

**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 -

Garry Sajiw  
("Sajiw")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

ADJUDICATOR: James Wolfgang

FILE No.: 2000/264

DATE OF HEARING: October 6, 2000

DATE OF DECISION: December 8, 2000

**DECISION**

**APPEARANCES:**

Garry Sajiw	on behalf of himself
Andrew Croll	counsel for Sajiw
Don Tillapaugh	representing Liard Aquaculture Inc.
Barb Sharpe	representing Liard Aquaculture Inc.
Michael Wagner	counsel for Liard Aquaculture Inc.
Robert Krell	representing the Director

**OVERVIEW**

This is an appeal by Garry Sajiw (Sajiw) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination dated March 20, 2000 by the Branch.

Sajiw filed a confidential complaint with the Branch on August 3, 1999.

Liard Aquaculture Inc. (Liard) had applied for and received two variances from the Employment Standards Branch. The first was in effect from March 18, 1996 until March 18, 1998. The second variance has been in effect from March 15, 1999 until March 15, 2001. Liard admits they failed to comply with the first variance and the delegate of the Director (“the delegate”) found it null and void. The delegate applied the provisions of Section 40 of the *Employment Standards Act* to that period. Liard also failed to follow the provisions of Section 40 of the *Act* for the one year period between variances. Finally, Liard disregarded the terms of the second variance until the matter came under the review of the Branch. No record of hours worked by Sajiw was kept by Liard in violation of Section 28 of the *Act* until after July 1999. Liard developed a theoretical model of a work period that was used by the delegate to establish a pattern of hours worked by Sajiw during the period when no records were kept.

Sajiw began keeping a record of his hours from April 5, 1999 until August 1999. The delegate used those records to calculate the hours worked by Sajiw for that period.

The Determination found Liard had failed to pay Sajiw overtime and ordered them to pay \$5,326.77.

Counsel for Sajiw believes he is owed at least \$13,966.00. If Section 40 of the *Act* were used rather than the terms of the variance the amount would be considerably more. Sajiw claims the amount is approximately \$30,000.

A telephone conference call was held on October 3, 2000 between both counsels for the parties, the delegate and the adjudicator. The delegate who participated in the conference call and appeared at the hearing was not the same delegate who first investigated the complaint. The purpose of the conference was an attempt to narrow the issues to be considered at the hearing.

An offer to mediate the dispute was rejected as the delegate had tried unsuccessfully earlier to mediate a settlement.

A hearing was held on October 6, 2000 and evidence was taken under oath from a number of witnesses.

There were preliminary objections to Sajiw being allowed to now present evidence at the hearing that should have been available at the time of the investigation by the delegate. It was agreed the evidence could be presented and I would determine later whether it should be allowed and what weight should be given such evidence.

## **ISSUE**

Is Sajiw entitled to additional overtime pay?

## **ARGUMENT**

Sajiw was employed as a Fish Technician I by Liard from February 17, 1997 to December 06, 1999. For the first 6 months he was employed at the Loughborough Inlet site and then was transferred to the Hardwicke Island site. The period we are concerned with is from August 1, 1997 to July 31, 1999. During this period he was paid \$120.00 per day until January 1, 1999 when his rate went to \$140.00 per day. Sajiw was terminated December 6, 1999 for misuse of cellular phone time, inflated claim for hours worked and a low level of productivity. The matter of whether Sajiw was terminated for just cause is not before the Tribunal.

Sajiw claims he worked an average of 15 hours per day over the year. A typical day begins with starting the generator, taking the water samples and feeding the fish. The fish are fed from sunrise to about 14 minutes after sunset each day. The hours of work in summer are obviously longer than in winter. The only exception to this schedule is if the water quality level is too low, in which case no feeding takes place. The fish are fed by computer and the technician monitors the feed rate and ensures the system is operating properly. In addition, there are a number of tasks which must be done during and outside the feeding schedule. The feed pipes must be cleaned, the cameras checked, the predator devices activated, dead fish removed from the pens, and all anchors and lines must be checked, etc. Between 40 and 100 tonnes of feed arrives on a regular 10 day basis, at times at night, and must be unloaded. Harvesting takes place on a 1 to 3 times a week basis. The fish have to be graded which, according to Sajiw, was a very labour intensive job prior to the new grading system.

The workload was much higher in the period prior to February 1999. A change in the harvesting system reduced the harvest time from 4-6 hours to 1½-2 hours. Changes to the coating on the nets reduced the amount of work required to pull them. A change in customers in June 1999

made it possible to harvest during the day rather than always at night as with the previous customer. Also the fish grading system changed making that job easier.

Liard became aware they were in violation of the *Act* in early 1999 and, on April 4, 1999 sent a memo to all employees advising them to start recording their daily hours of work. Forms were provided for this purpose. Sajiw claims he did not use the forms supplied and kept his own records. The reason he gave for not using the company forms was the owner told them to only indicate 10 hours per day regardless of the number of hours worked. All of Sajiw's witnesses supported that statement and one of them claimed being told if you put in for more than 10 hours per day you could be fired.

Liard denies they threatened anyone over the reporting of hours but do admit there was an attempt to limit the amount of time being reported on the time cards. They claim they were creating a time bank for the employees where the hours in excess of 10 could be banked. They claim that was discontinued after they found it to be a violation of the *Act*.

Liard claim the work records produced by Sajiw for the period April 5, 1999 to July 31, 1999 indicate he worked an average of 12.31 hours per day, not the 15 hours per day he claimed. If those were his hours during the summer season he would have worked less during the winter months and his average hours would be less than 12.31.

Liard produced a theoretical model of typical tasks in a work period and assigned time to perform the tasks to each one. This they indicate is a fairly accurate calculation of the amount of time an employee should take in performing all of the work. This model was used by the delegate to calculate the number of hours Sajiw might have worked in the period August 1, 1997 until he started keeping records in April 1999.

Liard also supplied a copy of an employee's work record, Ryan Horlyk (Horlyk), who was also employed at the Hardwicke Island site as a Fish Technician I indicating the hours he had claimed to work performing the same tasks as Sajiw. Liard claimed this was the person who replaced Sajiw. This is for the period August 1999 to August 2000. It indicates 109.5 hours of overtime worked in the one-year period, of which 107.5 hours were in the last 6 months of the period.

The witnesses for Sajiw were fairly consistent on the average number of hours worked per day, claiming the average to be 15 hours. They all indicated the average hours worked were greater prior to the changes made in late 1998 and early 1999.

The crew live on site in a facility that accommodates both the living and working quarters. There were 5 employees at the Hardwicke Island site with either 2 or 3 working together at any time. With the 8-6 shift schedule there is an overlap of 2 days from the new crew arriving and the old crew leaving.

There appears to have been a number of shift schedules used during the 2 year period, August 1997 to August 1999. The Determination shows a 5-2 shift schedule until March 1998 when it went to a 9-5 schedule. In May 1998 Liard went to the 8-6 schedule currently in effect.

Under the variance issued by the Branch March 15, 1999, the employees work from 4 to 11 hours per day on an 8-6 shift schedule. The total hours at the completion of a shift cycle is 80 and that is a mandatory minimum. Overtime is paid for hours in excess of the daily and weekly hours.

The delegate visited each of the sites and met with the employees regarding the general overtime investigation. By a memo dated August 11, 1999 Liard requested the employees provide any logbooks or records of hours worked to the delegate. As a result of that investigation a one-time offer of \$6,000.00 was proposed by the delegate to settle the overtime issue for all employees prior to August 1999. Each employee that had worked the 2-year period would be eligible for the full amount and those with less than 2 years would have the amount pro-rated. At the Hardwicke Island site all of the employees except Sajiw accepted the offer. Sajiw claims to accept the \$6,000 would amount to him receiving 20 cents on the dollar of the money owed.

There was a telephone conference call held October 3<sup>rd</sup> between the respective counsels, the delegate and the adjudicator. The written submissions by the potential witnesses contained a number of accusations that were not before the Tribunal. The parties agreed they would limit their presentations to the issue of hours worked by Sajiw and what overtime, if any, was owed and not lead evidence on the other matters.

## **ANALYSIS**

The issue before the Tribunal is fairly simple. The parties agree Sajiw worked some overtime during the period August 1, 1997 to July 31, 1999. The difficulty is in determining how much overtime did he work and what rate of overtime should be paid for those hours. Sajiw and his witnesses all indicated they had worked an average of 15 hours per day. Sajiw's record for the period April 1, 1998 to August 1998 indicate he had recorded less than 15 hours average per day during the busy period. Notwithstanding that, there is also a question as to how much weight can be put on the model of hours prepared by Liard.

There appears to be a basic flaw in the *Act*. The Determination correctly points out the definition of regular wages in Part 1 of the *Act* which states if an employee is paid flat rate, piece rate, commission or other incentive basis, the employee's wage in a pay period divided by the employee's total hours of work during the pay period becomes the regular wage. Due to this definition, an employee's regular wage will fluctuate, dependent on the number of hours worked. In fact, the more hours an employee works in a pay period the lower the hourly rate will be.

The reference to the hours for Horlyk cause me some concern. Liard supplied a summary of the hours worked by Horlyk from August 1999 to August 2000 rather than the actual payroll for him. The summary shows the hours worked in a pay period but does not indicate whether those overtime hours were worked at 1½ or double time. I understand there are 5 people employed at the Hardwicke Island site and we have no information whether the other employees had similar hours to Horlyk or not.

