

An appeal

- by -

Blue Collar Silviculture Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Wayne R. Carkner

FILE No.: 2002/266

DATE OF HEARING: August 6, 2002

DATE OF DECISION: August 20, 2002

DECISION

APPEARANCES:

for the Appellant	Mark Courtney Jeff Kent
for the Respondent	Marilyn Allin
for the Director	No Appearance

OVERVIEW

This is an appeal by Blue Collar Silviculture Ltd. (“BCSL”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued by the Director of Employment Standards (the “Director”) on April 22, 2002. The Determination concluded that the Appellant had contravened Sections 27, 28 & 40 of the *Act* and determined that the Respondent was entitled to a total remedy in the amount \$5,523.88. This total remedy included an interest calculation of \$131.41 pursuant to Section 88 of the *Act*. The Appellant is appealing the Determination on the basis that the Director erred in calculating the wages owing based on a thirty-five hour regular workweek and that the remedy should be recalculated using a base of a forty hour workweek. The Appellant requests that the remedy be varied to reflect wages owing based on a forty-hour workweek.

ISSUE

Did the Director err in calculating the remedy for wages owing based on a thirty-five hour workweek?

FACTS

BCSL is a business in the Silviculture and Forestry industry with a head office located in Vancouver BC. During the summer months of 2001 BCSL established an office in Quesnel BC to facilitate the fieldwork performed in this region. The Respondent was hired to manage the office and handle enquiries. The Respondent was employed February 27, 2001 and ceased employment on October 5, 2001. The Respondent was paid a salary of \$2100.00/month for the first month and then was subsequently paid \$2500.00/Month thereafter. Mark Courtney (“Courtney”), representing BCSL, hired the Respondent and was her direct supervisor. Courtney testified that the normal workweek for BCSL was forty hours and that he was unaware of the Delegate making calculations based on a thirty-five hour workweek until the Determination was issued. He stated that he had based the Respondent’s hours on a forty hour workweek and that was his understanding when he hired the Respondent. Courtney testified that he was not made aware by the Respondent that she was owed wages for additional hours and overtime until she presented him with a spreadsheet detailing all hours worked during her employment. This spreadsheet was provided after the Respondent ceased her employment. Courtney testified that the Respondent had worked on three Saturdays and BCSL had sent her a cheque for payment of these days. He stated that he concluded that the issues were settled until he was contacted by the Delegate and informed a complaint had been filed by the Respondent. He testified that at no time did he understand that the complaint was

based on a thirty-five hour workweek. Under cross-examination Courtney testified that there was no discussion with the Respondent as to the hours worked in a regular workweek when she was hired and he presumed that it was forty hours as the Respondent was a salaried employee.

Jeff Kent performs payroll services for BCSL as a contractor from November of 2001. He testified that the normal hours of work for employees at BCSL was forty hours per week. He further acknowledged that he had reviewed the Respondent's spreadsheet during the course of the Delegate's investigation and that he had trouble understanding how the hours were calculated in the spreadsheet. At no time did he realize that the claim was based on a thirty-five hour workweek.

The Respondent testified that she was hired to work a thirty-five hour workweek. She stated that she was to receive "perks" in lieu of a higher wage rate and that the thirty-five hour workweek was one of those "perks". She testified that she had approached Courtney several times during her employment regarding the extra hours she worked but that Courtney never had the time to discuss the issue of the additional hours, as he was extremely busy in the field. She stated that Courtney said he would deal with this issue when the season started to slow down. The Respondent testified that she had brought the additional hours to the attention of Katie Rogers, Jeff Kent's predecessor, several times through the course of her employment but with no results. When her employment ceased she provided the spreadsheet to Courtney and requested payment for the additional hours worked. The Respondent testified that she updated the spreadsheet daily.

In a written submission the Director takes the position that during the investigation there was no dispute over the weekly hours of work being thirty-five. The Director accepted the Respondent's spreadsheet as an accurate reflection of the hours she worked as BCSL's payroll records did not contain or indicate the hours the Respondent worked on a daily basis, only days worked by the Respondent. The Director asserts that this spreadsheet was provided to BCSL early in the investigation and clearly shows that the Respondent worked from nine to five (eight to four during the busy season) with a one-hour lunch break.

ARGUMENT

Courtney argued that the Respondent was hired on a monthly salary and that she worked more hours some days and fewer hours on other days. He argues that though BCSL disputes the hours claimed on the Respondent's spreadsheet, however, the only issue he was appealing were the calculations based on a thirty-five hour workweek. He emphasizes that neither he nor Jeff Kent could understand the spreadsheet and couldn't determine how the total hours were calculated on that document. As a result of this Courtney submits that the Determination should be varied to reflect a calculation based on a forty hour workweek.

The Respondent argued that the Director had applied the proper standard when calculating the hours based on a thirty-five hour workweek and submits that the Determination should be affirmed.

The Director, through written submission, asserts that the Appellant had been in possession of the spreadsheet at the conclusion of the Respondent's employment as well as acknowledging that he had viewed the Respondent's claimed hours of work in the spreadsheet in correspondence to the Director dated February 8, 2002. The Director submits that the spreadsheet is clear and shows that the Respondent had a one-hour lunch break daily and worked a total of seven hours as a regular workday. The Director asserted that there was no dispute in the times the Respondent's regular shift commenced and ended, that the only dispute was over the lunch period. The Director stated that as there was no exception taken

during the course of the investigation to the establishment of a thirty-five hour work week that the Appellant cannot now assert that the Respondent worked forty hours a week. The Director submits that the appeal be denied.

ANALYSIS

There is only a single issue before me in this appeal, did the Respondent work a thirty-five hour workweek or a forty hour workweek. The Director accepted the Respondent's records (the spreadsheet) as credible as BCSL did not maintain complete payroll records that included daily hours of work as required by the *Act*. It is clear that all parties were working off the spreadsheet during the course of the Director's investigation and that the spreadsheet was the central piece of evidence utilized by the Director in calculating the remedy.

BCSL argues that the spreadsheet was confusing and hard to understand and that they were unaware that the spreadsheet alleged that the Respondent worked a thirty-five hour workweek.

I have reviewed the spreadsheet and have difficulty understanding the Appellant's position. The spreadsheet is laid out efficiently and is easy to read. On the days that the Respondent worked regular hours the spreadsheet shows a start time, a finishing time eight hours later, identifies that the Respondent had lunch & identifies the hours worked as seven. On the days that the Respondent worked extra hours the spreadsheet identifies a start time, a finishing time, whether or not the Respondent had lunch or not & identifies the hours worked as all hours, when the respondent did not have lunch, and one hour less when the Respondent did take lunch. It is very clear to me, based on the spreadsheet, that the Respondent was claiming extra hours based on a thirty-five hour workweek. I must only conclude that the Appellant either overlooked the claim or failed to review the spreadsheet in detail. This is not a substantive ground for appeal.

As the burden of proof rests with the Appellant to show that the Director erred in the conclusion that the Respondent worked a thirty-five hour workweek the Appellant must provide conclusive evidence in support of this position. The Appellant has failed to do so.

CONCLUSION

The appeal for a variance of the Determination dated April 22, 2002 is denied.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination dated April 22, 2002 be confirmed plus any interest accrued pursuant to Section 88 of the *Act*.

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal