

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.: 1999/209

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 Darrin Thompson
Darrin Thompson	on his own behalf
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 Darrin Thompson (“Thompson”) was owed regular wages and overtime wages in the total amount of **\$2,658.27** (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 Thompson, 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.

ISSUE

The issue to be decided in this appeal is whether BWT owes wages to Thompson .

FACTS

Thompson worked for BWT as a truck driver from July 22, 1998 to October 6, 1998. Thompson was engaged in hauling materials from Dawson Creek to Chetwynd. The payroll records indicate that Thompson was compensated at the rate of \$60.00 per load. There was no record kept by BWT of the number of hours worked each day by Thompson.

Thompson kept a record of the daily hours worked in his log book. Thompson filed a complaint with the Employment Standards Branch (the "Branch") alleging wages were owing and continued to work for BWT.

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

Wright stated that Thompson approached him about a job. Wright asked Thompson about his experience and then offered him a job with a rate of \$60.00 per round trip from Dawson Creek to Chetwynd. Thompson requested a letter from Wright confirming employment so Wright signed the letter provided by Thompson before Thompson even began to work for BWT. Wright further stated that he did not know Thompson was unhappy about the work until he was advised of the complaint by the delegate of the Director. Wright further stated that Thompson took longer to do the round trip than the other drivers because he came to work tired from babysitting all day. Wright further stated that Thompson caused damage to the truck as a result of his inexperience. Wright finally stated that Thompson knew that the rate of \$60.00 per load/trip was inclusive of overtime.

Thompson testified on his own behalf. I have summarized the relevant evidence as follows:

Thompson stated that wages were not discussed until he was given a “check” ride and then he was told he would be a \$20.00 per hour driver. Thompson further stated that the letter confirming employment signed by Wright indicated that the rate of pay was to be \$18.50 per hour. When he got his first pay he discovered he was only being paid at the rate of \$60.00 per load. He asked James Byron (“Byron”) about the mistake in the rate and asked Byron if he would speak to Wright, Byron said no. Thompson then spoke to Wright about the rate and was told that for now the rate would stay at \$60.00 per load but it would be adjusted to reflect \$20.00 per hour later. Thompson further stated that the only reason some trips took longer was the poor shape of the truck, mechanical problems and some flat tires. Thompson further states that he recorded his daily hours in his log book at the end of each shift and submitted those logs with his complaint form on August 17, 1998. Thompson finally states that he continued to work for BWT until October 6, 1998.

ANALYSIS

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

The *Act* in Section 1 defines “regular wage” as follows:

"regular wage" 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;

(emphasis added)

I am satisfied that, based on the evidence provided, the rate of pay was \$60.00 per load. The payroll records confirm the \$60.00 per load rate of pay.

Wright argues that Thompson knew that the \$60.00 per load rate included all overtime incurred. That argument however, has no merit when the provisions of the *Act*, especially Section 4, are applied. Section 4 provides:

Section 4, Requirements of this Act cannot be waived

The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

When applying the provisions of Section 4, we can conclude that even if there was an agreement that the \$60.00 per load includes overtime, which Thompson denies, such an agreement would be of **no effect**.

The “regular wage” is then determined pursuant to the definition found in the *Act* as set forth above.

Based on the evidence provided, I conclude that the regular wage as determined by the delegate of the Director are correct in all respects.

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.*

Pursuant to Section 28 of the *Act*, BWT is required to keep records of the number of hours each employee works per day. The evidence is that BWT did not keep the records as required. Thompson however, did keep records of his hours worked each day. The

delegate of the Director reviewed Thompson'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 and, based on the evidence provided, I conclude that BWT owes wages to Thompson 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 **\$2,658.27** together with whatever interest has accrued pursuant to Section 88 of the *Act* since the date of issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal