

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 -

Bjorklund Holdings Ltd.
("BHL")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/408

DATE OF HEARING: October 1, 1999

DATE OF DECISION: November 8, 1999

DECISION

APPEARANCES

Carl Bjorklund	on behalf of Bjorklund Holdings Ltd.
Vic Schwab	on behalf of Bjorklund Holdings Ltd.
Mark Taylor	on his own behalf
Kelly Taylor	on behalf of Mark Taylor
Alan Phillips	on behalf of the Director

OVERVIEW

This is an appeal by Bjorklund Holdings Ltd. (“BHL”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated June 10, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). BHL alleges that the delegate of the Director erred in the Determination by concluding that Mark Taylor (“Taylor”) was owed wages in the total amount of \$14,395.13 (includes interest).

ISSUE

The issue to be decided in this appeal is whether Taylor is owed the wages as calculated by the delegate of the Director.

FACTS

The following facts are not in dispute:

- Taylor has been employed by BHL since March 1987;
- Taylor was a chip truck driver and hauled wood chips for BHL from a mill in McBride to pulpmills in Prince George;

- Taylor's last day of actual work was June 24, 1996 at which time he was involved in a motor vehicle accident while at work;
- Taylor was in receipt of WCB benefits at the time he filed his complaint with the Employment Standards Branch on March 18, 1997;
- The payroll records provided by BHL indicated that Taylor's rate of pay on his last day of work was \$19.24/hr;
- The payroll records provided by BHL did not show the daily hours worked by Taylor;
- the payroll records for the period Jan 1, 1996 to June 25, 1996 indicated the hours worked in each pay period.

Vic Schwab ("Schwab") on behalf of BHL argued that the complaint filed by Taylor was not made in time as required by Section 74 of the *Act* as Taylor last worked for BHL on June 24, 1996 but the complaint was not filed until March 18, 1997, outside of the 6 months time limit. Further it is argued by BHL that the conduct of Taylor leading up to the motor vehicle accident in fact provided just cause for termination of his employment. Finally it is argued that the calculations performed by the delegate of the Director contain errors with respect to the amount of wages owed.

Carl Bjorklund ("Bjorklund") testified on behalf of BHL that:

- the calculations of the delegate of the Director are based on 12 hour shifts when in fact Taylor's haul was done by all other drivers in 10 hours;
- the only way that Taylor would have worked 12 hours was if he was claiming pay for driving BHL's tractor unit to and from his home to the workplace;
- drivers were paid on a per trip basis with the second trip of each day generating more money as overtime was included in that trip rate;
- Taylor approached him and asked if he could take the tractor unit home at the end of his shift in order to save time at the start of each shift;
- he considered Taylor's request and in order to be helpful said it would be OK if Taylor took the tractor unit home each night;
- he would monitor all of the drivers via the radio and he would be aware when Taylor started work and finished work;
- Taylor was only able to take the tractor unit home during the period September 1995 to June 1996;
- he verbally advised Taylor's sister after the motor vehicle accident that he intended to fire Taylor but did not issue any written notice of termination or an ROE to indicate termination.

Alan Phillips testified on behalf of the Director and stated that:

- when he reviewed the pay statements provided, there was no indication of either the hourly rate of pay or any overtime rate of pay;
- the payroll records did not show the hours worked each day but did indicate an hourly rate of pay;
- he confirmed the hourly rate of pay by performing a reverse calculation of the wages paid for each 8 hour statutory holiday;
- he arrived at the daily hours worked by dividing the total wages earned by the number of days worked in that pay period and then dividing that product by the hourly rate;
- once the number of hours per day was established, he then calculated the overtime wages to be paid for the applicable period of work;
- Order in Council No. 0572 exempted the requirement to pay overtime wages to intra-provincial truck drivers effective April 26, 1996;
- he determined that the period for which Taylor was entitled to overtime wages was the period August 24, 1994 to April 21, 1996 and the period for which annual vacation pay was calculated was the period August 24, 1994 to June 24, 1996;
- he did not address the issue of timeliness in the Determination as it had been discussed with BHL and he did not understand it to be an issue of dispute;
- he determined that Taylor was owed overtime wages and annual vacation pay;
- he determined that Taylor had been overpaid for statutory holidays;

Mark Taylor (“Taylor”) stated that there was not much to add to the submissions already made except that the hours noted in the driver’s log were entered to satisfy the requirements of the National Safety Code ? with respect to the maximum number of hours a driver is entitled to operate a truck each day. Taylor further stated that the actual number of hours he worked exceeded those written into the log and that Bjorklund was aware of that fact.

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, BHL.

With respect to the issue of timeliness, Section 74 of the *Act* provides:

Section 74, Complaint and time limit

(1) An employee, former employee or other person may complain to the director that a person has contravened

(a) a requirement of Parts 2 to 8 of this Act, or

(b) a requirement of the regulations specified under section 127 (2) (1).

(2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.

(3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

(4) A complaint that a person has contravened a requirement of section 8, 10 or 11 must be delivered under subsection (2) within 6 months after the date of the contravention.

There was no evidence that Taylor was terminated although Bjorklund stated that he intended to do so. The fact is that Taylor was still an employee, albeit on WCB, at the time the complaint was filed. Aside from the exceptions set forth in Section 74 (4) *supra*, there is no time limit for when *an employee* may file a complaint, although the period for recovery of wages is limited by the provisions of Section 80 of the *Act*.

Even if Bjorklund had carried out his intention and provided notice of termination to Taylor, such notice of termination would have contravened the provisions of Section 67 of the *Act* as Taylor was on WCB from June 24, 1996 and was still on WCB at the time the complaint was filed. Section 67 of the *Act* provides:

Section 67, Rules about notice

(1) A notice given to an employee under this Part has no effect if

*(a) the notice period coincides with a period during which the employee is on annual vacation, leave, strike or lockout or is unavailable for work due to a strike or lockout or **medical reasons**, or*

(b) the employment continues after the notice period ends.

(2) Once notice is given to an employee under this Part, the employee's wage rate, or any other condition of employment, must not be altered without the written consent of

(a) the employee, or

(b) a trade union representing the employee.

(emphasis added)

Based on the evidence provided, I conclude that as Taylor was still an employee of BHL at the time the complaint was filed, the complaint was filed in accordance with the provisions of Section 74 of the *Act*.

The *Act* contains requirements for an employer to keep certain records with respect to the employment of an employee. Among those requirements are those set forth in Sections 28 of the *Act* which provides:

Section 28, Payroll records

(1) For each employee, an employer must keep records of the following information:

- (a) the employee's name, date of birth, occupation, telephone number and residential address;*
- (b) the date employment began;*
- (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;*
- (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;*
- (e) the benefits paid to the employee by the employer;*
- (f) the employee's gross and net wages for each pay period;*
- (g) each deduction made from the employee's wages and the reason for it;*
- (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;*
- (I) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;*
- (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.*

(2) Payroll records must

- (a) be in English,*
 - (b) be kept at the employer's principal place of business in British Columbia, and*
 - (c) be retained by the employer for 7 years after the employment terminates.*
- (emphasis added)*

The evidence was that the payroll records provided by BHL did not conform with the requirements set forth in Section 28 of the *Act*. The evidence further disclosed that the

daily records kept by Taylor (the driver's log books) were artificially constructed to satisfy federal regulations in regard to the maximum number of hours which may be worked by a truck driver.

In the absence of proper records kept by BHL and the inaccurate records kept by Taylor, it was appropriate for the delegate of the Director to utilize the available information from the payroll records to reconstruct the daily hours of work.

Based on the evidence provided, I conclude that the procedure utilized by the delegate of the Director to determine the number of hours worked each day is correct.

Based on the evidence provided and on the balance of probabilities, I further conclude that Taylor is owed wages for overtime hours and annual vacation pay.

I have reviewed the calculations performed by the delegate of the Director in regard to establishing the amount of wages owing and have found a number of mathematical errors in the application of the program used to calculate wages owing for some of the pay periods. I have recalculated the wages owing for those pay periods and the amounts are as follows:

Pay Period Ending	Wages Owing Calculated by the delegate of the Director	Actual Wages Owing	Adjustment
Sept.25/94	\$950.00	\$0.00	-\$950.00
Nov.20/94	\$228.00	\$0.00	-\$228.00
Apr.23/95	\$384.80	\$211.64	-\$173.16
June 10/95	\$202.02	\$586.82	+\$384.80
Sept.10/95	\$115.44	\$0.00	-\$115.44
Sub-total	\$1880.26	\$798.46	
TOTAL ADJUSTMENTS (\$1880.26 - \$798.46)			-\$1081.80

The amount of wages owing is therefore $(\$10,282.18 - \$1,081.80) = \mathbf{\$9,200.38}$.

I have recalculated the wages earned by Taylor for the period of employment from August 14, 1994 to June 24, 1996 as follows:

Wages earned (\$75,430.48 + \$9,200.38)	= \$84,630.86
Statutory Holiday entitlement	<u>= \$ 1,930.19</u>
sub-total	= \$86,561.05
Vacation Pay (\$86,561.05 x 6%)	<u>= \$ 5,193.66</u>

Total Wages Earned	= \$91,754.71
less total wages Paid by BHL	= <u>\$80,644.20</u>
Wages Owing	= \$11,110.51

The appeal by BHL is therefore allowed in part with respect only to the calculation of the total amount of wages owing.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 10, 1999 be varied to be in the amount of **\$11,110.51** together with whatever interest has accrued pursuant to Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal