BC EST #D420/99

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of two appeals pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Qualified Contractors Ltd.

("Qualified" or the "employer")

- of two Determinations issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE Nos.:	1999/419 & 1999/420
DATE OF HEARING:	September 21st, 1999
DATE OF DECISION:	October 22nd, 1999

DECISION

APPEARANCES

Denovan T. Hill	Legal Counsel for Qualified Contractors Ltd.
Satinder Raj Kals	on his own behalf
Kevin Molnar	for the Director of Employment Standards

OVERVIEW

I have before me two appeals both filed by Qualified Contractors Ltd. ("Qualified" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*").

The first appeal (EST File No. 1999/419) is from a determination issued by a delegate of the Director of Employment Standards (the "Director") on June 28th, 1999 under file number 000-709 pursuant to which the employer's former employee, Satinder Raj Kals ("Kals"), was awarded the sum of $11,242.16 on account of unpaid wages and interest. I shall refer to this determination as the "Wage Determination".

The second appeal (EST File No. 1999/420) is from a determination issued by another delegate of the Director of Employment Standards, also on June 28th, 1999 under file number 000-709, pursuant to which the Director levied a $150 monetary penalty pursuant to section 98 of the *Act*. I shall refer to this determination as the "Penalty Determination".

I shall first address the employer's appeal of the Penalty Determination.

THE PENALTY DETERMINATION

On May 14th, 1999, the Director issued a determination levying a $0 penalty against Qualified based on its failure to pay wages "at least semimonthly and within 8 days after the end of the pay period" [see section 17(1) of the *Act*]. Qualified did not appeal this $0 penalty and it now stands as a final order.

The relevant portion of the Penalty Determination now under appeal reads as follows:

> "Based on Qualified Contractors Ltd. payroll evidence, employee Satinder Raj Kals commenced work not later than June 16, 1998 and received his first wages on August 3, 1998 contrary to section 17(1) of the ***Employment Standards Act.***
>
> As Qualified Contractors Ltd. has contravened this specified provision of the ***Employment Standards Act*** on one previous occasion, the penalty is $150.00

> multiplied by the number of affected employees. The number of affected employees is one. The penalty imposed is **$150.00.**"

An employer's obligation to pay wages at least semimonthly (*i.e.,* section 17 of the *Act*) is a "specified provision" for purposes of section 29 of the *Employment Standards Regulation.* Pursuant to subsections 29(2)(a) and (b) of the *Regulation,* a first contravention results in a $0 penalty; a second contravention results in a penalty of "$150 multiplied by the number of employees affected by the contravention". Qualified had previously contravened section 17(1) of the *Act* and the $0 penalty levied as a result of that contravention was not appealed.

Of course, the employer did appeal the most recent $150 penalty, advancing various grounds of appeal including bias on the part of the delegate and, in essence, a failure by the delegate to give the employer a reasonable opportunity to respond as delineated by section 77 of the *Act.* At the appeal hearing, counsel for the employer advised me that he was "not pursuing the appeal" with respect to the Penalty Determination.

Accordingly, and given that the Penalty Determination appears to have been quite properly issued, the employer's appeal of the Penalty Determination is dismissed and the $150 monetary penalty is confirmed.

THE WAGE DETERMINATION

As noted above, the delegate determined that Qualified owed Kals $11,242.16 in unpaid wages and interest. The delegate has now acknowledged, however, that there is a clerical error in the determination inasmuch as he awarded Kals unpaid wages for the period July 31st to August 5th, 1998 even though Kals was not working for Qualified during this time. I might add that Kals never claimed wages for this latter period. In any event, the corrected figure, including interest calculated pursuant to section 88 of the *Act* as of June 10th, 1999, is $10,205.31.

The delegate found that Qualified--a contractor in the silviculture industry--employed Kals at various intervals during the summer and fall of 1998 as a camp cook; his wage rate was $10 per hour. The delegate rejected the employer's position that Kals worked no more than 6 hours per day and accepted Kals' position that he worked about 10 hours per day.

The employer's appeal was heard at the Tribunal's offices in Vancouver on September 21st, 1999. The employer called five witnesses. After first verifying that the employer did not wish to call any other evidence, I advised both the employee, Mr. Kals, and the Director's delegate that since I was not satisfied, having considered both the previously filed written submissions and the *viva voce* evidence presented at the appeal hearing by the employer, that the employer had raised even a *prima facie* case in support of its appeal, I did not need to hear their evidence or submissions. Other than varying the Wage Determination to correct the aforementioned clerical error, I dismissed the employer's appeal and indicated that more complete written reasons would follow.

I might add that given my view that the employer's appeal was manifestly without merit, and the fact that the appeal hearing would have been required to be adjourned to some future date, perhaps several months away, in order to complete the employee's and delegate's evidence, I chose to

bring the proceedings to a close. Section 2(d) states that one of the purposes of the *Act* is to provide fair and efficient dispute resolution procedures--requiring the respondent employee and the Director to appear and respond, at some future date, to a wholly unmeritorious appeal is, in my view, neither fair nor efficient.

It is, of course, axiomatic that proceedings before the Tribunal are *appeal* proceedings; the Tribunal does not conduct a *de novo* hearing. In this instance, the employer presented five witnesses. In sum, this evidence is a morass of inherently contradictory allegations and, in some instances, outright deceitfulness. Having considered the employer's evidence in total, I am unable to conclude that there is *any* basis--other than by correcting the above-noted clerical error--for varying or cancelling the Wage Determination.

Before I proceed to address the evidence of the five witnesses called by the employer, I should also note that although the employer alleged bias and a breach of section 77 of the *Act* on the part of the delegate, not a scintilla of evidence was presented to support either ground.

Qualified's first witness was Mr. Harbjahan Shoker ("Shoker"), the company's president and a director. Shoker was not, for extended periods, at the various job sites and thus was unable to testify, from his own personal knowledge, about Kals' hours of work. Sulinder Shoker, the site foreman (and Shoker's father-in-law) estimated that Shoker was on-site no more than 25% of the time spanned by Kals' unpaid wage claim. Even when Shoker was on-site, he usually spent his days at the actual job-site supervising the work of the crew, rather than in the camp, and thus was not in a position to testify as to whether or not Kals (as Kals maintained) worked (say, doing food preparation, cleanup or obtaining food supplies) during the day when the other employees were off working in the bush away from the camp site itself.

Shoker testified that the work crews ranged from 7 to 12 people but certainly not more than that. This evidence was lead, presumably, to show that Kals' cooking duties were rather less involved than as determined by the delegate. However, a subsequent witness agreed that the crew he worked with consisted of at least 14 people. The employer called two witnesses--and tendered statements signed by these witnesses--stating that the crews consisted of as many as 22 people. I might add that after tendering these two signed statements, the employer's counsel then proceeded to endeavour to impeach his own two witnesses, a matter to which I will return later on in these reasons. Finally, as to the crew size, the employer's *own records* show that on at least one day it recorded some 18 crew members working at a particular job site.

The employer relied, to a great extent, on the "hours of work" records prepared by Shoker's father-in-law, Sulinder Shoker. These handwritten records record 6 hours worked by Kals each day and that Kals worked 6 days each week. The records never vary as to Kals hours worked. Shoker testified that these recorded hours--for Kals and all other employees--were recorded each day (*i.e.*, a contemporaneous record) by Sulinder Shoker and then, in turn, forwarded to the company's accountant. However, during his testimony Sulinder Shoker frankly conceded that the entire "hours of work" records were unreliable and a complete fabrication. First, Sulinder Shoker testified that Kals often worked less than 6 hours in a day but 6 hours were nonetheless recorded--I must query why the employer would pay for hours not worked--and, second, said that the "hours of work" records were not prepared contemporaneously but sometime later on after the delegate commenced his investigation. Sulinder Shoker testified: "We did not record hours; we did not

write it down. It was not written down. The records were completed later; the papers were prepared later".

The next two employer witnesses, Narinder Phagura and Harnek Dhaliwal, both signed statements to the effect that the crews generally worked 7 days a week and that Kals cooked for the crew each day. Neither statement contains any allegation regarding Kals' actual daily hours. Dhaliwal himself only worked for the employer for some *5 days* in 1998 and thus was not in a position to comment on Kals' hours worked throughout the entire period spanned by his complaint. I might add that Dhaliwal himself claimed to have worked some 10 to 15 hours each day even though the employer's records show him only having worked as little as 3 hours and no more than 8 hours on any given day (further calling into question the veracity of the employer's time records).

Dhaliwal did corroborate Kals' assertion--and the delegate's finding--that Kals worked as the crew cook for some 5 days in May in the Revelstoke area prior to the subject contract being cancelled by the provincial government due to Qualified's breach of certain licensing provisions (the crew never actually commenced the brushing work provided for in the contract but was camped out in the area for several days). In addition, neither individual was present at the camp during the work day and thus was not in a position to contradict Kals' assertions as to his hours worked--both purported to do so (and thereby repudiate their written statements).

As to their impeachment by the employer (*i.e.,* the party who called them as witnesses), I find their stories wholly improbable. Phagura, for his part, testified in response to my questioning that, by reason of his alcoholism (he drinks every day), he had no clear recollection of any event that occurred more than a year ago. Phagura told a fanciful tale of having been, in essence, kidnapped by Kals, plied with alcohol over a 3-day period and then signing the statement in question without appreciating its contents. Dhaliwal, on the other hand, acknowledged the contents of his statement but says that he only signed it after having been promised by Kals some sort of reward in return. Thus, *on their own evidence,* Phagura is a an unrepentant alcoholic with no clear recollection of any of the events in question while Dhaliwal's evidence is for sale to the highest bidder. Neither witness, in my view, has any credibility whatsoever insofar as the number of hours Kals actually worked. To the extent that that these two witnesses' stories are considered at all, their evidence is at least as consistent with Kals' position as with that of the employer.

The employer's fifth and final witness, Jagdish Mahajan, worked for Qualified at a camp near Hazelton, B.C. in July and August of 1998. He testified that Kals prepared breakfast in the morning and that dinner was ready when the crew returned at the end of the day. Although he testified that Kals spent about 2 hours in the morning preparing breakfast and another 3 hours in the evening preparing dinner, I also note that breakfast was being prepared while the crew slept and dinner was prepared while the crew was away working. Thus, I cannot find that these time estimates are of much value. Further, and in addition, Mahajan acknowledged that he "was not sure what Kals was doing during the day" and that Kals may well have spent part of his days purchasing groceries or attending to other duties. According to Mahajan, the crew left each day around 7 or 8 A.M. and typically returned at around 6 P.M.

I am not persuaded that the employer has raised even a *prima facie* case that the Wage Determination ought to be cancelled or varied other than varied, as previously noted, to correct an admitted clerical error. In my view, and after considering the evidence and submissions presented

by the employer, I am of the view that, subject to correcting the aforementioned error, the Wage Determination ought to be otherwise confirmed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Penalty Determination be confirmed as issued in the amount of **$150.**

Pursuant to section 115 of the *Act*, I order that the Wage Determination be varied and that an amended Determination be issued as against Qualified Contractors Ltd. in the amount of **$10,205.31** together with interest to be calculated by the Director in accordance with section 88 of the *Act* as and from June 10th, 1999.

Kenneth Wm. Thornicroft,
Adjudicator
Employment Standards Tribunal