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 -

EMB Transport
(" EMB ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE NO.: 2000/509

DATE OF DECISION: December 7, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by EMB Transport Ltd. ("EMB") of a Determination which was issued on June 26, 2000 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that EMB had contravened Sections 27 and 28 and Section 40 of the *Act* in respect of the employment of Bernard MacRae ("MacRae"), and ordered EMB to cease contravening and to comply with the *Act* and to pay an amount of $16,651.38.

EMB says the Determination is wrong because MacRae was employed as a "logging truck driver" and, pursuant to Section 37.2 of the *Employment Standards Regulations* (the *"Regulations"*), Section 40 of the *Act* did not apply to his employment. Alternatively, EMB says that if the overtime provisions of the *Act* do apply to MacRae, EMB has complied with those provisions.

ISSUE

The issues in this appeal are whether Section 40 of the *Act* applies to MacRae and, even if it does, whether the requirements of that provision have been met by EMB. The burden is on EMB to show the Determination is wrong.

FACTS

The Determination notes the following background information:

> EMB Transport Ltd. ("EMB") transports logs, wood chips, and wood residue (hog fuel) from mill site to mill site, an activity which is under the jurisdiction of the Act. EMB operates within the Prince George area. EMB is not involved in the removal or transportation of logs from where raw timber is harvested (the "bush"). The logs that are hauled by EMB's trucks are logs that have already been brought to a mill from the bush for processing. The logs that cannot be used at that mill are then transported by EMB's truck to a mill that can use them.
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> The wood chips and hog fuel are similarly the result of some processing of the logs after they have been brought from the bush to the initial mill site. Their transportation is not part of the harvesting and/or extraction of the logs from the bush. They are transported by chip trucks - logging trucks are not physically equipped to transport wood chips or hog fuel as this material needs to be transported in containers such as on a chip truck. EMB's chip trucks are used to transport the wood chips and/or hog fuel to the mill that uses them.

> MacRae worked from August 12, 1994 to May 21, 1999, when he quit. He was employed as a chip truck driver and was compensated on a per load basis at the rate of $35 - $40 per load. For the period December 1 through March 31, the trip rate was $40; for the period April 1 through November 30, the trip rate was $35. He drove from the Woodland Mill in the BCR Industrial Site (Prince George) to the Northwood Pulp Mill on the Northwood Pulp Mill Road (Prince George).
>
> These are the facts which are not in dispute.

In addressing the position taken by EMB, that MacRae's employment fell within Section 37.2 of the *Regulations*, the Determination contained the following statement:

> The purpose and industry argument for establishing Section 37.2 for logging truck drivers paid on a compensation basis other than hourly, was that the work schedule and season were unpredictable. Applying for a variance or setting a wage scale in advance did not work well due to the unique circumstances of the industry - it being unpredictable and therefore the standards of Part 4 were difficult to apply. These factors do not impact EMB. The type of work performed by MacRae was not so unpredictable as to make the application of Part 4 of the Act difficult. EMB is not hampered by the same seasonal constraints that the logging industry is - in particular EMB's trucks travel on paved surfaces - rather than the narrow winding, dirt or gravel logging roads logging trucks are required to travel on. Nor is EMB hampered by weather as the logging industry is. The chip trucks have a regular schedule and operate year round.

The appeal does not challenge any of the above findings of fact.

EMB asserts, as they did during the investigation, that EMB pays its drivers a "premium rate to attract good drivers" and the rate includes overtime. During the investigation, EMB prepared an accounting of the hours worked by MacRae, which was relied upon by the Director as the basis for determining the hours worked by MacRae over the period of time covered by the Determination. In the appeal, EMB has attached a new summary, stating:

> Prior to the Determination EMB was unable to compile the exact hours worked by the Complainant, however, since then, EMB was able to determine the exact hours worked by the complainant and we are submitting a new Summary.

ARGUMENT AND ANALYSIS

I will deal first with the new summary of hours worked that has been submitted to the Tribunal with this appeal. The submission of the Director in reply to the appeal notes the following:

> The Delegate initially contacted the Appellant on December 7, 1999. During that contact, the Appellant was advised of the complaint, and its issues. The Delegate requested the Appellant to provide payroll records, including records of hours worked. An Employer

> has the responsibility under Section 28(d) "to keep information on the hours worked by an employee each day, regardless of whether the employee is paid on an hourly or other basis". The Appellant did not do so. However, both the Delegate and the Appellant agreed to accept the accounting of hours worked compiled at that time by the Appellant. Further, there was ample time for the Appellant to have accessed "the exact hours worked by the Complainant" and to have produced them to the Delegate. No reason is provided for not having done so during the course of the investigation, prior to issuing the Determination.

The Director says that the new summary should not be accepted in this appeal. I agree with the Director. The information contained in the summary was reasonably available to EMB during the time the investigation was conducted. Their inability to provide an exact record of hours worked was caused by their failure to comply with a requirement of Section 28 of the *Act*. They prepared the summary and they knew and agreed it would be used by the Director for the purposes of the investigation. On February 28, 2000, the Director provided EMB with the wage calculation based on the summary. EMB did not dispute the hours of work contained in that calculation. There was more than six months from the time the Director first contacted EMB and the issuance of the Determination during which EMB could have provided any additional relevant information. The circumstances in which the summary has been submitted does not provide either the Director or MacRae with an opportunity to test the bald assertion that the summary is an accurate reflection of hours worked by the Complainant.

The Tribunal has indicated in several decisions that it will not allow a party who fails or refuses to provide information during the investigation that is reasonably available and relevant to the investigation and later seek to introduce that information on appeal (see *Re Tri-West Tractor Ltd*., BC EST #D268/96 and *Re Kaiser Stables Ltd.*, BC EST #D058/97). The rationale for that approach lies in the statutory objective to provide "efficient" resolution of disputes over the interpretation and application of the *Act*. The circumstances of this case are compounded by the fact that EMB agreed to accept the summary as an accurate reflection of the hours worked by MacRae. Neither the new summary nor the argument based on that summary will be considered in this appeal.

On the question of whether EMB complied with the overtime requirements of the *Act*, I also agree with the conclusion found in the Determination. More to the point, EMB has not shown that conclusion to be wrong. In fact, EMB makes no attempt to show that it complied with the statutory requirements found in Part 4 of the *Act*. Rather, EMB argues that the Determination has the effect of unjustly enriching MacRae by compensating him at a rate of pay significantly higher than either the industry standard or what was agreed between MacRae and EMB. EMB points to Section 2 of the *Act* in support of their argument particularly Section 2(a) and Section 2(b). EMB says that MacRae received more than the "basic standards of compensation" and that the Determination, by re-writing the agreement between MacRae and EMB to provide more compensation to MacRae than was contemplated, is not be consistent with the statutory objective of "promoting fair treatment of both employees and employers".

There are two concerns with this argument. First, and most fundamentally, the substantive requirements of the *Act* in respect of the payment of overtime set out in Part 4 and are quite clear and specific. The requirements of Part 4 are minimum requirements and those requirements were not applied by EMB to the

employment of MacRae. The argument implies that payment of overtime is not included in the notion of "basic standards of compensation". That would be incorrect; payment of overtime is a part of the "basic standards of compensation" provided by the *Act*. If Section 37.2 of the *Regulations* did not apply, then a part of the "basic standards of compensation" to which MacRae was entitled under the *Act* was overtime. On the facts, it cannot be said that he received even the "basic standards of employment", let alone argue that he received more than the basic standards of the *Act*. To accede to the argument of EMB would countenance a clear violation of the *Act*. EMB says that is what MacRae agreed to[1]. However, Section 4 of the *Act* specifically addresses circumstances where an employer and an employee may attempt to agree to waive the minimum statutory requirements of the *Act* and it says such agreements have no effect. EMB would have me ignore that provision and, further, in effect tell the Director the delegate was wrong *not* to ignore that provision. Even if I were able to do so, I would not.

The primary statutory responsibility of the Director is to ensure compliance with the requirements of the *Act*. The Determination does no more than that and does so on the basis of specific statutory provisions directing the conclusions reached. The *Act* requires that overtime be paid and that in calculating the "regular wages" for the purpose of determining the overtime owing, that the compensation rate paid to an employee be converted to an hourly rate. Both of these requirements were included in the Determination. There was nothing wrong in any of that.

The second concern relates to EMB's reliance on Section 2 as the cornerstone for this argument. Section 2 is no more than a statement of the purposes and objects of the *Act*, which, while important, are not substantive provisions and do not override substantive provisions of the *Act*. Even if I were to accept that EMB was providing more than basic standards of compensation to MacRae or that it is unfair to (as EMB says) "unjustly enrich" MacRae (and I do not decide those matters one way or the other), that would neither authorize nor justify a breach of the *Act* nor allow the Director to ignore such a breach.

In any event, and as indicated above, the disagreement by EMB with the statement in the Determination that "EMB . . . never paid overtime" is without factual foundation. There is no indication in the material that EBM ever paid MacRae overtime as required by the *Act*. As well, there is nothing offered in the appeal showing EMB paid MacRae overtime. There is nowhere in the *Act* that allows an employee to be paid a rate of pay that is inclusive of specific statutory obligations.

On the issue of whether MacRae was a logging truck driver and excluded from the provisions of Section 40, *inter alia*, of the *Act* by operation of Section 37.2 of the *Regulations* , I also agree with the conclusion found in the Determination for all the reasons set out in the Determination.

I would make only one additional comment, in reply to the argument of EMB concerning the proper interpretation of who is a "logging truck driver" for the purposes of Section 37.2 of the *Regulations*. Section 37.2 of the *Regulations* reads:

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[1] I note that MacRae disagrees with that assertion, but I do not need to resolve that conflict in order to decide this aspect of the appeal.

Logging truck drivers

37.2 Sections 31 to 35, 36(1) and 40 to 42 of the Act do not apply to a logging truck driver who is paid on a compensation system other than an hourly rate and who is working in the interior area as defined in section 1(1) of B.C. Reg. 22/96, the Timber Harvesting Contract and Subcontract Regulation.

That provision must be read in its entire context, in its grammatical and ordinary sense and in harmony with the scheme of the Act, the object of the Act, and the intention of the legislature (see *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27).

There is no dispute that MacRae was employed as a chip truck driver and his job was as described in the Determination and reproduced above. EMB argues that the term "logging truck driver" is not defined in the *Act* or *Regulations* and ought to take its meaning from legislation dealing with "logs" and "logging". EMB submits that, when viewed against the definition of "logs" and/or "logging" in other legislation, the term "logging truck driver" can include a chip truck driver and provides the following:

> The definition of "logs" and "logging" may be found in other legislation as follows:
>
> *Logging Tax Act* - the definition of **"log"** includes wood chips and the definition of **"logging operations"** included all aspects of the forestry business, including sale and transportation of logs (and wood chips).
>
> *Forest Act* - the definition of "wood residue" includes wood chips and hog fuel. In prescribing restrictions on the manufacture in B.C., the government has included all aspects of the forest industry, including wood residue.

What this submission fails to appreciate is the reference in Section 37.2 to the *Timber Harvesting Contractor and Subcontractor Regulation*, B.C. Reg. 22/96 (the *"THCSR"*). The reference to the *THCSR* suggest that some assistance might be provided in that regulation to identifying those employees intended to be excluded from Part 4 of the *Act*. Among other things, an employee intended to be excluded in Section 37.2 is one *"who is working in the interior area as defined"* in the *THCSR.* In the *THCSR*, interior area is defined:

> ***"interior area"*** *means an area of British Columbia that is not in the coastal area;*

Coastal area is defined, and:

> *. . . means the area within one or more timber supply areas or tree farm licences listed below: . .*

The reference to "work in the interior area" is directly related to work performed in connection with a timber supply area or tree farm licences and is consistent with the conclusion in the Determination that the

work contemplated by Section 37.2 of the *Regulations* "refers to the extraction and harvesting phase of the logging industry". Nor can one overlook that the *THCSR* is intended to regulate timber harvesting operations and the work contemplated to be done in such operations is identified as "timber harvesting services" and is defined:

> ***"timber harvesting services"*** *means services provided in respect of one or more phases of a timber harvesting operation;*

A "phase" is also defined:

> ***"phase"****, when used in relation to a timber harvesting operation, means felling, bucking, yarding, skidding, processing, decking, loading, hauling, unloading, non-mill or non-custom dryland sorting or booming, logging road construction, logging road maintenance including temporary road deactivation, logging access road construction and any other phases or combinations or components of them that are aspects of a timber harvesting operation under a licence, but does not include catering, cruising, forest engineering, semi-permanent or permanent road deactivation, towing, barging, mill or custom dryland sorting or booming, reforestation, scaling, equipment rental, equipment maintenance or providing support services relating to timber harvesting;*

In my view, all of the above indicates an intention on the part of the legislature that the "logging truck drivers" contemplated by the exclusion in Section 37.2 of the *Regulations* are limited to those employed in timber harvesting in the interior area (and who are being paid on a compensation system other than an hourly rate).

This conclusion is consistent with the objective of the legislature in establishing exclusions from hours of work and overtime provisions of the *Act*. I adopt the following comments of the Tribunal in *Re Williston Navigation Inc.*, BC EST #D391/00:

> The *Act* is broad based public policy legislation. The fact that the exclusions in Section 34 exist at all suggests the legislature has accepted that, as a matter of public policy, it would be inconsistent with the *Act's* objectives, as well as being unfair, to require that such work be performed within the framework of the hours of work and overtime requirements of the *Act*. For the most part, the work performed by excluded employees has unusual or unique features that do not allow it to conform with the requirements found in Part 4 of the *Act*. In my view, the following statement, noted in the Determination as having been made by Williston during the investigation, is a reasonably accurate description of the basis for the exclusions found in Section 34 of the *Regulations*:
>
> . . . in looking at the type of worker that is exempt from Part 4 of the Employment Standards Act it would appear that the distinction is based on the inability of the employer to function in business if they were held to the strict standards of Part 4. The Act

> recognizes that some occupations have built into them a need or expectation of different hours of work or overtime due to the nature of the employment.
>
> The above statement is supported by Professor Mark Thompson in *Rights and Responsibilities in a Changing Workplace: A Report on Employment Standards in British Columbia* at page 31 of the Report, where he says that:
>
> . . . exclusions should be based on factors inherent to the work performed.

The conclusion in the Determination is also consistent with the general approach to exclusions to the minimum standards of the *Act*, which, as the Determination notes, are narrowly interpreted. A narrow interpretation is justified because such exceptions run against the objective stated in Section 2 of the *Act*:

> *(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;*

The argument of EMB on Section 37.2 of the *Regulations* is not supported by any analysis of the rationale for the exclusion of "logging truck drivers" from certain parts of the *Act* nor does the argument respond to the rationale provided for the conclusion in the Determination, which is that the "type of work performed by MacRae was not so unpredictable to make application of Part 4 of the *Act* difficult".

The work being done by MacRae for EMB does not fall within the work contemplated by the exclusion of "logging truck drivers" in Section 37.2 of the *Regulations*. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 26, 2000 be confirmed in the amount of $16,651.38, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal