

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 -

Spearhead Forestry Services Incorporated
("Spearhead")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Hans Suhr
FILE NOS.:	97/548, 97/549, 97/550, 97/551
DATE OF HEARING:	October 8, 1997
DATE OF DECISION:	November 7, 1997

DECISION

APPEARANCES

Lesley Becker on behalf of Spearhead Forestry Services Incorporated

Rob Hughes on behalf of Spearhead Forestry Services Incorporated

Kayle B. Grandy on his own behalf via telephone conference call

OVERVIEW

This is an appeal by Spearhead Forestry Services Incorporated (“Spearhead”), under Section 112 of the *Employment Standards Act* (the “Act”), against 4 Determinations dated June 27, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Spearhead alleges that the delegate of the Director erred in the Determinations by concluding that wages in the amounts of \$1,841.08, \$1,204.23, \$519.12 and \$284.09 were owed to certain employees.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Does Spearhead owe wages to Jeffrey D. Holliday (“Holliday”) ?
2. Does Spearhead owe wages to Kayle B. Grandy (“Grandy”) ?
3. Does Spearhead owe wages to Krista Naomi Farrell (“Farrell”) ?
4. Does Spearhead owe wages to Brian C. Roth (“Roth”) ?

FACTS

Holliday, Grandy, Farrell and Roth were employed by Spearhead to perform silvaculture work.

Holliday, Grandy, Farrell and Roth were accommodated at the same Hotel as the owners/supervisors.

Holliday, Grandy, Farrell and Roth traveled to and from the workplace in vehicles provided by Spearhead.

Holliday, Grandy, Farrell and Roth were paid for the time spent traveling from a designated marshaling point to the worksite.

Holliday, Grandy, Farrell and Roth were not paid for the time spent traveling to/from the Hotel and the designated marshaling point.

Holliday filed a complaint alleging that he was owed minimum wages, travel time, overtime pay, annual vacation pay, and minimum daily pay.

Grandy, Farrell and Roth filed complaints alleging that they were owed minimum wages, travel time, overtime pay and annual vacation pay.

Spearhead stated that the calculations performed by the Director are incorrect, unjustifiable and inconsistent with the records.

Spearhead stated that an example of the inconsistency is where Grandy and Farrell who worked on the same crew were found by the Director to be entitled to differing amounts for travel time on the same day.

Spearhead further stated that the calculation of the hourly rate for the former employees performed by the Director did not make any sense.

Spearhead further stated that the Director caused \$5,000.00 due to Spearhead to be 'held' until the complaints were complete and in July, released the balance not required by the calculations on the Determinations.

Spearhead further stated that the evidence from the crew logs kept on a day to day basis by the supervisor of each crew clearly show the actual hours worked by each employee.

Spearhead further stated that they calculated the payroll and paid employees on a semi-monthly basis, 1st to the 15th and then 16th to the end of the month.

Spearhead further stated that the Director did not contact them to discuss the allegations of wages owed prior to issuing the Determinations.

Spearhead further stated that the Director had been provided with the payroll records for each of the employees.

Spearhead finally stated that they only became aware that the Determinations had been issued when they telephoned the delegate of the Director to enquire as to the status of the investigation. The Director had mailed the Determinations to an old address despite the current and correct address being prominently displayed on the payroll statements provided to the Director.

The Director issued a separate Determination with respect to each employee. I will therefore deal with the Determination separately although there is some inter-relationship between all four Determinations.

Holliday

The Director concluded that Holliday was owed a total of \$1,841.08 for minimum wage, minimum daily pay, travel time, overtime wages and annual vacation pay.

Spearhead stated that Holliday was employed from November 4, 1996 to November 29, 1996.

Spearhead further stated that the daily crew logs recorded by the supervisor clearly show the hours worked each day by Holliday. The hours recorded for Holliday include 1/2 hour travel time, two 15 minute breaks and reflect 1/2 hour deducted for lunch each day.

Spearhead further stated that specifically the logs shows that Holliday earned \$100.00 for the day on November 9, 1996 as he agreed to work on layout for the day and yet the Director shows both \$100.00 and \$150.00 for the same day.

Spearhead further stated that on November 16th and 17th, all employees were notified on the previous day that they would not be required for work. Spearhead concedes that on November 18th and 19th, employees came in to work, however, due to the weather conditions, the vehicles were unable to reach the worksite and turned around.

Spearhead further stated that on November 20th work was carried out by the crews, however, Holliday was totally unprepared for the weather conditions and after 1/2 hour of work, he chose to sit in the transport vehicle for the balance of the day.

Spearhead finally stated that Holliday was paid a total of \$1,820.51 for the work performed and does not understand how the Director arrived at an amount paid of \$1,284.92.

Grandy

The Director concluded that Grandy was owed a total of \$1,204.23 for minimum wage, daily pay, travel time, overtime wages and annual vacation pay.

Grandy testified and stated that:

- he was advised by Rob Lilley, a supervisor, that the crummy left the Hotel at 6:30 a.m. and that was his ride;
- all employees rode in the crummy from the Hotel to the worksite;
- he kept notes on a daily basis and disagrees with the information from the crew logs;

- he concedes that on November 23rd he sat around for an hour waiting for the rest of the crew to finish up;
- he also had deductions taken from his pay for damage to the Hotel room and for equipment;
- he was not at work on December 9th;
- he alleges that the price per hectare was changed after the work was performed.

Spearhead stated that Grandy was employed from November 19 - December 13, 1996

Spearhead further stated that the crew logs clearly showed that Grandy worked as follows on the disputed days:

Nov. 19 - could not reach worksite due to heavy snow

Nov. 22 - finished at 3:30 p.m.

Nov. 23 - finished at 1:30 p.m.

Dec. 3 - finished at 2:00 p.m.

Dec. 9 - did not work although the Director assigned 10 1/2 hours for that date

Dec. 13 - finished at 1:30 p.m.

Spearhead further stated the pay statement provided to the Director clearly indicates that Grandy was paid a total of \$637.10 yet the Director chose to acknowledge only the \$200.00 advance as having been paid.

Spearhead further stated that the payment per hectare was adjusted as a result of the quality checks performed by Ministry of Forests.

Spearhead further stated that the amount shown as owing on the pay statement, \$200.73 was paid to Grandy on a cheque mailed to him.

Spearhead further stated that they do not understand how the Director arrived at the total amount of wages alleged to be owing to Grandy.

Spearhead further stated that the deduction for damage to the Hotel room was equally apportioned to all who stayed in that particular room.

Spearhead finally stated that the deduction for equipment was for equipment received by Grandy.

Farrell

The Director concluded that Farrell was owed a total of \$519.12 for minimum wage, travel time, overtime wages and annual vacation pay.

Spearhead stated that Farrell was employed from December 3 - 13, 1996.

Spearhead further stated that the hours calculated by the Director are inconsistent not only with the crew logs kept, but are also inconsistent with the hours alleged to have been worked by the other employees who worked with Farrell. An example of this inconsistency is December 9th, where only Farrell and Grandy are credited with hours worked by the Director. Grandy testified that he did not work on December 9th and the crew logs kept indicate that no employees worked on December 9th.

Spearhead further stated that the Director does not explain why Farrell was credited with more time spent in travel on December 10th, 12th and 13th than her fellow crew members.

Spearhead further stated that the pay statements indicate that Farrell was paid a total of \$406.06 yet the Director only credits \$243.00 as having been paid.

Spearhead finally stated that they do not understand how the Director calculated the amount of wages alleged to have been earned and owed.

Roth

The Director concluded that Roth was owed a total of \$284.09 for minimum wage, travel time, overtime wages and annual vacation pay.

Spearhead stated that Roth was employed from December 4 - 13, 1996.