It should be noted that Horlyk is the only employee left at Hardwicke Island from the five that were there during 1999. Of the other four, three were terminated, one who had been employed nearly 5 years with Liard, and one was laid off.

Finally, when I compare the hours claimed by Sajiw to the hours reported by Horlyk we must recognize that 107.5 of 109.5 hours claimed by Horlyk were worked in the last 6 months of the period. The hours reported by Horlyk during the April 01 to August 04, 2000 average 91.4 hours per pay period. When you consider the 8-6 shift schedule that indicates Horlyk claims to have worked 11.43 hours per day for the 8 days worked in the pay period. That compares favourably with the 12.31 hours reported by Sajiw during the same period in 1999.

There was no explanation for the reason Horlyk only reported 2 hours overtime in the first six months of the period and 107.5 in the second six months. It does give a degree of credibility to the evidence of Sajiw's witnesses that there was a conscience effort by Liard to limit the overtime reported in 1999.

It is my understanding from the evidence that Sajiw and Horlyk worked together at the Hardwicke Island site during the period April 1999 to August 1999. We were not supplied any information on the number of hours reported by Horlyk for that period if that were the case. All employees were advised on April 4, 1999 to maintain a record of the hours worked.

During the period prior to the investigation by the Branch Sajiw was paid a day rate, as were all employees. Liard took the position this rate included any extra hours the employees may work and would average out over the year. There was no attempt by Liard to limit the hours worked, in fact it was to their advantage to have the employees work as much as possible. The evidence of the witnesses, points in two directions. The first, when Liard became aware they would have to pay overtime there was an effort to limit the amount worked or claimed. The second, with the changes that had been made in late 1998 and early 1999, the job was made easier and took less time to perform. Both of these give some explanation to the nominal difference of .89 hours reported by Sajiw and by Horlyk for the same period of time but one year apart.

Counsel for Sajiw proposed we accept the finding of the delegate for the 4.5 month period, April to August 1999 and apply that to the entire 24 month period, assuming Sajiw worked the same or similar hours over the 24 month period. While the proposal has some merit, it is flawed, in my opinion. The 4.5 month period reported by Sajiw was a busier period than the average over the year. I recognize there is August and September where there is still a considerable amount of daylight, the rest of the period, October through March would, by all accounts, be worked at less hours per day.

I believe it is probably a more accurate "guesstimate" than that produced by Liard in their model that, I believe, was founded on a "perfect world scenario". That is the problem, it is a guesstimate, and could only be relied on for the actual period reported. There is some support for the fact, when we compare the hours for Horlyk for the same period one year later, and considering the changes that had been made, they are very similar. Sajiw, in cross-examination, agreed all of the changes made by Liard would probably reduce the workday by about two hours. The comparison between the actual hours reported by Sajiw and Horlyk are only .89 hours per day different. That would lead me to believe, if the hours worked for the same period in 1999 and 2000 are very similar, the hours worked for the same period in 1998 would also be similar, and probably more.

That matter is referred back to the Branch to remove the period April 1, 1998 to August 4, 1998 from the Liard model of hours and replace it with the same number of hours as in the April 1 to

August 4, 1999 calculation by the delegate. The daily rate was lower in 1998 and must be taken into account in the calculation, however Liard was not under any variance in that period of 1998 and the provisions of Section 40 of the *Act* apply.

One of the witnesses for Sajiw indicated the changes in 1998 of going to the deep well boats had reduced the weekly hours by about 4. That, along with the other changes made, is fairly consistent with the difference of hours between Sajiw and Horlyk. Sajiw and his witnesses demonstrated a consistent belief in the number of hours worked, on average. With the new methods and equipment the hours changed but I believe prior to those changes it is quite reasonable to believe the hours worked were considerably higher than the theoretical model developed by Liard. It is entirely possible the hours worked were not the most productive but there was no incentive for Liard to change that.

I believe the employees worked consistently in excess of the hours produced by the Liard model. Proving that is another matter. I believe the delegate, in the absence of reliable information for the period up to April 1, 1999, used the best information available.

From August 1997 until March 1998 Sajiw was working a 5-2 schedule. In a 14-day pay period he would work 10 days. In March 1998 he went to a 9-5 schedule working 9 days in a pay period. In May 1998 that changed to the 8-6 schedule now in effect working 8 days in a 14-day pay period. Therefore working the 5-2 schedule he would work 260 days in a year, less any vacation. On the 9-5 schedule he would be working 234 days in a year and on the 8-6 schedule he would work 208 days in the year. All of this is without regard to the number of hours worked per day. Even if he worked an average of 11 hours per day (less than those provided by Liard for Horlyk in the second half of 2000) this would mean he would have worked 780 hours of overtime on the 5-2 schedule, 494 hours on the 9-5 schedule and 208 hours on the 8-6 schedule. This is considerably more than the hours credited to him using the Liard model. If his average wage was \$10.90 (\$120.00 per day divided by 11 hours equals \$10.90) and all the overtime was at 1½ he would have earned \$1,062.75 per month in overtime on the 5-2 schedule, \$673.08 on the 9-5 schedule and \$283.40 on the 8-6 schedule. By my calculations, that would produce over \$11,900 in overtime for the period August 1997 to April 4, 1998.

If the 4.5 months (March 15<sup>th</sup> to August 1<sup>st</sup>) produce \$3,314.48 in overtime as proposed by Sajiw and accepted by the delegate it is difficult to believe the other 19.5 months only produce \$4,537.25 in overtime. The 19.5 months produces approximately 585 days. That is equal to 41.786 14-day pay periods working a 9-5 shift schedule for all but 3 pay periods of an 8-6 pay period. That equals 374 shifts at \$120.00 per day for a total of \$44,888.57 earned. The Determination awarded \$49,425.82, which includes the overtime worked using the Liard model, making a difference of \$4,537.25. The 19.5 months is over 4 ½ times longer than the 4.5 months but only produces 1/3 more money. This makes the Liard model appear to underrate the time to do the work or it means Sajiw substantially inflated the hours he claims to have worked. The hours reported by Sajiw for 1999 and for Horlyk in 2000 are similar for the same time period therefore I prefer the evidence of Sajiw to Liard.

The Liard model for 1998, as I understand it from the Determination, did not show more than an average of 10.04 hours worked per day during June and July, the busiest time of the year. That is

considerably lower than the 13.47 hours reported by Sajiw for June and July 1999 and the 12.05 hours reported by Horlyk during the same period in 2000.

The difficulty being I have no formula or evidence to change the finding of the delegate to something more realistic.

I also wonder why the Director did not cancel the second variance when it became obvious Liard was not in compliance. While I realize it is at the discretion of the Director to cancel a variance it would have seemed appropriate, at least until Liard was in compliance.

However, the responsibility rests with the applicant to prove the Determination wrong. It is not enough to cast doubt on the accuracy of the findings. They must offer an alternative solution that can be tested. With the exception of the 4.5 month period in 1998 I believe that has not been done. It is my opinion Sajiw had worked in excess of the model and the amount of hours credited in the Determination however I am limited as to what remedy I can offer. Simply saying Sajiw is owed more money is insufficient. Had Sajiw produced evidence supported by records to indicate the number of hours worked outside the period used by the delegate the matter would be much easier.

Don Tillapaugh, Assistant General Manager for Liard, admitted Liard had attempted to create a bank system for extra hours worked. When they realized they were in violation of the *Act* by creating a time bank without the approval of the employees they discontinued it. We have no evidence as to what happened to the residual hours that were in the hour bank established by Liard. There is no evidence they were paid out, in fact, Sajiw claimed in his written submission that he had not been paid and requested the time in his "Time Bank" be paid. That matter is referred back to the Branch to determine if there are records of such a time bank and what was the disposition of that time.

The question of whether the evidence from Sajiw's witnesses should be allowed was raised. Both the delegate and Liard felt the evidence was available at the time of the investigation and was not presented at that time and therefore should not be allowed now. In *Kaiser Stables Ltd.* BC EST #D58/97 the adjudicator states at page 4, in part:

The decision making process was quasi-judicial in the case before me. The Employer was given an opportunity to make a submission to the Director. The Director made numerous attempts to discuss the records and information submitted by the Complainants. The Director's August 19, 1996 letter clearly explained the consequences of his refusal to cooperate with the investigation. He ignored the Director's concerted efforts to give him the opportunity to participate. That was his decision. (emphasis added)

The Tribunal also dealt with a similar situation in the *Tri-West Tractor Ltd.* BC EST #D268/96.

In both cases there were several attempts by the delegate to get the evidence from the complainants. We have no evidence of the extent of any attempt by the delegate to interview any of Sajiw's co-workers after the investigation on the general overtime issue and his refusal to accept the \$6,000 offer. Sajiw had an opportunity to present his evidence but claimed the reason he did not was he felt the delegate was biased in favour of the employer and there was no point in



bringing his case forward at that level. It was after the Determination and he engaged counsel that the evidence came to the Tribunal.

The evidence given by the two witnesses for Sajiw was not, in my opinion, new evidence but more in the form of buttressing the case of Sajiw. I do not believe their evidence was such that it would change the decision. For that reason I will allow that evidence.

**ORDER**

In accordance with Section 115 of the *Act* I refer the Determination back to the Branch for recalculation and investigation to the matters referred to above. The remainder of the Determination is confirmed. Additional interest, where applicable, is to be calculated in accordance with Section 88 of the *Act*.

**James Wolfgang**

**James Wolfgang**

**Adjudicator**

**Employment Standards Tribunal**

JW/bls