BC EST #D415/98

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 -

North Island Camp Ltd.
operating as North Island Lodge
("North Island" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/477

HEARING DATE: September 17, 1999

DECISION DATE: November 8, 1999

DECISION

APPEARANCES

Ms. Heidi Massel Mr. Daniel Lipez	on behalf of the Employer
Mr. Edward Frick	on behalf of himself

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination of the Director of Employment Standards (the "Director") issued on July 13, 1999. By way of background, Edward Frick ("Frick") was an employee of North Island, a mechanic, between June 15 and August 24, 1998. He filed a complaint that he was owed regular wages, overtime pay, vacation pay, travel time and other amounts. Frick was paid a flat rate per day, initially $125, and from June 20, $130. The delegate determined that Frick was owed $932.58 on account of overtime wages and statutory holiday pay. The Employer appeals that conclusion.

ISSUES

The Employer argues that:

> 1) the Determination is flawed because there is no finding of fact that Frick actually worked for 10 hours every day;
>
> 2) in the alternative, $130 per day is more than sufficient to cover the hours actually worked; and
>
> 3) in the further alternative, assuming that Frick was "on call", he was at his own residence and the hours should not be counted as work.

FACTS

Mr. Isser Rogowski ("Rogowski"), one of the owners of the Employer, testified at the hearing. He explained that the Employer operates a lodge for 24 guests at the Queen Charlotte Island during the season, usually from mid-May to mid-September, depending on the weather. The lodge is on a barge situated in a remote area and is accessible by helicopter from Masset. The lodge is associated with other nearby lodges. The staff at the lodge consists of house keeping, dining room and chef, dock employees and guides. The lodge also employs a manager.

Frick was hired to assist the manager with mechanical problems with the Employer's fleet of 14 powerboats, including a "garbage boat" and an "extra" (there is also an "extra" engine). Rogowski testified that the manager normally–in previous seasons–would be responsible for servicing the boats and their engines. The reason the Employer decided to hire Frick was that the

manager suffered from a bad back and was–at least for a period–confined to bed. The boats are supplied with a new leased engine every season and are under warranty. If there is a major problem with an engine, it is either sent to the dealer for repair, or the dealer will send a mechanic to the lodge to deal with the problem. At the end of the season, there is some "cosmetic" done to the engines before they are returned to the dealer. In the result, Rogowski explained, "there is barely any work" to be done during the season on the engines apart from general maintenance and "trouble shooting" every two weeks.

All employees are paid a daily flat rate because the Employer "cannot keep watching". Rogowski testified that when Frick was hired, he was told that he would be working for a "daily rate" and that he would be working 8-10 hours per day. Frick's evidence was that the manager at that time told him that he would "work generally 8 hours per day" and "occasionally more". The Determination set out the Employer's position as follows:

> "... the complainant's calculated hours per day were 8 hours per day. Due to his flexible work schedule, his actual hours of work per day ranged from 4 hours per day to 8 hours per day. He was paid a flat rate of $125.00 per day from June 15 to June 19 and $130.00 per day from June 20 to his last day of employment. *This flat rate was based on 10 hours per day at $13.00 per hour*."
>
> (My emphasis)

The Determination stated Frick's position as follows:

"Regarding his claim for overtime pay, the complainant alleged that he was on call from 6:30 a.m. to 7:30 p.m. Monday to Sunday. The employer averaged his hours to 10 hours a day and paid him a flat daily rate of $130.00. He claimed that on many days, he had to work until 9:30 or 10:00 p.m."

It is clear from the evidence at the hearing that the actual hours of work varied considerably. According to Rogowski, on many days, there would be a lot less work. The boats would have to be readied in the morning and, after that, there would be little to do, perhaps a "couple of hours". Rogowski visited the lodge on two occasions during Frick's employment, June 15-19 and July 10-13, 1998, and his direct personal knowledge with respect to Frick's work and hours of work is limited to those two periods. Rogowski also explained that on the two occasions, when he visited, he went fishing with Frick. The latter agreed that he went fishing with Rogowski but says that he was "on call" on the radio if the need for his services arose–which it did from time to time when a boat developed engine problems. He testified that if a boat broke down he would have to go out and deal with the problem, even if he was fishing. There was some dispute with respect to the area covered by the radio. Frick acknowledged that on a "couple of days" he only worked a few hours and on a "couple of days he worked between 4 and 6 hours. When asked, in cross examination, how many days he worked more than 8 hours, he did not know and stated that "he was on call for a minimum of 10 hours per day".