Spearhead further stated that the crew logs indicate that Roth only worked until 10:00 a.m. on December 6th, and further that Roth worked 5 hours on December 13th even though the Director does not credit Roth with any hours worked on the 13th.

Spearhead finally stated that Roth was paid a total of \$329.00 for the work performed and they do not understand why the Director only credited Roth as having been paid \$200.00.

ANALYSIS

With respect to the issue of travel time, whether or not this is paid time depends on the employment agreement between the employer and employees. If the time spent traveling is under the direction or control of the employer and the employee is **required** to travel in such a manner, then the time spent traveling is considered as work. If the employee is **not**

required to travel under the control or direction of the employer yet chooses to do so for the employee's convenience, then that travel would not be considered as work.

In the case at hand, I am not satisfied that Spearhead, if they had indeed designated a marshaling point, clearly communicated to the various employees that the employees were responsible for travel to that designated marshaling point. In my view, if the employees had been clearly informed of the existence of a marshaling point and further informed that it was their responsibility to 'get there', the only liability for travel time on an employer would be from that designated marshaling point onward to/from the worksite.

Based on the evidence provided I conclude that the employees named in these Determinations were required to travel under the direction or control of the employer and that such travel constitutes work. I further conclude that the amount of time spent each day in such travel was 2 1/2 hours.

With respect to the issue of wages earned, paid and owing, the evidence indicates that the Director's calculation were not performed with regard to the provisions of the *Act*, nor were they performed with regard to the evidence of the pay statements provided. The evidence indicates that the Director calculated the *regular pay* contrary to the *Act* and only credited the employer with having paid either the advances noted on the statements or the **net** amounts on the pay statement. The evidence indicates that the Director disregarded information provided by Spearhead and performed all calculations based on the information of the employees.

The evidence further indicates that the Director did not contact Spearhead to discuss the apparent contradictions between the payroll information provided and the employees allegations.

The result of the incorrect calculations performed by the Director was that Spearhead was denied the use of moneys which were rightfully theirs and improperly, in this case, withheld from them.

The *Act* requires that regular wage employees being paid as these employees were to be calculated as follows:

“regular wage” means

.....

(b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period,

With respect to the calculation of wages earned by Holliday and Grandy, the Director calculated regular wage on a **daily basis** instead of a pay period basis. This has resulted in a grossly exaggerated total of wages earned. The Director has also incorrectly **recalculated** the total earnings of Holliday and Grandy on an hourly basis when it is clear from the evidence that they were to be paid on an incentive basis. The only purpose that

the Director should have used the ‘regular wage’ calculation for was to establish the hourly rate in order to calculate how much was to be paid for travel time.

With respect to the calculation of wages earned by Farrell and Roth, as they did not earn at least minimum wage for the hours worked, the appropriate calculation should be at the rate of \$7.00 per hour and the applicable overtime rates.

With respect to the hours worked by each employee, based on the evidence provided and on the balance of probabilities, I conclude that the hours reflected in the crew logs kept by Spearhead accurately reflect the hours worked. Those hours are to be adjusted to include 2 hours of travel time daily as Spearhead has already paid for 1/2 hour travel time.

I have recalculated the total of wages earned by the employees and incorporated the additional 2 hours of paid travel time each day. Spearhead already included 1/2 hour per day travel time in their hours recorded in the crew logs.

Holliday

I conclude that except for the travel time hours, Holliday was paid correctly by Spearhead for the work performed.

The wages earned by Holliday are therefore recalculated as:

pay period	earnings	hours worked	regular wage	travel time adjusted	travel earnings	adjusted earnings	
				1 x	1 1/2 x		
Nov. 1-15	\$1014.01	÷76	=\$13.34	4 hrs	16 hrs	\$373.52	\$1387.53
Nov 16-30	\$834.48	÷78.5	=\$10.63	9 hrs	15 hrs	\$334.85	\$1169.33
sub total							\$2556.86
+ 4%							\$ 102.27
TOTAL							\$2659.13
less paid							\$1820.51
OWING							\$ 838.62

Grandy

I conclude that Grandy is owed wages for travel time and is owed for the deductions taken from his wages in the amounts of \$9.22 and \$36.42. Grandy is further entitled to at least minimum wage for the period Dec 1-13. The wages earned by Grandy are therefore recalculated as:

pay period	earnings	hours worked	regular wage	travel time adjusted		travel earnings	adjusted earnings
				1 x	1 1/2 x		
Nov 16-30	\$266.50	÷30	= \$8.88	5.5 hrs	4.5 hrs	\$108.78	\$375.28
Dec 1-13	\$384.62	÷58	*\$7.00	4 hrs	12 hrs	\$154.00	\$538.62
adj. min. wage	\$21.38						\$ 21.38
sub total							<u>\$935.28</u>
+ 4%							\$ 37.41
TOTAL							<u>\$972.69</u>
plus deductions			\$9.22 + \$36.42				\$45.64
less paid							<u>\$637.10</u>
OWING							<u>\$381.23</u>

Farrell

I conclude that Farrell is owed wages for travel time. I further conclude that Farrell is entitled to at least minimum wage for the period Dec 1 - 13. The wages earned by Farrell are therefore recalculated as:

pay period	earnings	hours worked	regular wage	travel time adjusted		travel earnings	adjusted earnings
				1 x	1 1/2 x		
Dec 1 - 13	\$384.62	÷58	*\$7.00	4 hrs	12 hrs	\$154.00	\$538.62
adj. min. wage	\$21.38						\$21.38
sub total							<u>\$560.00</u>
+ 4%							\$22.40
TOTAL							<u>\$582.40</u>
less paid							<u>\$406.06</u>
OWING							<u>\$ 176.34</u>

Roth

I conclude that Roth is owed wages for travel time. I further conclude that Roth is entitled to at least minimum wage for the period Dec 1 - 13. The wages earned by Roth are therefore recalculated as:

pay period	earnings	hours worked	regular wage	travel time adjusted		travel earnings	adjusted earnings
Dec 1 - 13	\$329.00	÷47	= \$7.00	1 x 4 hrs	1 1/2 x 10 hrs	\$145.00	\$474.00
	+ 4%						\$18.96
TOTAL							\$492.96
less paid							\$329.00
OWING							\$163.96

The Director collected and/or withheld \$5,000.00 from Spearhead when, by performing the correct calculations the total amount of wages owing by Spearhead is found to be \$1560.15. The Director collected and/or withheld an excess amount of \$3,439.85.

Spearhead argues that they should not be penalized as a result of the inaccurate calculations performed by the Director. Spearhead further argues that they should be paid interest on the amount of money which was in excess of the total of all Determinations.

I feel compelled to comment on the manner in which these complaints were investigated and handled by the Director. The actions by the Director in this matter certainly do not, either in spirit or intent, meet the purposes of the *Act* as set forth in Section 2 which provides:

Section 2, Purposes of this Act

The purposes of this Act are to

- (a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,*
- (b) promote the fair treatment of employees and employers,*
- (c) encourage open communication between employers and employees,*
- (d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*
- (e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and*
- (f) contribute in assisting employees to meet work and family responsibilities.*

The manner in which Spearhead was treated by the Director during this investigation can not, in any way, be considered to be either fair or efficient.

The appeals by Spearhead are allowed to the extent set forth above.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 27, 1997 with respect to Holliday be varied to be in the amount of \$838.62.

I further order that the Determination dated June 27, 1997 with respect to Grandy be varied to be in the amount of \$381.23.

I further order that the Determination dated June 27, 1997 with respect to Farrell be varied to be in the amount of \$176.34.

I further order that the Determination dated June 27, 1997 with respect to Roth be varied to be in the amount of \$163.96.

Hans Suhr
Adjudicator
Employment Standards Tribunal