

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 -

Pioneer Electric Co. Ltd.
("Pioneer")

- of Determinations issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Sherry Mackoff

FILE NOS.: 97/560 and 97/561

DATE OF HEARING: September 22, 1997

DATE OF DECISION: October 6, 1997

DECISION

OVERVIEW

This is an appeal by Pioneer Electric Co. Ltd. (“Pioneer” or the “Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from two Determinations issued by delegates of the Director of Employment Standards. Both Determinations are dated July 2, 1997.

In the first Determination (“Determination #1”), the delegate, Pat Cook, found that the employer owes regular wages and overtime wages to Bruce Bunton, a former employee. The Determination held that Mr. Bunton is entitled to the sum of \$421.04, plus interest, for a total of \$437.00. Ms. Cook found that Mr. Bunton had worked 64.5 regular hours at \$10.00 per hour and 5 overtime hours at time and a half.

The employer seeks to have Determination #1 varied to show that Pioneer owes Mr. Bunton the net sum of \$55.21. It is the employer’s position that Mr. Bunton worked 63 regular hours at \$7.50 per hour.

In the second Determination (the “Penalty Determination”) delegate J.R. Dunne imposed a \$NIL penalty on Pioneer. Pioneer seeks to have the Penalty Determination cancelled.

A hearing was held at the Vancouver office of the Employment Standards Tribunal on September 22, 1997. Mr. Sunil Singh represented Pioneer and Ms. Pat Cook represented the Director of Employment Standards. Mr. Bunton was not present at the hearing. His whereabouts are unknown.

ISSUES TO BE DECIDED

- 1) What wages are owing to Mr. Bunton?
- 2) Should the \$NIL Penalty Determination be cancelled?

I will deal first with Determination #1.

FACTS

Mr. Singh is the president and “owner/operator” of Pioneer. He testified that Pioneer is an electrical contractor that has operated in the Lower Mainland and eastern Canada (Toronto) for the last 13 years. Pioneer repairs, maintains and installs electrical systems in buildings and machinery.

Mr. Singh testified that he hired Mr. Bunton as a labourer. Prior to hiring him, Mr. Singh had placed an ad with Canada Manpower in Coquitlam seeking an “electrician helper”. The rate of pay was advertised at “\$7.50 -\$15.00/HR DEP. ON EXP.”

Mr. Bunton began working for Pioneer on Friday, September 20, 1996. He worked at a Coquitlam job site where Pioneer was engaged to do electrical work on a new residential home. Mr. Singh worked with Mr. Bunton on the site.

There was no written contract of employment. Mr. Singh testified that Mr. Bunton was hired at \$7.50 per hour for a trial period of 90 days. Mr. Singh said that if everything had worked out Mr. Bunton would have been taken on as a permanent employee. Mr. Singh stressed that Mr. Bunton had no knowledge of electrical installation, maintenance or repair.

In her Determination, Ms. Cook sets out the complainant’s position that “... he was hired at \$10.00 per hour to work as an electrical apprentice/helper.” The Determination goes on to state that “The Complainant states he has been working as an electrical apprentice for four years and he would not have accepted the job at \$7.50 per hour.”

Neither the employer nor the employee were registered with the apprenticeship board.

There is no dispute that Mr. Bunton worked for Pioneer on 8 days. Those days are set out on a document titled “Daily Time Ticket” (Exhibit #2). This document was, for the most part, in Mr. Singh’s handwriting and Mr. Singh stated that he kept it in his truck. (Although the document begins with the date Friday, September “21st”, it was agreed at the hearing, after looking at a calendar of September, 1996, that Friday was September 20th, and that the days on the Daily Time Ticket are “off” by one.)

For the eight days shown on the Daily Time Ticket both Mr. Singh and Mr. Bunton worked at the site.

The Daily Time Ticket shows 8 hours on Friday, September 20th; 8.5 hours on Saturday, September 21st; 9 hours on Monday, September 23rd; 8.5 hours on Tuesday, September 24th; 9.5 hours on Wednesday, September 25th; 5 hours on Thursday, September 26th; 9.5 hours on Monday, September 30th and 5.0 hours on Tuesday, October 1st, 1996. Sunday, September 22nd does not appear on the Daily Time Ticket.

As well as showing the number of hours worked, the Daily Time Ticket shows the start time and the finish time each day. It also shows that on Wednesday, September 25th, Mr. Bunton was off from 12:00 to 1:30 and that on Friday, September 27th Mr. Bunton did not work. On Monday, September 30th there is written “no lunch”. Mr. Singh testified that there was a 30 minute unpaid lunch break on a regular day.

With the exception of three dates, the hours submitted by Mr. Bunton to Ms. Cook matched the hours on the Daily Time Ticket. Mr. Bunton’s list of hours showed that he worked 6 hours on Sunday, September 22nd; 10 hours on Monday, September 30th and 6 hours on Tuesday, October 1st.

Mr. Singh commented extensively on the Daily Time Ticket. The essence of those comments was to show why Mr. Bunton should receive no overtime. With respect to Saturday, September 21st, he said that Mr. Bunton should not be paid 30 minutes overtime because he doesn't pay for teaching. Commenting on Thursday, September 26th, Mr. Singh said that Mr. Bunton worked until noon but was paid until 1 P.M. With respect to Monday, September 30th, Mr. Singh stated that he told Mr. Bunton that he could work overtime, but that he would not be paid overtime. Mr. Singh said that Mr. Bunton agreed and worked extra that day in order to complete his "Thursday" time. With respect to Tuesday, October 1st, Mr. Singh stated that Mr. Bunton received two extra hours' pay because the job finished at 11 A.M. and he was paid until 1 P.M.

As stated previously, Sunday, September 22nd, does not appear on the Daily Time Ticket. However, Mr. Bunton claims six hours' wages on that day.

Mr. Singh testified that Mr. Bunton did not work on the Sunday - that he was not allowed on the site on Sunday. He stated that when he hired Mr. Bunton he told him not to go to the site on Sunday. Mr. Singh testified Pioneer does no work on Sundays.

In his written submission Mr. Singh dealt with the "Sunday" issue this way:

Mr. Bunton was a electrical helper and was told not to attend on the job site on Sundays, later he claim that he worked on a Sunday which was on Sept 22, 1996, when he came on the job site he was not sure what he was doing. what he did was wrong and without our instructions.

A little further on in his written submission Mr. Singh states:

He is claiming 5.5 hours on 22nd Sept 1997, which he did on his own and without our instructions. He knows he is not allowed to work on Sundays, but he later told me that he wants to learn more that is why he came on Sunday to do on his own.

Mr. Bunton received one cheque from Pioneer, written by Mr. Singh. It was a cheque dated September 30, 1996 in the sum of \$327.76. On the bottom left corner of the cheque, beside the word "For", Mr. Singh wrote the following: "40 Hrs. Regular".

Mr. Singh stated that it is Pioneer's normal practice to pay employees every two weeks. Although Mr. Bunton had not worked for ten working days Mr. Singh said he gave him a cheque on September 30th for humanitarian reasons.

According to Mr. Singh, Mr. Bunton was in very difficult circumstances. Mr. Singh testified that Mr. Bunton told him he was broke, had not showered for three days and that he needed to buy food. Mr. Singh testified that Mr. Bunton asked him for \$300 for rent for his trailer and for approximately \$25 to \$27 for health requirements: food, beverages, and a shaving kit.

Mr. Singh said that he wrote the cheque on the job site and that he had no calculator. He said that he put "40 hours regular" on the cheque in order to keep a rough record. He said that it was a rough estimation so that the office would know that it was not a gift. Mr. Singh said that he did not intend the cheque to be "net" or "gross".

Mr. Bunton's last day of work with Pioneer was October 1st. Mr. Singh said that Mr. Bunton quit; that he simply failed to come to work anymore. (It was Mr. Bunton's position, as set out in the Determination, that he had been fired.) Mr. Singh testified that he tried to reach Mr. Bunton after he quit, but that he was unsuccessful in reaching him.

It was very clear from Mr. Singh's evidence that he was unhappy with Mr. Bunton's work. He stated that on the first day of work Mr. Bunton did everything wrong but that he kept him on to give him a chance. He pointed out that on Thursday, September 26th, Mr. Bunton, without notifying the employer, did not return to work in the afternoon and that on Friday, September 27th, without notice, did not show up for work.

ANALYSIS

What wage was Mr. Bunton to be paid?

The first matter in dispute concerns the wage rate at which Mr. Bunton was hired. Was Mr. Bunton hired at \$7.50 or \$10.00 per hour?

I have carefully considered all the evidence and submissions.

The onus on an appeal of a Determination is on the appellant to satisfy the Tribunal that the Determination is wrong.

On the issue of the rate of pay, I concur with the finding of the delegate, Ms. Cook, and hold that Mr. Bunton was hired at \$10.00 per hour. I base this conclusion on the cheque that Mr. Singh gave to Mr. Bunton. That cheque was for the sum of \$327.76 and it stated on it that it was for 40 regular hours. If Mr. Bunton had been hired at \$7.50 per hour then the gross amount of wages for 40 hours would be \$300 and a net amount of wages would be even less. To quote from the Determination: "On the other hand, if the rate of pay was \$10.00 per hour then the cheque could in fact be a net amount."

In my view if a cheque were intended as an advance, it would say so.

Is Mr. Bunton owed wages for Sunday, September 22nd?

The Determination found that Mr. Bunton was entitled to six hours' pay for working on Sunday, September 22nd. However, in her final submission, Ms. Cook stated that she may have erred in finding that six hours of work was done on Sunday and that the number of hours should be varied down to four.

Mr. Singh maintains that no wages are owed for that day.

