

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 -

Butch Wright Trucking & Hauling Ltd.
("BWT")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/208

DATE OF HEARING: August 17, 1999

DATE OF DECISION: October 4, 1999

DECISION

APPEARANCES

Butch Wright	on behalf of Butch Wright Trucking & Hauling Ltd. via teleconference
James Byron	on behalf of Butch Wright Trucking & Hauling Ltd.
Ted Giles	on behalf of Nola Rankin
Nola Rankin	on her own behalf (via teleconference)
Robert Joyce	on behalf of the Director

OVERVIEW

This is an appeal by Butch Wright Trucking & Hauling Ltd. (“BWT”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated March 22, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). BWT alleges that the delegate of the Director erred in the Determination by concluding that Nola Rankin (“Rankin”) was owed wages in the total amount of **\$7,774.94** (includes interest).

PRELIMINARY ISSUE

The hearing was scheduled to commence at 9:00 a.m., however, legal counsel for BWT telephoned the Tribunal office to advise that Butch Wright (“Wright”) would not be able to attend at 9:00 a.m. and a postponement was requested. Subsequent to that telephone call, Wright telephoned to the panel to personally request a postponement. Wright stated that he had attempted to fly his own airplane to Dawson Creek the previous afternoon but was forced to return to Duncan by inclement weather. Wright further stated that he had again attempted to fly out of Duncan early this morning however, heavy fog prevented him from doing so. Wright further stated he then took a commercial flight to Vancouver and was awaiting connecting flights to Dawson Creek. Wright further stated that he anticipated arriving in Dawson Creek at approximately 2:00 p.m. and would be available to attend the hearing at that time.

The panel received submissions from the other parties to the hearing. The panel was advised that Ted Giles, a witness for Rankin, was required to be in Edmonton early in the evening and would therefore be unable to attend at the hearing beyond noon. The panel considered the submissions and the fact that this hearing was being conducted in Dawson Creek at the request of BWT. The panel further considered that Wright is an experienced pilot therefore he should have anticipated the possibility of inclement weather and made the necessary adjustments to ensure that he was able to be in Dawson Creek in time for the hearing. The panel decided that the hearing would proceed with Wright participating via teleconference from the Tribunal's hearing room in Vancouver.

ISSUES

The issues to be decided in this appeal are:

1. Is BWT entitled to deem that accommodation expenses and provision of a pickup constitute payment of wages ?
2. Does BWT owes wages to Rankin ?

FACTS

Rankin was employed by BWT as a truck driver from July 11, 1998 to August 5, 1998. Rankin was first hired by BWT in Duncan and Rankin drove one of BWT's trucks to Dawson Creek. Rankin was then engaged in hauling materials from Dawson Creek to Chetwynd. There were no payroll records provided by BWT with respect to Rankin. BWT did not keep any records of the hours worked by Rankin. Rankin kept a record of the daily hours worked.

Butch Wright ("Wright") testified on behalf of BWT. I have summarized the relevant evidence as follows:

Wright stated that:

- he has known Rankin and her family for a long time;
- Rankin approached him about a job as she wanted to learn to drive truck;
- he advised Rankin that he would teach her to drive truck as a favour to her father;
- Rankin got driver training in Duncan;
- he lent Rankin a company pickup as a one time gift;
- he transferred the pickup from his name to 2 other individuals and then to Rankin for insurance and liability purposes;
- Rankin drove gravel truck for BWT in the Duncan area;

- he told Rankin about the upcoming job in Dawson Creek and advised her if she could gain some experience, he would give her a crack at the job;
- he told Rankin he would pay her \$7.50 per hour;
- the job was based on a 3 hour round trip Dawson Creek to Chetwynd;
- he told Rankin that if she proved to be OK after a couple of weeks, she would get a raise;
- he had a meeting in Duncan with Rankin and the other employees who would be going to Dawson Creek and told the other employees that their rate would be \$60.00 per load based on a 3 hour round trip as that was how the job had been priced out;
- he told the employees they would have to be responsible for their own accommodation, however, he would put the rooms on his credit card to start and when they got paid, they could repay him;
- Rankin offered to drive one of the trucks to Dawson Creek;
- Rankin and another employee Dave Begy (“Begy”) drove trucks to Dawson Creek;
- he provided for all the expenses incurred by Rankin and Begy in driving the trucks to Dawson Creek;
- when the trucks arrived in Dawson Creek, there was a delay of about 1 week due to bad weather;
- the job started on July 17, 1998 and Rankin was given an opportunity to drive truck but she was again told it was at \$7.50 per hour;
- he and other employees had to spend quite a bit of time showing Rankin how to load the truck properly, Rankin got frustrated easily;
- he told Rankin she had to keep track of her own paperwork;
- he asked Rankin for her load slips in order to get paid, as you get paid for what you hand in with her paperwork, they were all mixed up;
- Rankin quit, left very upset and crying, said she was going to see Labour Relations;
- when Rankin quit, he told her to hand in all her slips, she went to LP to get copies to make sure she had them all;
- instead of minimum wage, he decided to pay Rankin \$60.00 per load, made out a cheque for \$300.00 for Rankin provided she signed the transfer papers for the pickup truck;
- he never paid anyone for driving the trucks to Dawson Creek;
- he did not give Rankin a paycheque as she refused to sign the pickup truck over to him;
- other drivers such as James Byron and Dave I’Anson went through the same process, starting out at \$7.50 per hour and then getting increases as experience increases;
- he told Rankin he wanted the pickup truck returned, she refused;
- he only lent her the pickup truck so she could get back and forth to work to gain the experience she wanted;

- Begy and I'Anson are unsatisfactory former employees who are attempting to “get even” with BWT.

In response to Rankin’s submission to the Tribunal, Wright states that:

- he does not know where she got the \$20.00 per hour from, it was always \$60.00 per load;
- Rankin and Darrin Thompson (“Thompson”) who drove the same truck on opposite shifts somehow interpreted the \$60.00 per load to mean \$20.00 per hour;
- Rankin and the other employees knew that the \$60.00 per load was inclusive of overtime, James Byron knew this;
- he told them all that the rate was \$60.00 per load based on a 3 hour round trip;
- the only reason that the rooms were put into his name is that the employees, Rankin included, didn’t have any money;
- he never agreed to pay an hourly rate, the whole job was priced on a per load/trip basis;
- Rankin quit, James Byron was right there, when she quit we hired the next guy, she later came back and wanted to work but we had already filled the spot;
- the pickup was never given to Rankin in lieu of wages;
- there were a total of 35 load slips for Rankin from LP;
- he cannot recall when the pickup was transferred to Rankin but it did take place in Duncan;

In response to cross examination by Rankin, Wright stated:

- Rankin did not tell him that the frame on the truck was cracked;
- he never discussed repayment for truck supplies purchased by Rankin;
- Rankin did drive the truck from Duncan to Dawson Creek on her own;
- Rankin did not have anyone riding with her when hauling between Dawson Creek and Chetwynd;

In addition to Wright’s testimony, counsel for BWT provided submissions on behalf of BWT. There are contradictions between the information contained in the submissions and Wrights evidence. Where the information in the submissions of BWT’s counsel conflicts with the testimony of Wright, I have accepted the evidence of Wright.

James Byron (“Byron”) testified on behalf of BWT and stated that:

- he is BWT’s onsite supervisor in Dawson Creek;
- when the job was being discussed in Duncan, the rate was based on \$60.00 for each trip of 3 hours or about \$20.00 per hour;
- agreed to pay Rankin \$7.50 per hour;
- Rankin had problems doing the job;

- Rankin quit;
- the employees were told that the \$60.00 per load rate was all inclusive;

In response to cross examination by Rankin, Byron stated that:

- he believes he met Rankin at Wright's house about 1 1/2 months before the Dawson Creek job came up;
- he recalls a number of conversations between Rankin and Wright in regard to the transfer of the pickup truck;
- as he understands it, Rankin needed the pickup truck for transportation;
- he heard the next day at work that Rankin had quit, everyone knew she had quit;
- he was told by Wright that Rankin had quit, he was not actually present for any conversation between Wright and Rankin;
- he gave Rankin the transfer papers for the pickup truck the night before and asked her to sign them for Wright;
- Rankin refused to sign the transfer papers for the pickup truck;
- he was aware of the crack in the frame of the truck that Rankin drove and he believes it was welded up after an inspection by the DOT;
- he cannot recall if he told Wright about the problem with the truck frame.

In response to questions on cross examination by the delegate of the Director, Byron stated that:

- he had no direct first hand knowledge that Rankin quit, only relied upon what he was told by Wright;
- his understanding of the transfer of the pickup truck to Rankin was based on information given to him by Wright;
- his only responsibility with the payroll is to take the various slips to the bookkeeper;
- he has never seen any payroll records with respect to Rankin's rate of pay;

In response to questions from the Tribunal, Byron stated that:

- it was his understanding that BWT would cover all costs associated with going to Dawson Creek;
- it was also his understanding that BWT would cover the first couple of weeks accommodation in Dawson Creek and after that the employees would be responsible for their own costs;
- in his own case, BWT covered his accommodation costs for the first 2 weeks and then he paid for his own.

Rankin stated that she had nothing to add to the submissions already provided to the Tribunal. The relevant information from those submissions indicated that:

- she was working for BWT on an “on-call” basis in the Duncan area when she was asked by Wright if she would be interested in working for BWT in Dawson Creek;
- the going rate for driving a gravel truck in the Duncan area was \$16.00 per hour and that is what she earned from BWT;
- Wright transferred the pickup to her in lieu of wages for work performed in Duncan;
- prior to going to Dawson Creek, she and the other employees, Dave Begy (“Begy”), Dave I’Anson (“I’Anson”) and Byron sat down with Wright to discuss the wages and conditions for the job;
- the agreement reached was for \$20.00 per hour based on a 12 hour day;
- Wright advised that for the first little while, they might not get any days off until he could find some drivers in the Dawson Creek area;
- Wright also agreed that for the first month or so, he would be responsible for expenses incurred for food and lodging and after we got our first pay, we would have to be responsible for our own costs;
- there was no discussion that BWT would consider the cost of food and lodging as an advance to be recovered later;
- she had done some work for another company in Duncan, Winter Trucking, for the going rate of \$16.00 per hour, so why would she travel to Dawson Creek for not only less money, \$7.50 according to Wright, and to pay for her own expenses;
- it was 4 days before the first payday when Wright decided to change the rate of pay from \$20.00 per hour to \$60.00 per load;
- Wright did not tell us about the change in rate of pay, he got Byron to do that;
- when Wright was confronted about the change, he said that his equipment and overhead were higher than expected and he would not be able to pay for our rooms for the first month after all, he would be taking it out of our pay;
- when I and the other drivers objected, Wright became abusive and told us we would get what we get and if we don’t like it we could quit;
- she did not quit, when she arrived at work she found that another driver had been hired to drive the truck she had been driving;
- she asked Wright for her paycheque but he refused and said she had quit;
- Wright told her that if she didn’t accept the pay as offered she would get nothing;
- when she insisted upon being paid what had been agreed upon (\$20.00 per hour), Wright tore up the cheque and told her she would have a hard time even proving that she had worked for him as she didn’t even have any load slips;
- she went to LP to get copies of her load slips and then went to labour relations (Employment Standards) to file a complaint

Ted Giles (“Giles”) testified that:

- when he discussed driving for BWT with Wright in Prince George, the rate discussed was either \$20.00 per hour or a day rate of \$240.00 per day;
- he drove the same truck as Rankin on the cross shift on a couple of occasions and found that truck to be in poor shape, overheating, poor lights, etc.
- he was not aware of any problems with Rankin being late or holding up other drivers;
- the inground scales installed by BWT were OK when they worked, but on dayshift, we would have to use the mill scale to check loads and then make adjustments;
- he knew about the crack in the frame of the truck that Rankin was driving and was sure that Wright had been told by other drivers as well;
- he felt that Rankin kept up with the other drivers.

In response to cross examination by Wright, Giles stated that:

- on some occasions he was driving the same shift as Rankin and found that she was able to keep up with the flow;
- he paid for his own accommodations;
- he never asked BWT to pay for his accommodations.

The delegate of the Director testified that:

- he contacted Wright in regard to the complaint from Rankin;
- Wright attended the Employment Standards office in Dawson Creek and at that time, Wright was not able to state what the wage rate for Rankin was other than “..minimum wage, whatever that is..”
- he attended at the bookkeepers office to review the records available;
- Wright then submitted letters from Byron and I’Anson;
- Byron’s letter stated that when he first started working for BWT, it was for \$7.50 per hour until he gained enough experience and further that every new employee of BWT starts the same way;
- Byron’s letter went on to state that both Rankin and I’Anson started under the same conditions at BWT, that is, \$7.50 per hour;
- I’Anson’s letter states that he is in training with BWT and is currently being paid minimum wage and that Rankin was hired and working under the same arrangements;
- when he reviewed the payroll records of I’Anson he found that I’Anson was being paid initially \$20.00 per hour, then \$45.00 per load for first 10 loads then \$60.00 per load;
- he confronted I’Anson about the inconsistencies between the letter supplied by Wright and the payroll records and I’Anson advised him that the letter was dictated by Wright;

- I'Anson further advised him that at the meeting with Rankin, Begy and Byron, Wright promised them \$20.00 per hour and as the employees had no money, BWT would pay for the accommodations;
- on November 2, 1998 he spoke to Begy who advised that prior to leaving Duncan, the employees were promised \$20.00 per hour and then it was later changed to \$60.00 per load;

In response to cross examination by Wright, the delegate of the Director stated that:

- Wright did not mention a wage rate being paid to Rankin during his visit to the Employment Standards office;
- he did not check into Begy's driving record as that had no relevance to the issue being investigated;
- he obtained the information relied upon in the Determination from a number of sources, including interviews with other employees, payroll records, interview with Wright, etc.;
- he recalls Wright stating that the rate was \$60.00 per load inclusive.

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, BWT.

The manner in which payment of wages may be made is found in Section 20 of the *Act* which provides:

20. An employer must pay all wages

(a) in Canadian currency,

(b) by cheque, draft or money order, payable on demand, drawn on a savings institution, or

(c) by deposit to the credit of an employee's account in a savings institution, if authorized by the employee in writing or by a collective agreement.

It is clear from the plain reading of Section 20, that providing the pickup truck or accommodations in lieu of wages would be contrary to the *Act* .

With respect to making deductions from an employees wages for any reason, such as accommodations, or having the employee assign wages the Act in Sections 20 and 21 provides:

Section 21, Deductions

(1) 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.

(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

Section 22, Assignments

(1) An employer must honour an employee's written assignment of wages

(a) to a trade union in accordance with the Labour Relations Code;

(b) to a charitable or other organization, or a pension or superannuation or other plan, if the amounts assigned are deductible for income tax purposes under the Income Tax Act (Canada),

(c) to a person to whom the employee is required under a maintenance order, as defined in the Family Maintenance Enforcement Act, to pay maintenance,

(d) to an insurance company for insurance or medical or dental coverage, and

(e) for a purpose authorized under subsection (2).

(2) The director may authorize an assignment of wages for a purpose that the director considers is for the employee's benefit.

(3) An employer must honour an assignment of wages authorized by a collective agreement.

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

BWT at various times in their submissions and in Wright's evidence attempt to make the point that the payment of the accommodations for Rankin was merely an advance on wages and that Rankin had agreed to assign wages to BWT for reimbursement of those costs. There was no evidence that Rankin provided any authorization, written or otherwise, to permit BWT to withhold wages for payment of the pickup truck or accommodations.

The requirement in the *Act* for an employer to keep records is Section 28. The relevant portion of Section 28 is (1) (d) which provides:

(1) For each employee, an employer must keep records of the following information:

(d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;

BWT kept no records in regard to the hours worked by the employees. Rankin did keep records of the hours worked each day and entered in her log.

A central issue in cases such as this is often the credibility of the participants and the witnesses.

A guide frequently relied on with respect to credibility issues is found in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356-8 where the court said:

....The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth....

In my view therefore, when assessing the credibility of a witness, a number of factors are to be considered. These include:

- the demeanour of the witness
- opportunities for knowledge
- powers of observation
- judgment and memory
- ability to describe clearly what has been said and heard
- the probability of the event happening in the manner suggested

Wright's evidence was very clear on those issues which appeared to support his position yet he was unable to provide that same clarity on issues which might be detrimental to BWT's case. The evidence of Wright contradicts the evidence of Byron with respect to the issue of BWT paying for accommodation for the first "couple of weeks". Wright submitted a letter from I'Anson with regard to the issue of wages and accommodation and, after I'Anson advised the delegate of the Director that the letter was "dictated by Wright", Wright's evidence now portrays I'Anson as a dissatisfied former employee.

Wright's lack of credibility is further demonstrated when his evidence is compared to the submissions of BWT's counsel to the Tribunal.

Furthermore, In the appeal, counsel for BWT includes the letter from I'Anson to support their position yet in a later submission counsel attempts to discredit I'Anson by categorizing I'Anson, Begy and Darrin Thompson as "terminated by Butch Wright Trucking & Hauling Ltd. and are adverse witnesses"

Therefore, when considering the evidence provided, where the evidence of Wright differs from the evidence of the other witnesses, I prefer the evidence of the other witnesses.

I conclude therefore, based on the evidence provided and on the balance of probabilities, the rate of pay that was offered to Rankin for working in Dawson Creek was \$20.00 per hour.

The provisions with regard to overtime wages are found in Section 40 of the *Act* which provides:

(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 1/2 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 a week and is not on a flexible work schedule adopted under section 37 or 38

(a) 1 1/2 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.

(3) For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.

(4) If a week contains a statutory holiday that is given to an employee in accordance with Part 5,

(a) the references to hours in subsection (2) (a) and (b) are reduced by 8 hours for each statutory holiday in the week, and

(b) the hours the employee works on the statutory holiday are not counted when calculating the employee's overtime for that week.

The delegate of the Director reviewed Rankin's records and, after applying the appropriate provisions of the *Act*, calculated the wages that were earned and should have been paid.

For all of the above reasons, based on the evidence provided and on the balance of probabilities, I conclude that BWT owes wages to Rankin in the amount as calculated by the delegate of the Director and set forth in the Determination.

The appeal by BWT is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated March 22, 1999 be confirmed in the amount of **\$7,774.94** together with whatever interest has accrued pursuant to Section 88 of the *Act* since the date of issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal