BC EST #D435/99

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-

Villa Agencies Inc. and Go Transport Ltd. (Associated Corporations)
(the Employer)

- and by-

Christopher Rasmussen
(an Employee)

- of a Determination issued by-

The Director of Employment Standards
(the Director)

ADJUDICATOR:	Hugh R. Jamieson
FILE NOS:	99/276, 99/ 277 & 99/343
DATE OF HEARING:	October 1, 1999
DATE OF DECISION:	October 19, 1999

DECISION

APPEARANCES

Mr. Jack L. Wright,	Counsel for the Employer
Ms. Pamela Quesnel,	Counsel for Mr. Rasmussen
Ms. Kerry Deane-Cloutier,	Counsel for Mr. Quinn
Ms. Martha Rans,	Counsel for the Director.

OVERVIEW

This decision deals with three appeals arising from two Determinations issued by the Director on April 16, 1999, against the Employer. In the first Determination concerning Mr. Christopher Rasmussen the Director found that he was entitled to the amount of $2,105.12 being wages, vacation wages and statutory holiday pay owing plus interest. In the same Determination the Director dismissed a claim by Mr. Rasmussen for compensation for length of service, finding that he had been terminated for cause. The Employer appealed this Determination on May 8, 1999, claiming that no money was owed.

On June 2, 1999, Mr. Rasmussen applied to the Tribunal for an extension of time to file an appeal against this Determination. The extension was granted for the reasons set out in Tribunal Decision BC EST# D341/99. The grounds for this appeal are that Mr. Rasmussen disputes the termination for cause and also claims that he is owed $11,248.73 in overtime pay.

The other Determination involved Mr. Paul Quinn, the Director finding that he was owed overtime and statutory holiday pay in the amount of $7,866.49. The Employer appealed this Determination on May 8, 1999, claiming that no money was owed.

At the outset of the hearing into these appeals, the parties affected by the Director's finding that Mr. Rasmussen was fired for cause, agreed that this aspect of the Determination be referred back to the Director for further investigation. I will go into this agreement in more detail later however, for the purposes of this overview, this issue comes off the table.

The parties to the remaining issues agreed that I should determine the proper wage rate for the work done for the Employer by Messrs. Rasmussen and Quinn and that the Determinations then be referred back to the Director for recalculation of the amounts, if any, that is owed to these employees.

ISSUES TO BE DECIDED

The sole issue left is to determine what hourly wage rate is to be used by the Director for the calculation of the hours worked by Messrs. Rasmussen and Quinn.

FACTS

The Employer is in the Overload Tractor business, leasing tandem axle tractors along with drivers to large National Carriers as well as to local Cartage Companies.

Mr. Rasmussen was employed as a driver from January 30, 1995. When hired he was advised that he would earn $15.00 per hour and that he would receive a 25 cent raise every six months. Around April 1995, the pay structure changed and Mr. Rasmussen's rate changed to $10.00 per hour with a $5.00 per hour bonus for all hours worked.

When Mr. Rasmussen's employment was terminated on June 19, 1998, a complaint was filed alleging non payment of overtime, statutory holiday pay and, compensation for length of service. At the time, Mr. Rasmussen estimated that he was owed $14,644.73.

Following an investigation, the Director found that Mr. Rasmussen was entitled to $2,105.12. The break down being, $548.72 overtime wages, $1,367.90 statutory holiday pay, $76.90 vacation pay and, $111.84 interest.

Mr. Quinn was also employed as a driver and he worked for the Employer from June 1996 to April 30, 1998. The facts surrounding his hourly wage are similar to that of Mr. Rasmussen. When he was hired, he was told he would be making $15.00 per hour. However, this later changed to $10.00 per hour plus $5.00 bonus.

Mr. Quinn also filed a complaint for overtime wages and statutory holiday pay after he had left his employment with the Employer. The Director found that he was owed $7,866.49. The specific break down here is a little harder to determine as the Director's Delegate uses total amount earned compared with total amounts paid. In any event, the total seems to include overtime wages, statutory holiday pay and interest.

THE HEARING

At the beginning of the hearing, Counsel for the Director raised a preliminary motion requesting that the termination for cause aspect of Mr. Rasmussen's appeal not be heard and that it be referred back to the Director for further investigation. The rational for this request was that in the decision granting the extension for filing the appeal, BC EST# 341/99, there had been a finding that Mr. Rasmussen may have been denied natural justice. More particularly, the finding was that the Director may have failed to provide him with the specific details of the just cause allegations and to provide him with a meaningful opportunity to respond.

According to the Director, in these circumstances, it would be improper for the Tribunal to hear the merit of the just cause claim of the Employer de novo. If the Director's investigation fell short of being complete, the matter should now go back so that the possible flaw in the process can be corrected.

Counsel for the Employer agreed with this proposal and after some reluctance, Counsel for Mr. Rasmussen also agreed. Accordingly, without taking a position on the correctness or otherwise of the Director's preliminary motion, on the agreement of the parties, I will be referring this aspect of Mr. Rasmussen's appeal back to the Director.

The rest of the hearing was taken up with evidence from the parties as to their versions of the proper interpretation and application of the contracts of employment of Messrs. Rasmussen and Quinn. Both employees' testimony confirmed what had been submitted in writing regarding their promised wage rate of $15.00 per hour with the later restructuring to $10.00 per hour plus the $5.00 bonus.

The argument for Mr. Rasmussen is that any recalculation of monies owing to him should be at $16.75 per hour which takes into account his promised rate and the periodic 25 cent raises.

Mr Quinn on the other hand is ready to concede the $10.00 an hour basic rate and asked that the Determination in his name be confirmed in the amount found due by the Director.

Mr. Mark Maarsman gave evidence on behalf of the Employer and he also basically repeated what was submitted in the written pleadings. In a nutshell, he was adamant about the basic rate being $10.00 per hour with the $5.00 bonus covering overtime, weekends and holidays. When asked about this bonus, which was called a maintenance bonus, Mr. Maarsman consistently hedged about what standards the employees had to meet to qualify for the bonus.

When asked about the promise to the employees of $15.00 an hour Mr. Maarsman admitted quite openly that when hiring drivers, he is deliberately vague as to the actual hourly rate, knowing that few quality people would come onboard for $10.00 per hour. Once the new people are hired and work for a few weeks, he gives them the real breakdown of their wages. He claims that he has never had any complaints about this practice.

It should also be mentioned that the Employer produced two documents through Mr. Maarsman at the hearing that turned out to be controversial. These were purported to be signed contracts by both Mr. Rasmussen and Mr. Quinn accepting the employment terms of $10.00 per hour. These documents, which were dated October 1, 1996 and July 4, 1996 respectively, contained the following pay schedule:

> " PAY SCHEDULE
> 1. T/A Tractor Drivers $10.00 per hour.
> 2. A Bonus will be added for all overtime, weekend and holiday Work ....."

While Mr. Raasmussen and Mr. Quinn admitted signing these documents, they both said that it was one of these sign it or not be dispatched situations. Mr. Rasmussen added that he had also signed other papers of a similar nature however, he had always been given the impression by Mr. Maarsman that it would not make any difference to the wages he earned at the end of the day.

Both Counsel for Mr. Rasmussen and Mr. Quinn objected to the admissibility of these documents, claiming that they had not seen them before and also that these purported contracts had not been presented to the Director during the investigation. The Employer on the other hand said that they had indeed been given to the Delegate.

Insofar as these documents having been given to the Director, I have searched through the mass of paper accummulated in these files and nowhere do I see copies of these documents. Nor do I see any mention of them anywhere in the Director's submission or for that matter, in any of the submissions filed by the Employer in the appeal. I must therefore conclude that these documents were not produced to the Director during the investigation.

Consequently, in the circumstances I find that these documents will not be given any weight in accordance with the Tribunal's policy and practice of not permitting parties to rely on new evidence at an appeal that was not provided to the Director during the investigation - see - *Tri-West Tractor Ltd.*, BC EST# D268/96*; Kaiser Stables Ltd.,* BC EST# D58/97; and *Specialty Motor Cars (1970) Ltd.*, BC EST# D570/98.

ANALYSIS

Let me say immediately that I cannot find in the circumstances that the base rate for calculating the claims by these two employees for overtime pay should be $16.75 per hour as sought by Mr. Rasmussen, or even $15.00 per hour. Notwithstanding the impressions left by Mr. Maarsman at their hiring interviews about earning $15.00 per hour, the preponderance of evidence clearly shows that since the summer of 1995, the regular wage paid by the Employer to drivers has been $10.00 per hour. The employees knew that and lived with it for almost three years.

Having said that though, the Employer cannot have it both ways. The $5.00 bonus which was also paid to the employees over the same period of time under the guise of a maintenance bonus has to remain just that. Once paid as a bonus, it cannot be set off later against overtime wages or any other minimum standard of benefit required to be paid by the *Act.*

It should also be made clear that the Tribunal's role in these appeals is restricted to reviewing the decisions arrived at by the Director's Delegate and to ascertain whether the Delegate erred in considering the material that was before her at the time the Determinations were issued. Having erred in this context can of course be simply a matter of miscalculation or, it can involve more serious conduct like acting in an arbitrary, discriminatory or bad faith manner.

Looking at the Determinations under review within those narrow guidelines, it is readily apparent that despite the similarity in the circumstances surrounding the complaints by these two employees, the amounts found due were based on two different conclusions.

In the case of Mr. Rasmussen, the wage rate of $10.00 per hour was accepted by the Delegate as the base hourly rate and she also found that other than for a few minor miscalculations, overtime had been paid at the appropriate rates. This apparently came about after the Delegate's examination of a record of hours and payments that was submitted by the Employer. These records

show a break down of all hours worked by Mr. Rasmussen paid at the regular rate of $10.00 per hour, overtime after 8 hours at time and a half and overtime after 11 hours at double time. Statutory holidays were paid at $10.00 per hour for 8 hours. Apparently, Mr. Rasmussen seldom worked on statutory holidays.

As it turns out however, these records presented to the Delegate by the Employer were prepared after the complaints were filed. In so doing, the $5.00 per hour so called maintenance bonus had been converted into overtime pay, indicating on the face of the records at least that overtime hours worked had been paid at the proper rates. At the hearing, the Employer did not attempt to hide the fact that these records had been prepared after the fact. Mr. Maarsman candidly admitted this. However, he said that this had been done at the request of the Delegate.

In any event, moving to the Determination affecting Mr. Quinn, it can be seen that here, the Delegate discounted the after the fact records produced by the Employer and based her findings on Statements of Earnings provided by Mr. Quinn. These Statements of Earnings had been issued to Mr. Quinn by the Employer along with his paycheques. This rejection of the Employer's records is reflected in the Conclusion passage at page 2 of the Determination:

> " I believe the pay statements issued with the paycheques accurately reflectthe pay structure in place at the time Quinn worked for Villa. I believe the employer's pay records were adjusted to indicate that overtime was paid appropriately. "

As a result, Mr. Quinn was assessed as having a substantial amount of overtime pay owing to him while Mr. Rasmussen's claim for overtime was to all intents and purposes dismissed.

Searching for some reason why the Delegate would treat two similar complaints so differently, it appears that the answer lies in the fact that unlike the Quinn situation, the Delegate does not appear to have had Mr. Rasmussen's Statement of Earnings before her when the Determinations were issued. What she did have was a hand written list of overtime hours claimed to have been worked that was attached to the Rasmussen complaint - see the Director's submissions dated June 15, 1999, at page 1. For whatever reason, it seems that Mr. Rasmussen did not come up with his Statement of Earnings until they were produced by Counsel along with his appeal.

To make sure that there is no misunderstanding here, while it may have assisted the Delegate immensely if Mr. Rasmussen had produced these Statements of Earnings earlier, he is not the one who is obliged by law to keep these sorts of records and to produce them on demand to the Director. It is the Employer. At the hearing, Mr. Maarsman insisted that he must have supplied these documents to the Delegate in response to a Demand for Payroll Records served on the Employer. However, like the signed contracts Mr. Maarsman claims to have given to the Delegate, I see no copies or reference to Mr. Rasmussen's Statement of Earnings anywhere in the Director's submissions.

Be that as it may, based on what was before the Delegate when the Determination was issued, I believe that the right conclusion was arrived at in the Quinn Determination. Notwithstanding any arguments to the contrary by the parties, the Statement of Earnings issued to Mr. Quinn by the

Employer well before these disputes arose speak for themselves. The regular hourly wage is clearly shown in these Statement of Earnings as $10.00 per hour during the relevant period. It is also clear that all hours worked were paid at the regular hourly wage and that overtime rates of wages as required by *the Act* were not paid. Furthermore, there was no evidence before the Delegate of Mr. Quinn ever having disputed this basic hourly rate.

Consequently, for the purposes of the recalculations to be made by the Director for Mr. Quinn, the regular wage will remain as $10.00 per hour. This will probably result in the same finding as in the Determination as I do not believe that there is any room for dispute about the hours worked by Mr. Quinn. But there may be some adjustments to be made to the interest accruing. In any event, in keeping with the agreement of the parties, this Determination will be referred back to the Director for recalculation of the amount of wages owing.

Obviously, in the circumstances where the employment contracts were similar, Mr. Rasmussen has to be treated in a similar manner to Mr. Quinn. However, to avoid allegations of a double standard, no weight can be placed on his Statement of Earnings as they, like the contracts the Employer attempted to put in at the hearing, were not produced by Mr. Rasmussen until the appeal stage of the process.

This notwithstanding, in the interests of fairness and consistency, the Employer obviously cannot be allowed to recharacterize the maintenance bonus as overtime wages after the fact for Mr. Rasmusssen. Accordingly, I must find that the Delegate erred in accepting as bona fide, the records produced by the Employer in the Rasmussen complaint that had been contrived to show that overtime had been paid. Considering what was before the Delegate at the time though, she did not err by accepting the number of hours recorded as having been worked by Mr. Rasmussen or, the base rate of $10.00 per hour.

ORDER

Pursuant to Section 115 of the *Employment Standards Act*, both Determinations in question are hereby referred back to the Director for the purpose of recalculating the amount due to both employees on the basis of a regular wage of $10.00 per hour. Overtime hours worked, hours worked on statutory holidays and accrued interest, will be adjusted accordingly.

The termination for cause aspect of the Determination affecting Mr. Rasmussen is referred back for further investigation as agreed upon by the parties.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal