

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 -

Zlatko Gaspar
("Gaspar")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE NO.: 97/241

DATE OF HEARING: August 5, 1997

DATE OF DECISION: August 21, 1997

DECISION

APPEARANCES

Zlatko Gaspar	for himself
Sheila Jovanovic	for D. J. Bobcat & Landscaping
Dragan Jovanovic	for D. J. Bobcat & Landscaping

OVERVIEW

This is an appeal by Zlatko Gaspar (“Gaspar”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination issued by a Delegate of the Director of Employment Standards on March 19, 1997. The Determination found that D. J. Bobcat & Landscaping (the “Employer”) had contravened Sections 17(1), 18, 40, 41 and 45 of the *Act*, in particular by failing to pay Gaspar for overtime worked and two statutory holidays. The Determination also found that Gaspar was not entitled to length of service compensation pursuant to Section 64 of the *Act*.

Gaspar sought to have the Determination varied to order compensation for additional hours worked without payment and to include compensation for length of service.

Gaspar participated in the hearing with the assistance of an interpreter.

ISSUE TO BE DECIDED

The two issues to be decided are the hours worked by Gaspar for the Employer, and whether the Employer’s operation was seasonal under the terms of the *Act*.

FACTS

Gaspar was employed by the Employer from August 27, 1996 to December 19, 1996 as a labourer at the hourly rate of pay of \$10.00. The Employer provides services, including a bobcat tractor, to prepare housing sites for contractors and to landscape housing areas after construction. Both the Employer and Gaspar agreed that the work schedule was irregular. Gaspar worked on four days during the week of August 26, and did not work again until September 23, 1996, for instance. Gaspar’s employment terminated on December 19, 1996. He filed a complaint on February 11, 1997, claiming compensation for length of service, and raising the question of his entitlement to overtime and a delay in the issue of his final pay cheque.

The Delegate examined the Employer's payroll records and concluded that that Gaspar had worked a total of 402 hours, including approximately 34 hours at time and one half. In addition, the Delegate found that Employer had not paid Gaspar for the two statutory holidays that fell during his period of employment. Gaspar presented his own records of hours worked, showing that he worked a total of 407.5 hours. On some days, Gaspar's records showed he worked more hours than the Employer's data, while on occasion, the Employer's records were more favourable to Gaspar. The largest discrepancy came in the September 22-October 5 pay period, when Gaspar stated that he worked 81.5 hours, while the Employer recorded 70 hours worked.

Mr. Jovanovic ("Jovanovic") testified that he told Gaspar on a number of occasions that his work was dependent on the weather. In particular, he warned Gaspar in December that the job on which they were working would be the last one for the season. In December, Jovanovic told Gaspar that his wife should take a job she had been offered. The final job was interrupted by the weather. Gaspar did not work on December 13 or 17 and 18. He worked four hours on December 19. According to Janovic, the weather was worse on December 20, and he was only able to work clearing snow for a time after that date. Sheila Jovanovic completed a record of earnings on December 21, 1996. In March 1997 more work became available, and the Employer recalled Gaspar effective March 17. He did not reply or appear for work.

Jovanovic stated that he was surprised when he learned of Gaspar's complaint. Gaspar had asked him for holiday pay in November, around the time of the Remembrance Day holiday. Jovanovic told him that the Employer did not pay for statutory holidays, a position that he later acknowledged contravened the *Act*.

ANALYSIS

The appellant bears the burden of persuading the Tribunal that the Delegate's Determination is incorrect. In this case, Gaspar offered no new evidence in support of his position regarding the hours he worked. Although he pointed to the September 22-October 5 pay period for the largest discrepancy between his records and those of the Employer, there were no daily figures of time worked, merely the total for two weeks. Comparing Gaspar's records with the Employer's, there was no pattern of understating the time worked. Both Gaspar and Jovanovic stated that they discussed hours of work in November, and Gaspar did not bring up any underpayment for time worked previously. On the balance of probabilities, I prefer the Employer's statement of time worked.

Section 65(4) of the *Act* states that Section 63, which governs compensation for length of service, does not apply to an employee who:

- (b) is laid off or terminated as a result of the normal seasonal reduction, suspension or closure of an operation, or
- (c) is laid off and does not return to work within a reasonable time after being requested to do so by the employer.

The Determination raised the possibility that Gaspar's work might fall under either of Sections 64(4)(b) or (c). It is not necessary to decide which provision should apply, since the result would be the same. The work Gaspar performed clearly was seasonal, and the evidence before the Tribunal leads to the conclusion that Gaspar knew that he would be subject to a lay off when the weather became severe.

ORDER

For these reasons, the Determination of March 19, 1997 is confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal