Employment Standards TRIBUNAL

An appeal

- by -

Precision Service & Pumps Inc.
("Precision" or "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2001/454

DATE OF DECISION: August 21, 2001

DECISION

OVERVIEW

This is an appeal by an employer, Precision Service & Pumps Ltd. ("Precision Pumps" or "Employer"), from a Determination dated May 18, 2001 issued by a Delegate of the Director of Employment Standards ("Delegate"). The Employer paid Lynn Siemens (the "Employee") for all work, including travel time, but did not pay any overtime wages on the travel time, on dates when the hours worked, including travel, exceeded 8 hours per day, and 40 hours per week. The Employer alleged that the Employee agreed to work the travel time at straight time. In this case the travel time spent by the Employee driving a truck from the Employer's site to remote job sites around British Columbia was work, as defined in Section 1 of the *Act*. Section 40 clearly indicates that overtime must be paid when the hours worked exceed 8 hours per day and 40 hours per week. While it is unnecessary to find whether the Employee agreed to the Employer's payment method for travel time, an agreement which violates s. 4 of the *Act* is void. I therefore confirmed the Determination in the amount of $5,477.07.

FACTS

This case was decided on the basis of written submissions of the parties, without an oral hearing.

Lynn Siemens (the "Employee") was employed by Precision Service & Pumps Ltd. (the "Precision Pumps" or "Employer") between September of 1998 and August of 2000. Precision Pumps supplies industrial pump repair services throughout British Columbia. Mr. Siemens is a non-union employee. His job involved a considerable degree of travel to different job sites. He was paid by the hour for his work, at a rate of $15.00 per hour, which was then increased to $16.00 per hour. On a number of days, when he travelled, he worked overtime. He was compensated for travel time by payment of his hourly rate, but the Employer did not include travel time for the purpose of calculating the Employee's entitlement to overtime wages. The Employer says that there was an agreement between the Employee and the Employer where the Employee agreed to accept payment for travel at straight time rates. The Employee disputes that there was an agreement, and claims that he pressed for overtime wages.

The Employee filled out daily time sheets, on which was noted:

> Travel Time Regular Rate (Inc. SAT. And SUN.)
>
> 8 HOURS ON SITE -REGULAR RATE
>
> 9 HOURS - 10 HOURS TIME AND AHALF
>
> 11HOURS & OVER DOUBLE TIME

In the appeal submission, the Employer filed materials indicating various scenarios where it always been straight time for travel, even when the other work or the other work and travel exceeded 8 hours per day.

The employer's method of dealing with overtime is described in a letter from Summit Management Services to the "Labour Relations Board" dated October 2, 2000:

> ...We have prepared a schedule of the days worked for the requested period. In order to simplify the wage calculation, our client paid straight time at his normal wage (not minimum wage) for all travel time whether it was commute travel or not. Subsequent to preparing the work records, we have determined that 35 hours included in the travel time was travel that was for work commute. ...
>
> It is our belief that this method compensates our client's employee's in excess of the regulations in the labour standards act.

The Delegate found that the Employee was entitled to the sum of $5,203.97, plus interest in the amount of $273.10 for a total owing of $5,477.07. While the Employer disputes the entitlement of the Employee to the sum set out in the Determination, the Employer has not raised any issue with regard to the correctness of the calculation.

Employer's Argument:

The Employer vigorously disputes its liability to pay anything further to the Employee, and says that the Employee has been fully compensated. The Employer argues that it was open to the Employer to contract with the Employee for travel time at minimum wage, but the Employer paid the usual rate, which was in excess substantially of the minimum wage. The Employer says that the rates are based on a collective agreement. The Employer further asserts that because the Employer adopted a standard which has appeared another union contract, and is an industry standard as a result of trade union negotiations , the Employee is covered by a collective agreement, and that Section 43 of the *Act* applies. The Employer says that by filing time sheets, and by not complaining, the Employee can be taken to agree with the Employer's method of payment. The Employer further says that the Employee did agree with the Employer's treatment of travel time. The Employer argues that it is contrary to natural justice for the Delegate to have included "travel time" in the overtime calculations, and that a first complaint by the Employee on August 29, 2000 is an attempt to retroactively and unilaterally alter the terms of employment. The Employer also raises natural justice in connection with an alleged late disclosure of a document prepared by the Employee.

ISSUE:

Is the Employer obliged to include travel time, in the calculation of overtime wages?

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case the Employer, to show that there was an error in the Determination such that I should vary or cancel the Determination.

Before addressing the main issue, in this appeal, I wish to comment on two points, raised by the Employer in its submission. I note that the Employer has raised the issue of "natural justice"in connection with his submission that it would be "unfair" to revise the wage bargain between the parties to pay overtime on travel wages. Natural justice, as a matter of administrative law, is purely a procedural concept, and has no application in determining an employee's minimum employment standards. The minimum standards are set out in the *Act*.

The employer also raised the argument of natural justice in connection with the late disclosure of a document prepared by an employee which summarizes discussion between the employer and employee about travel time. The document appears to have been prepared by the employee, prior to the filing of the employment standards complaint on August 31, 2000, but was not provided to the employer until it was exchanged by the Delegate as part of the appeal submissions in this case. I do not wish, in this case, to deal with the issue of the disclosure duties of the Delegate. The Tribunal has dealt with this issue on other occasions, and this is not a proper case to deal further with the Delegate's duties during the investigation. Assuming, but not deciding in this case, that there was a violation of the disclosure duty of the Delegate, it is an argument which, on the facts of this case, gets the employer nowhere. This is a case where there is clear evidence in the employer's payroll records, and in admissions made by counsel and by the Employer's representatives in correspondence to the Delegate, which demonstrate a breach of the *Act*.

It often comes as a surprise to employers that they cannot contract out of the provisions of the *Employment Standards Act*, when this is drawn to the employer's attention by a Delegate of the Director of Employment Standards, during an investigation. Section 4 reads as follows:

> The requirements of the *Act* or the regulation are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61, and 69.

This Tribunal has dealt with numerous cases where employees and employers have reached agreements contrary to the *Act*, situations where the employer has alleged a contractual arrangement, or alternatively where the employer has violated the *Act*, and the employee has raised no objection until after the termination of the employment relationship. Section 4 is a powerful tool to ensure that employers comply with the minimum standards set out in the *Act*. The *Act* places a burden on the employer to be knowledgeable about the provisions of the *Act*. It is not unusual for employment standards claims to be raised by employees, around the time of the termination of the employment relationship. In this case the employment relationship appears to have ceased following a confrontation between the Employer and the Employee concerning travel for overtime. As an adjudicator I must apply the provisions of the *Act*, particularly s. 4,

notwithstanding, that the parties may have agreed to a term in an employment relationship which is contrary to the *Act*. The Delegate did not make any finding of fact on the point of whether the Employee agreed to be compensated for travel at a straight time rate. It is unnecessary for me to make a finding, in order to decide this appeal. None of the exceptions to Section 4 apply in this case. There is no estoppel defence to a claim presented by an Employee under the *Act*, where the Employer defends the Employee's claim on the basis of an agreement contrary to the minimum provisions of the *Act*.

Counsel for the Employer suggests that Section 43 of the *Act* applies to this case. He suggests as follows:

> The Adjudicator (sic) in this instance has erred in interpreting Section 43(1) of the Labour Standards Act (sic). His narrow and restricted interpretation would limit the application of Section 43(1) to Union Members only. Such an interpretation is contrary to Section 8 of the Interpretation Act and the Legislative intent of the Labour Standards Act. ...
>
> The legislative object of the Labour Standards Act is to set minimum standards for contracts of employment within the Province The Adjudicator in the first instance concedes the payment of travel at the straight time rate greatly exceeds that minimum standard. The policy of this employer finds its genesis in a collective agreement, which is all that is required for Section 43(1) to apply.

Counsel argues that this non-union employer has adopted an industry standard with regard to payment of straight time for travel, which arises out of collective agreements negotiated by a trade union. Counsel submits that the employee is covered by a collective agreement, and that one has to have regard to the "meet or exceed" concept. Section 43 reads as follows:

> 43(1) If the hours of work, overtime and special clothing provisions of a collective agreement, when considered together meet or exceed the requirements of this Part and section 25 when considered together, those provisions replace the requirements of this Pat and section 25 for the employees covered by the collective agreement.

It is apparent that s. 43 only applies to an employee who is "covered by a collective agreement". In British Columbia, the Labour Relations Board must grant a certification to a union to represent members of a bargaining unit, before a union has the power to conclude a collective agreement with an employer. The collective agreement then covers the employees in the bargaining unit. The fact that a non union employer adopts a method of compensation, based on an industry standard negotiated by a union, does not mean that an employee in a non-union employment relationship is "covered by a collective agreement". Counsel for the employer suggests that a large and liberal interpretation should be given to the word "covered by a collective agreement". There is only one possible meaning to the words "employees covered by

a collective agreement", and s. 43 clearly does not apply in respect of a non-union employee, such as Mr. Siemens.

It is well established in the Tribunal's case law that an agreement for payment at straight time for all hours worked is void under s. 4 of the *Act*:

> *Regional Security Ltd., BCEST #D200/97; Goldsmith Enterprises Ltd, BCEST #D042/97;Cliff Roussel Construction Ltd., BCEST #D235/97; Northway Restaurant Ltd., BCEST #D133/97; Kim, BCEST #D36/97; Avondale and Associates Protective Services Ltd, BCEST #D532/97; Prints-Charming, BCEST #D534/97; Oriental Tea Garden Restaurants Ltd, BCEST #D450/97;*

As part of the wage bargain between the parties, an Employer can set the terms of employment to provide for different rates of pay for different types of work. This Employer did not take this approach. There is a suggestion in the materials filed, that a competitive employer in this industry could not attract employees with this type of payment scheme. I note that a wage scheme which distinguishes between travel and other work, may make for a more complicated overtime analysis because the Delegate would then have to find the "regular wage"(and choose between different rates) of the employee, in order to calculate the overtime entitlement. If the Employer can attract employees on a two tier wage system distinguishing between travel and other work, it is free to do so. An Employer who pays an Employee a wage rate in excess of the minimum wage, is not exempted from the requirement of the *Act* to pay overtime. Overtime is also an important minimum standard which is set out in the *Act,* and the *Act* applies to all employees (unless exempted). An employer cannot pay a high hourly rate, and avoid the other minimum provisions of the *Act*, as seems to be suggested by this Employer.

The question in this case is whether the Employee's travel time can be considered "work" within the meaning of the *Act*, and whether this work attracts overtime. The *Act* defines work in Section 1 broadly:

> "Work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere

Travel time is not excluded from the definition of work. Certain types of travel, in the nature of a daily commute to work, are not considered work, because the employee performs no labour or service for the employer during the daily commute. Once, however, an employee is required to report to a marshalling site, or the employer's business premises, the time spent going to a remote job site is generally considered work: *Millar, BCEST #D 208/97; Maid West Housecleaning Services Ltd., BCEST #D090/97, Norton BCEST #D406/98, Spearhead Forestry Services Inc., BCEST #D488/97*.

The question of whether "travel" is "work" is primarily a question of fact. Here the Delegate found that the Employee would load the truck and drive to work sites throughout the province. Some of these sites were local, and some required considerable travel. In order for the Employer

to provide industrial pump repair service to its customers it had to supply the services of Siemens or another employee, presumably in a truck with tools. In driving from the Employer's premises to the business site of a customer of Precision Pumps, Siemens was providing labour or service for the benefit of the Employer, and therefore was working for the Employer.

The overtime provisions set out the *Act* are cast in mandatory language:

> An employer must pay overtime wages in accordance with section 40 and 41 if the employer requires or, directly or indirectly allows an employee to work
>
> (a) over 8 hours a day or 40 hours per week.

In this case the Employer allowed or required Siemens to work overtime.

Travel time which constitutes work must therefore be considered in the calculation of overtime wages: *Aleza West Contracting Ltd, BCEST #D089/99*. For all the above reasons, I am not satisfied that the Employer has demonstrated any error in the Determination.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated May 18, 2001 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal