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 -

H & H Logging Ltd.
(" H & H ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/543

DATE OF DECISION: September 25, 2000

DECISION

This is a decision based on written submissions by Dale W. Osborne of Mair Jensen Blair, Barristers and Solicitors for H & H Logging Ltd., John Robinson on his own behalf and that of Clint Campbell, and K. J. McLean for the Director of Employment Standards.

OVERVIEW

This is an appeal by H & H Logging Ltd. ("H & H"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued July 14, 2000. The Director found that H & H contravened Sections 18, 45 and 58 of the *Act* and section 37.7(2)(a) and (b) of the Employment Standard Regulations in failing to pay Clint Campbell and John Robinson ("Campbell" and "Robinson") wages for hours worked, overtime wages, statutory holiday pay and vacation pay, and Ordered H & H to pay $15,334.09 to the Director on behalf of Campbell and Robinson.

ISSUE TO BE DECIDED

Several grounds of appeal were advanced in H & H's August 8 letter of appeal. The first was whether the Director erred in finding that the relationship between the H & H and Campbell and Robinson was one of employer and employee. H & H also contended that the Determination was based on false allegations, and disputed the hours worked and the rate of compensation. Mr. Osborne indicated that further documentation in support of the appeal would follow.

On August 16, Mr. Osborne submitted documentation in support of the appeal. However, there was no evidence to support H & H's argument that Robinson and Campbell were not employees, and no submissions were advanced on that issue. I infer that this ground of appeal has been withdrawn.

FACTS

Campbell and Robinson filed complaints with the Director contending they had not been paid wages for hours of work, overtime, statutory holiday pay and annual vacation pay. The Director's delegate wrote to H & H regarding its position on the complaint on February 24, 2000. No response was received, and on March 16, the delegate issued a demand for H& H's payroll records.

On April 13, 2000, the delegate received a letter from Brian McKechnie of McKechnie Watt, Barristers and Solicitors, the registered office of H & H, enclosing a letter from Ritta Marshall of H & H. That letter stated, in part, as follows "We have no information regarding John Robinson or Clint Campell (sic). These men represented themselves as contractors and had been asked repeatedly to provide WCB GST or SIN #'s and provided us with someone elses (sic) phone number for contact...These two individuals left before X-mas 1999 to go Vancouver Island (sic) and did not return to our employ. You obviously have contact with Clint and John perhaps's (sic) you might be able to obtain this information on our behalf so that we may settle this matter."

The delegate had several telephone conversations with Ms. Marshall subsequently, in which she repeated H & H's position that Robinson and Campbell were contractors, argued that the wage claim was based on the records of other employees at the work site, and contended that cancelled cheques indicating the gross amount of wages paid could be produced. No written statements of other employees at the work site or cancelled cheques were ever provided to the delegate. Neither of the principals of H & H ever contacted the delegate.

The delegate also had discussions with Ms. Marshall regarding offers of settlement of the claims. H & H did not reply to those offers. On June 5, 2000, a voice mail message was left with Ms. Marshall regarding the production of payroll information. There was no response.

The delegate based his determination on the information provided to him by Robinson and Campbell. They contended that they worked for and with the employer, lived in a trailer near the employer's residence, and were picked up and travelled to the work site each day with the employer. The tools, equipment and fuel required for the job were provided by H & H.

Robinson and Campbell indicated that they thought they were employees, but were told they were being regarded as contractors by H & H. Robinson and Campbell provided H & H with time sheets for the first two pay periods. H & H advised them that was unnecessary as it would keep track of their hours. Robinson and Campbell continued to record their own hours of work, and provided those to the delegate.

No record of hours worked by Robinson and Campbell were maintained by H & H because it was of the opinion that they were contractors. No other documentation was provided by H & H to refute the claims.

The Director's delegate found that Robinson and Campbell were employees, and were owed wages in full as claimed.

ARGUMENT

Enclosed with the letter of appeal are photocopies of paycheques to Campbell and Robinson, time card entry listings, photocopies of field notes and other handwritten documents, and unsworn statements of Ms. McCullough and one other individual.

H & H argues that the documents show a discrepancy between the hours worked, the amounts paid to Robinson and Campbell, and the rate of pay.

Robinson argues that, if H & H felt he and Campbell were contractors, they ought not have kept a record of the overtime hours they worked. Robinson states that he and Campbell did not supply tools, equipment or fuel, and were, at the commencement of their work, asked to keep time sheets.

Robinson also challenges the validity and accuracy of the documents. He notes discrepancies between the timecard entries and the field notes, and argues that they cannot be relied upon. Robinson also contends that Ms. McCullough's statements as to the nature of his work are inaccurate. He claims that he was hired as a chaser and second loader.

The Director's delegate argues that H & H has failed to provide any evidence that Robinson and Campbell were not employees, although that is one of the grounds of appeal.

The delegate further argues, as I understand it, that the documents submitted with the appeal ought not be considered, because H & H indicated, in response to the Director's demand for employer records, that it had no information regarding either Robinson or Campbell. Further, although records were requested in two subsequent telephone conversations, no records were provided. The delegate argues that the appeal should be denied.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am not persuaded that the Director erred.

H & H has forwarded a number of documents which, they allege, contradicts the evidence of Campbell and Robinson in support of the appeal. This information is clearly evidence which was available to H & H at the time the Director's delegate was investigating the complaint, and ought to have been presented at that time.

The Delegate sent the first request for information to H & H on February 24, 2000. A Demand for Records was issued on March 16. H & H's reply was forwarded to the delegate by a law firm which I infer is the corporate office of H & H. Subsequent telephone calls were made to H & H regarding the information necessary to make a Determination. Despite the fact that Ms. Marshall indicated she would provide that information, no documents or records were received by the delegate. The Tribunal has held on many occasions that it will not accept evidence at a hearing which ought properly to have been put to the Director's delegate at first instance. (see *Kaiser Stables* BC EST #D058/98, and *Tri West Tractor Ltd.* BC EST#D268/96).

Mr. Osborne stated, in his initial letter of appeal, that H & H did not supply the delegate with documents to support its position as it was "under the impression from [the delegate's] conversations with Ms. Marshall that the matter would be referred to a Tribunal prior to any decisions being made." (emphasis in original)

I find this argument untenable. The Demand for Records requires H & H to provide employment documentation by March 31. The Demand indicates that failure to comply may result in a penalty for contravention. It ought to have been apparent to H & H at that time that the delegate had authority to make decisions that had legal consequences.

H & H had access to legal advice. The scheme of the *Act* does not provide for a Determination being made at first instance by a Tribunal. The delegate's reply suggests that Ms. Marshall had a discussion with the Regional Manager, in which she was advised that a decision would be made on the information available. Information was to be provided, and was not. H & H cannot now come forward with information that was available at all relevant times, and which it neglected or refused to provide to the delegate.

However, even if I were to accept the documentation on appeal, it is, in my view, insufficient evidence to vary or set aside the Determination. Some of the material is illegible, and is

incomprehensible without being placed in context. It is unaccompanied by any sworn evidence as to who the makers of the documents are, what they refer to, or when they were made. Even if this material was not available when it was requested by the delegate, it is simply an inadequate basis on which to allow an appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated July 14, 2000 be confirmed, together with whatever interest has accrued since that date.

C. L. Roberts

C. L. Roberts
Adjudicator
Employment Standards Tribunal