

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 -

John Thomas Southwell
("Southwell")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE No.: 2000/175

DATE OF DECISION: August 21, 2000

DECISION

OVERVIEW

On November 17, 1999 I referred the matter of an appeal by John Thomas Southwell ("Southwell") back to the Director of Employment Standards for further investigation pursuant to s. 115(1)(b) of the *Employment Standards Act* ("the Act"). Southwell appealed initially from a Determination issued by Kevin Molnar as a delegate of the Director of Employment Standards on June 10, 1999. The Determination required Ridley Island Sawmills Ltd. ("Ridley Sawmills") to pay wages, overtime pay, holiday pay and vacation pay in the amount of \$3,147.24 to Southwell. The Director has now completed a further investigation of some issues I raised in my decision dated November 17, 1999. Rather than make a new Determination after conducting this investigation, the Director submitted a letter to the Tribunal dated March 13, 2000 which sets out the results of the further investigation and recommends that the initial Determination be confirmed without variation. While I believe it is preferable in the circumstances for a fresh Determination to be made, which then entitles Southwell to respond in a meaningful way if he disagrees with the results of the investigation, I am content to treat this proceeding as a continuation of my initial decision. Proceeding in this way seems to be in keeping with the Act's objective of resolving disputes in efficient manner.

FACTS

Southwell was employed by Ridley Sawmills as a caretaker at its mill site on Ridley Island, just outside Prince Rupert, B.C. Southwell worked for Ridley Sawmills between April 28 and December 31, 1997. He alleges that he was to be paid \$80.00 per day to work between 7:00 PM and 7:00 AM, for 7 days each week. His duties were to act as a security guard, make regular patrols of the mill site, and report any unusual occurrences. Southwell's original complaint with the Director alleged that he was also asked to perform clean-up duties around the mill equipment between April 28 and May 12, 1997, in which time he says he worked a total of 53 hours. Southwell also complains that on May 28, 1997 his daily wage was unilaterally reduced to \$60.00; he quit this employment after his wage was again unilaterally reduced to \$40.00 per day in December, 1997. Southwell says he was also asked to act as security guard on a 24-hour basis between May 24 and June 6, 1997, at a time when there appeared to have been a risk of fire to wood chips at the mill site.

The initial Determination noted that Ridley Sawmills failed to comply with a demand for records issued to it, and provided only some documents relating to Southwell's employment. Ridley Sawmills apparently had no documentation relating to Southwell's hours of work. Ridley Sawmills claimed that Southwell's wage was \$60.00 per day, which is controverted by pay stubs produced to the Director by Southwell indicating the \$80.00 rate. Ridley Sawmills alleged it had no expectations that Southwell would work any number of hours each day, whereas Southwell alleges he was directed to work a 12-hour shift every night, and to make rounds of the mill site every hour of the shift. The Determination employed the \$80.00 rate for a short period of time, then the \$60.00 rate and finally the \$40.00 in calculating wages owing to Southwell. The Director's delegate decided that Southwell worked 4 hours each shift, calculated on the basis that

he made 12 rounds of the work site each shift, which took 20 minutes to do. The Determination was silent on the other complaints made by Southwell.

Upon further investigation following my decision of November 17, 1999, the Director's delegate reports that Southwell has abandoned his complaint about performing 53 hours of cleanup duties. Regarding the two-week period in which Southwell alleges he watched the site around the clock on account of a heightened risk of fire, Southwell reported that the Director's delegate had misunderstood how he described working during this two-week period. Southwell advised it was during this period that he set his alarm clock every hour in order to walk around the site to check for fires. He reports that for the remainder of his employment, he was awake and on-duty for his 12-hour nightly shifts. Regarding the termination issue, Southwell reported that he worked a further 7 weeks after the wage reduction to \$40.00 per day only because he needed time to find a new place to live. He continued to allege that he had no choice but to quit his employment because his wage was reduced to half of what had been originally agreed to.

In the further investigation, Ridley Sawmills repeated that Southwell was not required to work any particular hours each day, and stated to the Director's delegate that Southwell would have performed his job adequately if he were to have dropped by the site a couple of times each day. Ridley Sawmills contends that it did not require Southwell to live on-site, and that this arrangement came about as a request by Southwell. Ridley Sawmills alleged that it was required to reduce Southwell's wage because of a downturn in the economy and because the mill was non-operating. The employer further alleges Southwell agreed to this wage reduction, and left his employment for the purpose of returning to school. The Director's delegate reports that Ridley Sawmills has "no recollection" of any fire watch requirement.

ISSUE TO BE DECIDED

This appeal requires me to decide whether Southwell is owed wages for a two-week period when he was on-duty for 24 hours each day, and also whether he is owed compensation for length of service by reason he had been constructively dismissed.

ANALYSIS

The Director's delegate, having investigated these two issues further, reports that he would make no change to his Determination as a result of the further investigation. This leaves Southwell with no forum to challenge these further findings by the Director's delegate, because of the manner in which the results of this further investigation was received by this Tribunal. In the interest of a fair and efficient resolution of this dispute, I am cognizant of the fact Southwell did not appear at the oral hearing of his initial appeal, and that the Director's delegate was required to conduct a further investigation solely as a result of concerns I expressed having read the material filed on the initial appeal. With regard to the issue of whether Southwell had been constructively dismissed, the Director's delegate has doubted Southwell's version of the facts and has preferred the employer's evidence. There is nothing before me that would allow me to question that conclusion of the Director's delegate, and I do not intend to disturb the Determination in that regard.

However, the employer's response to the fire-watch duties was simply that it had no recollection of such duties having to be performed. It is unacceptable, in my view, that Southwell's complaint in this regard should be dismissed when the employer cannot say one way or the other whether Southwell had to perform those extra duties. I note that the Director's delegate had no evidence that cast any doubt on Southwell's claim regarding these extra duties, and Southwell's report that the Port Corporation was pressuring Ridley Sawmills to conduct a short-term fire watch is plausible. I therefore conclude that the Determination is in error by dismissing Southwell's complaint when the employer has no recollection about the facts in issue. There is no reason to disturb the Director's finding that Southwell's regular hours were 4 hours each day. For the fourteen-day period in which Southwell performed fire-watch duties, a fair and efficient resolution of his complaint would be to find that he worked an additional 4 hours on each of those days. The Determination will therefore be varied by adding 4 hours to each day of Southwell's employment between May 24 and June 6, 1997, inclusive. The regular wage as defined in the Act for this period would be \$15.00 per hour. There will likely be an overtime calculation to be made, holiday pay and a slight increase to the vacation pay award, which I leave to the Director's delegate to calculate. The Determination is confirmed in all other respects.

ORDER

After carefully considering the evidence, I find that the Determination made by Mr. Molnar on June 10, 1999 should be varied pursuant to s. 115(1)(a) of the Act by adding 4 hours each day to the calculation of hours worked by Southwell between May 24 and June 6, 1997, inclusive, and by calculating the resulting wages, overtime pay, holiday pay and vacation pay owing to Southwell for this period, together with interest pursuant to s. 88 of the Act.

Ian Lawson
Adjudicator
Employment Standards Tribunal