mr Gulbranson or with Betty Hurtado, Gulbranson's bookkeeper. During his employment, he received two increases to his hourly rate, first to $16.50 an hour then to $18.00 an hour. He asked Mr. Klassen for those increases. He never agreed to an hourly rate less than what he was told by Mr. Klassen his rate was from time to time.

Similarly, Howell was told at the time of hiring his hourly rate would be $20.00 an hour. He was not told, nor did he ever agree, there would be no overtime paid on that rate. He was only vaguely aware of how the "topping up" worked until he made some calculations on one of his paycheques and was unhappy with the result. He complained to a foreman, Ron Fawcett, and as a result of that complaint had a discussion with Mrs. Hurtado who explained the system to him. He left Gulbranson's employment shortly after that discussion.

ANALYSIS

This case will be decided on a determination of what the regular wage of the individuals was during the relevant period. Section 40 of the *Act* is the applicable overtime provision in the circumstances of this case. Subsections 40(1) and (2) state:

40. (1) 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.

(2) An employer must pay an employee who works over 40 hours in a week 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 40 hours, and

(b) double the employee's regular wage for any time over 48 hours in a week.

The basis for the calculation of overtime is an employee's "regular wage". The concept of "regular wages" is defined in Section 1:

"regular wages" means

(a) if an employee is paid by the hour, the hourly wage,

(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,

(c) if an employee is paid a weekly wage, the weekly wage divided by the lesser of the employee's normal or average weekly hours of work,

> (d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work, and
>
> (e) if an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work.

In this case, the individuals were paid by the hour. Their regular wage will be their hourly wage. The term "hourly wage" is not defined, but can be determined from the definition of "wages" found in Section 1 of the *Act*. Subsections (a) and (g) of the definition are applicable to the circumstances of this case:

> **"wages"** includes
>
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
>
> but does not include
>
> (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency, . . .

I find Gulbranson did contravene the overtime provisions of the *Act* during the relevant period. Specifically, I find Gulbranson failed to pay overtime to the individuals on their "regular wage". However, I do not agree with the delegate of the Director about how the "regular wage" of some of the individuals for the relevant period has been calculated. On this aspect of the appeal and in the particular circumstances of this case, I have a different view of what would be the "regular wage" for Douglas, Jones and White than I have for Howell and Quock.

Douglas, Jones and White

In May, 1994, Douglas, Jones and White agreed to a reduction of their hourly rate. They knew the purpose for which the reduction was being made and acknowledged in their evidence they were content with that reduction in the hourly rate as long as the resulting pay was equivalent to their "old rate" at straight time hours. Thereafter, all of their wage statements confirmed their new hourly rate of pay, showed overtime paid on that rate of pay, showed a "top up" and attached a calculation revealing the gross wage payable to be the equivalent of their "old rate" at straight time hours. In other words, it confirmed the agreement they had made. There is nothing in the *Act* prohibiting an employer and an
employee from agreeing to a reduced hourly rate of pay. That is what took place between Gulbranson and Douglas, Jones and White. If this were all that had occurred, I would set aside entirely that part of the Determination relating to Douglas, Jones and White.

Having said I disagree with the claim of Douglas, Jones and White that I should find their "regular wage" to be their "old hourly rate", I also disagree with Gulbranson that I should find their "regular wage" to be their "new hourly rate". In most pay periods Gulbranson provided the individuals with a "top up". That payment falls squarely within the definition of wages in the *Act* and must be included in the calculation of the "regular wage". Mr Ehrlich argued I should view the "top up" as being in the nature of a gratuitous bonus, which would not be included in the definition of wages. The "top up" was never contemplated to be, and never was, a discretionary payment by Gulbranson. It was related directly to the work performed by the individuals and was paid as such.

The result is that in each pay period the "top up", described on the wage statements as a "P/M bonus", should be converted to an hourly rate (by dividing the number of total hours worked in the pay period into the P/M bonus) and the resulting hourly rate added to the base hourly rate shown on the wage statements. That hourly rate will be the "regular wage" upon which the required overtime calculations are based.

Howell and Quock

When Howell and Quock were hired, they were told what their hourly rate of pay would be. In fact, in the case of Quock he was not told his rate of pay for at least one week after he was first employed. Quock received two rate increases while he was employed. I find neither of these two individuals ever agreed to a reduction of the hourly rate they were told they would be paid. They were caught by the scheme agreed to by the other individuals but had no direct participation in it. Their "regular wage" is the hourly rate Gulbranson agreed to pay them during their employment. Mr. Ehrlich says I should infer an agreement to the lesser hourly rate because the wage statements given to the individuals in each pay period shows the hourly rate for, $15.00 an hour for Howell and $12.00 an hour for Quock. He argues if they disagreed with that rate they could have and should have brought that to the employer.

The argument does not account for some of the evidence of Howell and Quock. Howell said that he never fully understood the wage statement and in any event had an assurance that his hourly rate would be no less than $20.00 an hour. Quock testified he was told his hourly rate would be $15.00 an hour to start and that he had his starting rate adjusted upward on two occasions, first to $16.50 an hour and then to 18.00 an hour, during his term of employment. Mr. Klassen gave evidence on behalf of Gulbranson and did not deny he had done that. In those circumstances there is no reason why either Howell or Quock should have raised an issue regarding the rate shown on the wage statement. They were entitled to rely on the representations made to them by the company about what their hourly rate would be.

I confirm the Determination as it applies to Howell and Quock.

Mr. Ehrlich argued that if I should conclude Gulbranson contravened Section 40 of the *Act*, I should consider the issue of whether the defense of "officially induced error" is available to Gulbranson. The sense of the doctrine of "officially induced error" is if an accused is led to believe by the erroneous advice of an official responsible for the administration or enforcement of a particular regulatory statute that he was not acting illegally, the defense of "officially induced error" is available to a charge of violation of the statute provided the accused has reasonably relied on the erroneous advice. Mr. Ehrlich supported his argument with a decision of the Ontario Supreme Court [Court of Appeal], **Regina v. Cancoil Thermal Corporation et al.** (1986) 11 C.C.E.L. 219.

The significant limitation on the doctrine for the purposes of this case is it applies only to regulatory offenses: *i.e.* to a prosecution under the applicable statute. It does not operate to disentitle individuals for whose benefit the statute exists from enforcing their rights under that statute, see **Libby Canada Inc. V. R. in right of Ontario (Ministry of Labour) and Anne Hoy**, (1995) 34 Admin. L.R. (2d) 276.

The argument is not available to Gulbranson in this case.

ORDER

Pursuant to Section 115 of the *Act* I order the Determination dated March 10, 1997 be referred back to the delegate of the Director to recalculate the overtime owed to Douglas, Jones and White. In all other respects I confirm the Determination.

David Stevenson
Adjudicator
Employment Standards Tribunal