Mr. Singh's evidence was clear that Mr. Bunton had been specifically instructed not to go to the site on Sunday. Mr. Bunton's attendance at the work site on Sunday was neither required nor authorized. I would therefore disallow any wages for Sunday, September 22nd. [See: section 34(1) of the *Act*.]

How many hours did Mr. Bunton work for Pioneer and was Mr. Bunton owed any overtime?

It is Mr. Singh's position that Mr. Bunton is entitled to be paid for 63 regular hours and that he is not entitled to any overtime.

Leaving aside the Sunday hours, there are only two small differences between the number of hours claimed by Mr. Bunton and the number of hours shown on the Daily Time Ticket. For Monday, September 30th the Daily Time Ticket shows 9.5 hours and for Tuesday, October 1st it shows 5 hours. Mr. Bunton claimed 10 hours for September 30th and 6 hours for October 1st.

In her Determination, the delegate deals with these two days as follows:

With respect to the other two days, I am accepting the Employer's hours for Monday, September 30, 1996. For Tuesday I am accepting the original time marked on the time sheet which would be 5.5 hours not 5 as stated by the Employer nor 6 as stated by the Complainant.

I have determined how many hours Mr. Bunton worked each day, as well as whether he is entitled to overtime, from the hours shown on the Daily Time Ticket (Exhibit #2). From Mr. Singh's testimony it is clear that the Daily Time Ticket is almost entirely in his writing and that it was kept in his truck. Mr. Singh was at the work site with Mr. Bunton each day. It is also significant that six of the eight days shown on the Daily Time Ticket match the hours submitted by Mr. Bunton. Moreover, the employer maintains that Mr. Bunton is entitled to be paid for 63 hours.

Based on the Daily Time Ticket, it is my decision that Mr. Bunton is entitled to be paid for 58 hours at straight time and 5 hours at time and a half.

Section 4 of the *Act* precludes an employee from contracting out, or waiving, the minimum protections provided for in the *Act*. On five days the Daily Time Ticket records that Mr. Bunton worked more than 8 hours. Specifically he worked a half-hour of overtime on Saturday, September 21st; one hour on Monday, September 23rd; a half-hour on Tuesday, September 24th; one and a half hours on Wednesday, September 25th and one and a half hours on Monday, September 30th. He is, therefore, entitled to overtime on each of those five days. In total he worked 5 overtime hours. By virtue of section 40(1) of the *Act*, he is entitled to overtime for those hours at time and a half.

Recalculation of Mr. Bunton’s wages based on \$10.00 per hour is as follows:

58 hours a \$10.00 per hour:	\$580.00
5 hours of overtime at \$15.00 per hour:	75.00
Subtotal:	655.00
4% vacation pay:	26.20
Total:	681.20
Less wages paid:	327.76
Wages owing:	353.44

I would note that a cheque for \$437.00, which is the full amount of the Determination, was provided by Pioneer pursuant to a suspension request and is being held in trust by the Director of Employment Standards pending the outcome of the appeal.

The Penalty Determination

The Penalty Determination issued by delegate Dunne imposes a penalty on Pioneer “in the amount of \$0.00”. However, the Determination does not specify what contraventions of the *Act* have triggered the imposition of this penalty. The Determination reads in part:

On July 2, 1997, a Determination was issued by Pat Cook, Industrial Relations Officer (copy attached). As Pioneer Electric Co. Ltd. has contravened a specified provision of a Part of the Employment Standards Act or of a Part of the Employment Standards Regulation, this is a penalty in the amount of \$0.00 for these contraventions.

The Determination concludes:

I find that Pioneer Electric Co. Ltd. has contravened Sections 18, 27, 40, and 58 of the Employment Standards Act or the Employment Standards Regulation.

Mr. Singh asks that the Penalty Determination be cancelled. He is concerned about the escalating penalty amounts that follow a first penalty.

Ms. Cook noted that the employer has not complied with four sections of the *Act*: sections 18, 27, 40 and 58.

Section 81(1)(c) of the *Act* provides:

On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:

- (c) if a penalty is imposed, the nature of the contravention and the date by which the penalty must be paid;

This Penalty Determination does not meet the requirements of section 81(1)(c) of the *Act* because it does not specify the nature of the contraventions. It therefore must be cancelled.

In my view for a penalty to be validly imposed, the legislative contravention must be clearly and unambiguously set out. This has not been done in this Penalty Determination. To adopt the words of Adjudicator Thornicroft in *Westminster Chevrolet Geo Oldsmobile Ltd.* BC EST #D210/97: "...one cannot determine, by reading the Penalty Determination itself, precisely why the Determination was issued."

ORDER

I order, pursuant to section 115 of the *Act*, that Determination #1 dated July 2, 1997 be varied to the amount of \$353.44, plus interest pursuant to section 88 of the *Act*.

Pursuant to section 115 of the *Act*, I order that the Penalty Determination dated July 2, 1997 be cancelled.

Sherry Mackoff
Adjudicator
Employment Standards Tribunal