

An appeal

- by -

524953 B.C. Ltd. operating as L & D Laundry
("L&D")

- 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: Sheila McDonald

FILE No.: 2001/190

DATE OF HEARING: July 31, 2001

DATE OF DECISION: September 10, 2001

DECISION

APPEARANCES:

Julia Brunelle	on behalf of the Employer
Mr. Mark Barfoot	the employee
Mr. Larry Coutreille	on behalf of the employee

OVERVIEW

Mr. Mark Barfoot worked for L&D Laundry for several months commencing in the fall 1999 and into the spring of 2000 after responding to an advertisement for a manager. He filed a complaint on May 18, 2000 stating that regular wages, overtime wages, statutory holiday pay, annual vacation pay and compensation for length of service were owing. In addition, he stated that a record of employment was required. During the course of the investigation L&D did not provide any payroll records.

ISSUE

There are three issues in this case. Are outstanding regular and overtime wages owed to Mr. Barfoot? Is statutory holiday or annual pay outstanding? Is compensation for length of service due to Mr. Barfoot?

THE DETERMINATION

A Determination was issued on February 14, 2001 by Mr. Bill Woolsey, a Delegate of the Director of Employment Standards finding that L&D Laundry had contravened the *Employment Standards Act* and owed Mr. Barfoot \$2,769.03 in wages and vacation pay and interest of \$152.26.

Mr. Simon Joseph Brossoit, owner of L&D Laundry explained during the investigation that Mr. Barfoot had worked for him but no employer records were kept for the hours he worked or for wages paid to him. He stated that he had not hired Mr. Barfoot as a manager and that he had paid Mr. Barfoot in cash for the work he performed - \$1000.00 for the one month's work in the Laundromat and \$5.00 for each delivery that he made. He said he was not sure what month Mr. Barfoot had worked in the Laundromat and there was no record of the number of deliveries Mr. Barfoot had made.

Mr. Patrick Watson at "Numbers Are Us Bookkeeping", Mr. Brossoit's bookkeeper did provide a copy of a "record of Employment" for Mr. Barfoot. The ROE records Mr. Barfoot as working

from March 15, 2000 to May 15, 2000. Mr. Watson further stated in a letter to Mr. Woolsey dated August 10, 2000 that he could find no backup verification for any payroll given to Mr. Barfoot for any time period.

On October 18, 2000 Mr. John Dafoe, another Delegate of the Director issued a Penalty Determination for \$500.00 for not producing employer records pursuant to Section 28(a) of the *Employment Standards Regulation* against L&D Laundry.

Mr. Barfoot told Mr. Woolsey that he was hired by Mr. Brossoit to manage the Laundromat and a concession. He said he was to work under minimal supervision and was responsible for the business operation. His duties included selling items from the concession, organizing the delivery of shopping requests consisting of groceries and confections to customers, overseeing the Laundromat operation, receiving revenue and preparing inventories.

He said that Mr. Brossoit told him he would receive 10% of the shares and profit of the business. Later in November 1999, he said that Mr. Barfoot would be an employee and Mr. Brossoit's wife would manage the business. While he worked at the Laundromat, Mr. Barfoot says that Mr. Brossoit paid him a total of \$1,700.00 in cash.

Mr. Barfoot provided ledger pages from the business covering parts of October and November 1999 and his own diary pages of January and February 2000 as confirmation that he worked there. His calendar showed that he worked approximately 6 hours a day and he said he had kept track of his hours up to 601 hours.

Shirley Friesen, Mike Hall, Liam Hall, Brian Kendell and Larry Courtoreille all submitted letters stating that Mr. Barfoot had worked at the Laundromat between September 1999 and April 2000. All but one letter stated that Mr. Barfoot worked 6 to 7 days a week and several of the letters stated that Mr. Barfoot had worked 12 hours a day.

The employer asserted that no wages were owed, however, he was unable to produce any documentation to support his position. As evidenced by the employer's statement there were no records kept for Mr. Barfoot's employment. At one point in the investigation the employer committed to obtaining and submitting documents, which he alleged, would show Mr. Barfoot had received income replacement money from ICBC. As of the date of the Determination he had failed to do so.

Mr. Woolsey concluded in the Determination that Mr. Barfoot did work for the employer from September 1999 to April 2000 based on Mr. Barfoot's records and letters submitted from witnesses. He accepted on the balance of probabilities that Mr. Barfoot did work a total of 601 hours for which he was partially paid. Based on a rate of pay of \$7.15 an hour Mr. Woolsey found that Mr. Barfoot was still owed wages and vacation pay in the amount of \$2,769.03 plus \$152.26 in interest. Mr. Woolsey found that there was insufficient information to determine if any over time wages or statutory holiday pay were outstanding. In addition, as both parties

agreed that Mr. Barfoot quit his job he did not find the employer liable for compensation for length of service.

EMPLOYER'S EVIDENCE

Ms. Brunelle stated that she believed that Mr. Barfoot was paid in full. She said that there was a lot of paperwork missing and the delivery book was missing that would show that Mr. Barfoot owed the employer money. She said the witness letters provided to Mr. Woolsey, the Delegate were fabricated and that Mr. Barfoot never worked 12 hours a day. She said that Mr. Barfoot had smashed up the delivery vehicle and had received lost wages from ICBC.

She stated that she quit her job elsewhere in late October 1999 and came back to work at the Laundromat. She said she then sent her brother a plane ticket to come to Terrace to work at the Laundromat and he worked 8 hours a day. She said that Mr. Barfoot was only hired as an attendant.

She said she did not have the schedules for the Laundromat and that she could not find any paperwork.

EMPLOYEE'S EVIDENCE

Mr. Barfoot said he started working at L&D Laundromat in October 1999 and that he was promised profit sharing. He said Mr. Brossoit told him that the more money he could bring in the more money he could make. He said Mr. Coutreille, a friend of his, told him he should keep track of his hours.

On November 19, 1999 he said he was heading home and got into an accident. He then took two days off but he did work after the accident. He said that he received \$888.00 as a settlement from ICBC. He said that he set the schedule for himself and three other workers at the Laundromat and that the schedules should be produced by the Employer. He said that he knows he worked 600 hours and that between October 2 and November 5, 1999 he worked 245 hours as he was working more than 8 hours a day.

He said he received \$1700.00 in cash from Mr. Broisset.

Mr. Larry Coutreille said he went every night after work to visit Mr. Barfoot at the Laundromat for security reasons. He said he told Mr. Barfoot to keep track of his hours.

THE FACTS AND ANALYSIS

The Determination was appealed on March 5, 2001. According to a letter written by Mr. Watson, the employer's bookkeeper the appeal of the Determination was based on the fact that Mr. Broisset had a claim in with ICBC at the same time that he said he was working at the

Laundromat. I can only conclude that the letter should have said Mr. Barfoot. The letter asks for the case to be reopened and for further investigation to take place. The appeal also included a copy of a letter dated December 2, 1999 addressed to the employer from a ICBC claims adjuster requesting that a Certificate of Earnings claim form be filled out and returned to ICBC in order to assess Mr. Barfoot's claim.

The Director's response to the appeal points out that the appeal is based on two points: that there is additional information available, which may indicate that a revised finding is possible, and that this should be investigated.

Mr. Barfoot's submission to the Tribunal with respect to the appeal dated March 13, 2001 stated that he received \$888.28 for disability pay for the period November 26 to December 31, 1999. Copies of two computer printouts from ICBC were also attached. In a further letter to the Tribunal dated April 5, 2001 Mr. Barfoot stated that he had his accident on November 19, 1999 and returned to work on November 21, 1999. He states that ICBC knew he was working and had no problem with that

In responding to Mr. Barfoot's submission, the Director in a letter dated April 10, 2001 states that during the investigation both the employer and the employee mentioned the ICBC monies, however, neither party provided him with any documentation. Mr. Barfoot when questioned during the investigation said that he had received the monies but not for wages. The employer committed to provide information but failed to do so.

On April 10, 2001 Mr. Watson wrote to the Tribunal on behalf of the employer asking for an extension as they were trying to get together papers to support their case and show that Mr. Barfoot had not worked the hours he claimed.

It is clear from the facts that the employer did not keep any payroll records for Mr. Barfoot. The employer had opportunities to respond and participate in the investigation and provide other documentation to the Director and did not. The letter from the ICBC claims adjuster to the employer was not provided until the appeal was filed.

I would conclude that the Certificate of Earnings form was filled out by the Employer and returned to ICBC as monies were in fact paid out to Mr. Barfoot. I would conclude that the Employer had the documentation and choose not to share it with the Director.

I agree with Mr. Woolsey when he suggests that two previous Employment Standards Tribunal Decisions, *Tri-West Tractor* (EST D268/96) and *Kaiser Stables* (EST D058/97) apply in this case. These two decisions speak to the issue of an employer who has failed to participate in an investigation in a meaningful way and then wishes to appeal the findings of a Determination, which has found against them. In short, the decisions state that an employer cannot "sit in the weeds" refusing or failing to participate in an investigation and then appeal on the basis that there is new information available.

L&D Laundry not only did not keep payroll records for Mr. Barfoot but also choose not to provide any documentation they did have to the Director during the investigation. The Employer was aware of the ICBC monies and told the Director they would provide documentation accordingly which they obviously had as they supplied it at the appeal stage.

I find no reason why the investigation should be referred back to the Director for further investigation. I am in agreement with the Director's conclusions in the Determination that Mr. Barfoot is owed wages as per Mr. Woolsey's calculations. There is insufficient evidence to determine if any overtime wages or statutory holiday pay is outstanding.

Both parties agree that Mr. Barfoot quit his job, therefore, the employer is not liable for compensation for length of service.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination ER# 083146 be confirmed.

Sheila McDonald
Adjudicator
Employment Standards Tribunal