Frick testified that he did "many other things" besides maintaining the boat engines, cosmetic waxing of the boats, installing non-skid strips on the gunnels, helped the chef, cleaned and filleted fish etc. He did this to fill the time and not to be "bored". Rogowski agrees that Frick did other "minor work".

In cross examination, the Employer suggested that Frick "volunteered" for this work. Rogowski stated that, in his view, there was really no need for Frick's services, and explained that the Employer received complaints from other employees that Frick "did nothing". Ultimately, the owners of the Employer discussed the situation and decided to reduce Frick's days of work to 5 days per week at a reduced rate of pay. Apparently, Frick did not agree with this proposal and quit, although he returned to Employer for a few days when asked by the manager. I is common ground that Frick did not work between June 26 and 29 and August 3 and 17.

The staff lives both on the barge and on land, a "two minute boat ride" away. Frick generally lived on land with the guides. Rogowski said that Frick could request transport, take the "garbage boat", or go back and forth with the guides. Rogowski explained that Frick was always able to leave to go his quarters and that there was "no need for anybody to be on call". As mentioned above, Frick explained that "he was on call for a minimum of 10 hours per day", including lunchtime, between 6:30 a.m. and 7:30 p.m. He agreed that no-one told him that he had to stay on the barge and that he could probably have gone to his quarters on land. Frick did not agree with the suggestion that his quarters were his residence.

ANALYSIS

It is trite law that the appellant bears the burden of proving that the Determination is wrong. For the reasons set out below, I am not satisfied that the appellant Employer has met that burden.

As indicated above, the Employer argues that the delegate erred because there is no finding of fact in the Determination that Frick actually worked for 10 hours every day or that he was on call for those hours. The Employer referred me to this paragraph in the Determination:

> "*The Employer advised that the complainant was paid a flat rate of $130.00 per day from June 20 to the end of his employment. This was based on 10 hours per day at $13.00 per hour.* Pursuant to Section 40(1)(a) of the Employment Standards Act, an employer must pay the employee who works more than 8 hours in a day time and half the employee's regular wages for hours over 8. In this case, the employer has paid the complainant regular wages for 10 hours a day and the complainant is therefore owed half-time for the remaining 2 hours per day." (My emphasis)

There is merit to the Employer's argument that the delegate is required to determine the hours worked to ascertain the overtime wage rate (*Madock*, BC EST #D046/96). The overtime rate is determined by the "regular wage" rate, which is defined in Section 1 "regular wage", in the case of employee who is paid a flat rate:

> (b) if an employee is paid on a flat rate ... the employee's regular wages in a pay period divided by the total hours of work during that pay period,

The Employer argues that there are no records to support the claim and that there is no credible evidence that he worked the hours claimed (*Guidote*, BC EST #D479/98). The Employer suggested that Frick's evidence as to the hours worked was couched in "averages" and "generalities" and should not be accepted.

Leaving aside *weekly overtime* and other issues, which have not been raised by the parties, and which I do not propose to deal with, I do not agree with the Employer.

First, the Employer, as mentioned above, in fact, advised the delegate that the daily flat rate was based on $13.00 per hour for a 10 hour day. In my opinion, in the context of the factual circumstances of this case, including Frick's statement to the delegate that he was on call between 6:30 a.m. and 7:30 p.m., and sometimes worked longer hours, the delegate could well conclude from what the Employer told him that either Frick actually worked 10 hours per day, or agreed to limit his claim to an average of 10 hours per day, or was "on call" for 10 hours per day, *i.e.*, had to be available to perform work for the Employer when called upon. The delegate may simply have accepted the facts supplied from the Employer as the factual basis for his determination. From a practical standpoint, if an employer explains that an employee is paid on the basis of 10 hours per day and the employee is in agreement, or does not dispute it, there is probably little reason for the delegate to investigate further. I agree with the Employer's argument, supported by the Tribunal's comments in *Queen Charlotte Lodge Ltd.*, BCEST #D353/99, that in situations where the employer has failed to keep or produce records they are required to keep, the Director must decide the number of hours worked and provide reasons for the decision. In the circumstances, the 10 hour per day may well be a reasonable estimate. In brief, I am not satisfied that the delegate erred as argued by the Employer.

Second, and in any event, Rogowski explained, in his direct testimony, that the initial agreement with Frick was that he was to work an 8-10 hour day. Frick's evidence tends to support this. From the evidence, I conclude can that the agreement between Frick and the Employer was that he was to make himself available for a 10 hour work day, seven days per week, *i.e.*, he was "on call" at least for that time. I accept that he sometimes worked less than 10 hours and sometimes more. The Employer explained that the source of the statement to the delegate–10 hours per day at $13.00–was the Employer's accountant and that he was mistaken. The accountant did not testify at the hearing and I do not have the benefit of his explanation in that regard. In any event, Frick stated that his pay stubs indicated 10 hours per day. He explained that he thought the Employer "averaged it out", *i.e.*, that it represented pay for an average of 10 hours per day. In my view, this is convincing and reliable evidence that Frick is entitled to pay for 10 hours per day. If he is "on call" for 10 hours per day, he is deemed to be at work unless he is on call in his own residence (Section 1(2)), and he is entitled to pay at the overtime rate for hours in excess of 8 in a day at the appropriate rate (see Section 40). An agreement to work overtime at straight time is contrary to the *Act* and of no effect (Section 4). I do not accept the Employer's argument that Frick "volunteered" to when he did other work, helping the chef and so on. He performed labour or services for the Employer. In the result, I am not convinced that the delegate erred.

Third, while I am sympathetic to the Employer's practical difficulties keeping records of hours worked in the circumstances (see also *Queen Charlotte Lodge*, *above*), there is no question that the *Act* requires such record keeping (see Section 27 and 28). The difficulty, when neither the Employer nor the employee keep records of hours worked–though, in this case, the pay stubs indicate 10 hours

per day–is that it obviously becomes difficult to ascertain those hours. The records kept by the Employer, placed into evidence at the hearing, indicated days worked only. The number of days in respect of which the delegate awarded overtime pay is consistent with the number of days when the Employer indicated that he worked a full day. While I appreciate that the Employer seeks to question the actual hours worked and I appreciate Rogowski's evidence in that regard, I note that he was only at the lodge twice, June 15-19 and July 10-13, 1998, and therefore, has limited personal knowledge of Frick's hours of work. In cross examination by Frick, he agreed that–apart from his own observations during his trips up to the lodge–he "only knew what the manager told him". A more appropriate witness, therefore, would have been a person who was at the lodge during Frick's employment and who had direct personal knowledge of his hours of work, for example, the manager. I draw an adverse inference from the Employer's failure to call such a person to testify. Considering the burden on appeal, I accept that Frick is entitled to overtime wages as determined by the delegate.

In my view, the Employer is not prohibited from agreeing with an employee to work for a certain daily rate, with pay for a guaranteed or minimum number of hours, including overtime hours, and set out the wages on the basis of a daily rate, provided the agreement otherwise meets the requirements of the *Act* and the *Employment Standards Regulation*. However, the hourly rate must be clearly explained to the employee (*Kask Bros. Ready Mix Ltd.*, BC EST #311/88). In the case at hand, however, the daily rate was set by the Employer as $130. Accepting, as I do, that Frick worked 10 hours per day, either actually worked or was on call, then it is clear from the definition of "regular wage" set out above, that overtime wages are owing by the Employer. In other words, in the circumstances, the $130 per day is not sufficient. Had the Employer structured the wages differently, it might have been.

The Employer argues, in the alternative, that if Frick was "on call", he was at his residence. Section 1(2) reads:

> 1.(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

Frick denies that his quarters at the lodge was his residence. I agree. The Employer did not provide any authority for this proposition and, indeed, there was little evidence to support it. The meaning of "residence" has been considered by the Tribunal (and the courts) in a number of decisions, of which–perhaps–*Lowan (c.o.b. as Corner House)*, BC EST #D254/98 provides the most comprehensive analysis, although in the context of "residential care worker". The principles I glean from *Lowan* is that "residence"–as compared to the concept of domicile–is something more than temporary or intermittent, but with a degree of permanence: a person's settled abode, where a person keeps clothes, stores treasures and family memories, a place of privacy protected in law from state intrusion, a place of retreat from work, a person's own address, a telephone number, and where a person receives mail. It is clear that Frick had quarters at the lodge (on land) and that he slept there. Rogowski explained that the guides lived in these quarters, they slept and smoked there. Frick said at the hearing that he had a home in the Vancouver area. In that factual context, I am not persuaded that he was "on call" in his residence as argued by the Employer.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated July 13, 1999 be confirmed.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal