

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

- by -

Roy Gordon Finnie  
("Finnie")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**Adjudicator:** Hans Suhr

**File No.:** 96/600

**Date of Decision:** December 13, 1996

## DECISION

### OVERVIEW

This is an appeal by Roy Gordon Finnie (“Finnie”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 004099 issued by a delegate of the Director on September 24, 1996. In this appeal Finnie claims that the Director’s delegate incorrectly determined that he was not owed additional wages.

I have completed my review of the submissions received from Finnie, Gregg Breault operating Gregg Breault Transport (“Breault”) and information provided by the Director.

### ISSUES TO BE DECIDED

1. What was the correct rate of pay for the calculation of wages earned ?
2. Does the *Act* have jurisdiction over work performed outside the Province of British Columbia ?
3. Does Breault owe additional wages to Finnie ?

### FACTS

The submissions by Finnie and Breault agree on a number of points which are as follows:

- a) Finnie was employed as a truck driver from April 23, 1995 to March 17, 1996;
- b) The rate of pay was initially set at \$16.00 per hour;
- c) Breault paid Finnie at the rate of \$16.00 / hour plus appropriate overtime wages for work being performed;
- d) The work being performed was covered under the Oil Patch Variance;
- e) On June 18, 1995, Finnie and Breault entered into an agreement to raise Finnie’s hourly rate of pay to \$20.00 per hour which would be inclusive of all applicable overtime and statutory holiday pay;
- f) Some work performed by Finnie for Breault was in the Province of Alberta;
- g) Breault deducted from Finnie’s wages amounts for airfare, telephone calls and for damage to a water pump.

### SUBMISSIONS BY THE PARTIES

In his submission accompanying the appeal, Finnie states that the hours he submitted earlier to the delegate of the Director were in fact incorrect as he, Finnie, had forgotten to submit some hours and those hours should be included in the calculation of wages earned.

Finnie further states that while he agrees the delegate was correct in finding that the June 18, 1995 agreement between Finnie and Breault violated Section 4 of the *Act*, the only parts of that agreement which should be invalid are the parts which contradict the *Act*, that is, the parts which deal with the non-payment of overtime rates of pay or non-payment of statutory holiday pay and that the balance of the agreement, the raise in hourly rate to \$20.00 remains a valid agreement, therefore, all of the wage calculations should be made using the rate of \$20.00 per hour.

Finnie finally states in his November 27, 1996 submission that the hours he worked in the Province of Alberta should properly be included in the calculation of wages earned.

In his submission Breault states that Finnie was paid for a minimum of 9 hours of work each day when in fact the period of work on some days was less than 9 hours.

Breault further states that Finnie was treated more than fairly because Breault paid for room and board, taxi fares in addition to the minimum 9 hours per day even when the truck was only on standby in Fort St. John.

Breault further states that Finnie instructed him to deduct the cost of the damage to the water pump as the damage was as a result of Finnie's negligence.

Breault further states that he agreed to pay for 1/2 of Finnie's telephone calls, even though those calls were of a personal nature and not business related.

Breault finally states that the June 18, 1995 agreement with Finnie clearly states that Federal or B.C. Labour laws would not apply, therefore the agreement overrides the *Act*.

The payroll information provided indicates that approximately 20% of Finnie's total earnings during his period of employment with Breault was derived from work performed outside the Province of B.C.

## **ANALYSIS**

With respect to issue # 1, (the rate of pay used by the delegate to calculate wages earned by Finnie,) I must consider both the content and the context of the June 18, 1995 agreement. That agreement clearly provided that in return for an hourly rate of \$20.00, all hours worked by Finnie, including overtime and statutory holiday hours, would be paid for at the \$20.00 rate.

Sections 40, 45 and 46 of the *Act* contain the minimum requirements with respect to the payment of the appropriate overtime rates of pay and statutory holiday pay. Sections 40, 45 and 46 state:

**Overtime wages for employees not on a flexible work schedule**

- 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 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 any 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 reference 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 when calculating the employee's overtime for that week.

**Statutory holiday pay**

- 45.** An employee who is given a day off on a statutory holiday or instead of a statutory holiday must be paid the following amount for the day off:
- (a) if the employee has a regular schedule of hours and the employee has worked or earned wages for at least 15 of the last 30 days before the statutory holiday, the same amount as if the employee had worked regular hours on the day off;

- (b) in any other case, an amount calculated in accordance with the regulations.

**If employee is required to work on statutory holiday**

46. (1) An employee who works on a statutory holiday must be paid for that day
- (a) 1 1/2 times the employee's regular wage for the time worked up to 11 hours, and
  - (b) double the employee's regular wage for any time worked over 11 hours.
- (2) In addition, the employer must give the employee a working day off with pay according to section 45.
- (3) The employee may choose to have the pay for the day off credited to the employee's time bank, if one has been established.
- (4) The employer must schedule the day off with pay
- (a) before the employee's annual vacation,
  - (b) before the date the employment terminates, or
  - (c) if the pay for the day off is credited to the employee's time bank, within 6 months after the date of the statutory holiday, whichever is earliest.

Section 4 of the *Act* states

**Requirements of this Act cannot be waived**

4. 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.

Section 4 of the *Act* provides that any agreement to waive the minimum requirements is "...of no effect..." therefore, as the increased rate of pay (\$20.00 / hour) is directly linked to the inclusion of all overtime hours and statutory holiday hours in that rate, the entire agreement of June 18, 1995 is invalid.

I conclude that the correct rate of pay for the calculation of wages is **\$16.00** per hour.

With respect to issue #2, (jurisdiction of the *Act* over work performed outside the Province of British Columbia,) I find that the work of Breault's employee Finnie, regardless of where that work was performed, is protected by the *Act*. The issue of some work being performed outside of B.C. was dealt with by adjudicator Roberts in *EST #D339/96, G.A. Borstad Associates Ltd.* I adopt the reasoning set forth in that decision.

Section 2 (a) of the *Act* provides that one of the purposes of the *Act* is to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment.

Section 3 provides that the *Act* applies to all employees, other than those excluded by regulation, regardless of the number of hours worked.

Breault's employee was not excluded from the application of the *Act* by *Regulation* with the exception of the terms of the Oil Patch Variance.

Breault operates from Dawson Creek, B.C. and the work performed by his employee occurred primarily in British Columbia.

From time to time, Finnie performed work on behalf of, and for the benefit of Breault, in the Province of Alberta. However, only approximately 20% of Finnie's total earnings were derived from work outside of B.C. Finnie received instructions and was directed by Breault from Dawson Creek.

With respect to issue #3, ( does Breault owe additional wages,) in light of my decision on issue #2 above, I conclude that Breault may owe additional wages for the work performed but previously excluded from the calculations by the delegate.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 004099 be varied to the extent as set forth above and further be referred back to the Director for the recalculation of wages owing to include those periods of work previously excluded.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**

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