

**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 -

Sean Smyrichinsky  
("Smyrichinsky")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** James Wolfgang

**FILE NO.:** 98/522

**DATE OF HEARING:** November 20, 1998

**DATE OF DECISION:** January 7, 1999

## **DECISION**

### **APPEARANCES**

Sean Smyrichinsky	for himself
Kevin Onclin	for Pacific National Group Enterprises Ltd.
Marco Peemoeller	for Pacific National Group Enterprises Ltd.

### **OVERVIEW**

This is an appeal by Sean Smyrichinsky (Smyrichinsky), under Section 112 of the Employment Standards Act (the "Act"), from a Determination issued on July 17, 1998 by a delegate of the Director of Employment Standards.

The Determination dealt with "Curtailing of Variance, required to take water taxi, and not receiving proper lunch breaks". It found, "As there is nothing that this branch can do on your behalf the file will now be closed".

Smyrichinsky appealed the Determination as he believed it was "incomplete". He felt the investigating officer did not do a thorough job and did not address all of his concerns. He felt there was bias as no employees, to his knowledge, were interviewed and the investigation was limited to talking to management.

A hearing was held November 20, 1998 where I took evidence under oath from all the parties. Smyrichinsky raised a number of issues that were in his original complaint but were not addressed in the Determination. A number of these were resolved as a result of the discussion that took place.

### **ISSUE TO BE DECIDED**

The issue to be decided in this case is whether Smyrichinsky's complaint was properly investigated, and if not, what action should be taken.

### **FACTS**

Smyrichinsky was employed by Pacific National Group Enterprises Ltd. (Pacific) as a Farm Technician from March 11, 1997 to December 7, 1997 and worked as a "floater". Pacific had a "flexible work schedule" working a 7 days on, 7 days off, 10 hours per day. The employees received free room and board at Bud's Mover, a floating room and board facility, and also the marshalling point for the employees.

As a result of a company restructuring, Pacific decided to move to the standard 5-2 schedule. This started with selective groups in January, 1996. It was to be extended to most of the remaining employees in November, 1997.

On October 7, 1997 an "all employee meeting" was held to explain the changes. All of the affected employees except those who were on their days off were in attendance. The employees who were on their days off, including Smyrichinsky, were all contacted by telephone. The changes were not only to the work schedule but also affected the room and board provisions and daily travel to the marshalling point. It made it necessary for the employees to find local accommodation which was very limited, particularly during the summer months. In order to minimize the impact of the change, Pacific arranged for free accommodation at a motel in the area for a 2 to 3 month period.

Smyrichinski objected to the change of schedule, claiming it was not subject to a vote of the employees and under the Regulations it requires the approval of 65% of the affected employees to implement a flexible work schedule.

Pacific takes the position it does not require the approval of the employees to return to the regular work schedule. They had notified the Employment Standards Branch of the change, which was all that was required.

The other major change involved the marshalling point. Prior to the restructuring, employees were transported to Bud's Mover by company boat at the beginning and end of each 7-day cycle and worked the various sites from there each day. The new arrangement required them to report daily to Bud's Mover at the start of each shift. Pacific provided a boat to transport the employees from the company wharf to Bud's Mover or employees could use their own boat or take a water taxi. The marshalling point was approximately 20 minutes from the company wharf. The company boat left at 07:00 and the shift started at 07:30. Smyrichinsky claimed he should have been paid from the time he left the company wharf. Pacific argues the boat transport to the marshalling point is a courtesy, not a requirement, and is not paid time.

Smyrichinski also claimed Pacific owed him pay for his lunch periods. He was taken by boat from the marshalling point to his work site and left there until the boat returned at night. As it was a floating site he was unable to go ashore without a boat. The site consisted of several areas for fish, a toilet and a feed shed for the storage of fish food. The site was fairly rough at times and had no heat. He did not have a hand held radio but there was a radio located in the feed shed. He claims the employer required him to "remain" at the work site all day, including his lunch period, therefore he should be paid for his lunch break.

While the work sites are isolated and a boat is not available at each site, Pacific maintains the employees are not required to be available during lunch breaks. They are free during the break and can leave the site if that is possible.

Smyrichinsky worked on a statutory holiday, October 13, (in Smyrichinski's submission he indicated the date worked was October 24 however this was the date of the end of the pay period and not the holiday. He corrected the date at the hearing) and he claims he was not paid properly for the day. Pacific presented time sheets at the hearing showing the method of paying employees. In the case of October 13, the company admits an error had been made in the pay for working the statutory holiday however it was corrected the following pay period. In addition, payment for a shift worked by Smyrichinsky on October 17 was also missed but was corrected the following pay period.

Smyrichinsky claimed the delegate of the Director did not conduct a proper investigation of his complaint. He claims none of the other employees were contacted to determine what actually was the practice and the delegate relied on the information supplied by the employer.

According to Smyrichinsky, the crews worked in excess of the 10 hours reported on the time sheets during the summer months. When he raised the question of overtime with his supervisor he was told the hours worked out over the year as the employees did not work full days in the winter although they would continue to receive the same 10 hours pay. There appears to have been no records kept of actual hours worked, either by Pacific or by Smyrichinsky. Pacific does admit additional hours were worked by employees at times but not to the extent claimed by Smyrichinsky.

Pacific claims it had a very difficult time adjusting to the new Employment Standards Act and Regulations because the "farm worker" rules in the former *Act* were quite different and allowed much more flexibility in scheduling the work force. It was also going through a serious restructuring which caused additional problems. Part of the cost-cutting program involved putting more employees on the 5-2 shift and reducing the number on the 7-7 shift. The employees working the 5-2 shift were returned to the company wharf each day thereby eliminating the room and board costs associated with the 7-7 shift.

## **ANALYSIS**

Smyrichinsky believed he had a verbal contract with Pacific which provided for a 7-7 shift schedule and free room and board, plus transport to and from Bud's Mover at the beginning and end of each shift cycle and this should not be changed unilaterally. This was the cause of most of his complaint. Pacific agrees those were the conditions in effect at the time Smyrichinsky was hired however, as a result of the restructuring, it changed them following notice to the employees, including Smyrichinsky.

When an employer is seeking a variance of hours of work it must satisfy the Director and have the support of at least 65% of the employees to make the change. There is nothing in the *Regulations* that would require an employer to seek the approval of the employees to return to the regular hours of work. It simply must notify the Director of the change. Pacific met this requirement and gave notice to the employees.

Pacific was well aware of the difficulty the restructuring would cause the existing employees but felt it had no other choice. The change in hours of work impacted on a number of conditions. It delayed the implementation for some time and tried to introduce the changes in a manner that would allow the transition to be as painless as possible. The free room and board was stopped, however Pacific did provide free accommodation for a 3 month period and paid the rent for some employees who found local housing before the period expired. It recognized some employees would not be able to make the change and would leave.

The daily marshalling point was at the same location, Bud's Mover, but the employees were now required to travel there daily from the company wharf, either by company boat, company arranged water taxi, or by their own transportation.

There is now reason to review whether the time spent in travel to and from Bud's Mover should be considered time worked for those on the 5-2 shift schedule. Unless an employee owned a boat the only reasonable transportation was by way of company boat. Pacific indicates this was a "courtesy" and employees were not paid in transit to and from Bud's Move, the declared marshalling point. It is my finding that if Pacific had not provided transportation from the company wharf the majority of employees would not have been able to report for work at the marshalling point.

Employees in either the plant or office were expected to report for work at their respective work locations. In each case this is accessible by the local road system.

The employees reporting to Bud's Mover each day had a different situation. They were expected to travel similar distances as the employees reporting to the plant or office and be at the company dock for transportation to the marshalling point. This amounted to an additional 40 to 60 minutes per day of unpaid time. Transportation to the company wharf to Bud's Mover and the return that is the issue.

To have employees report on their own to a location that does not have reasonable access is inconsistent with the intent of the *Act*. In Tribunal decision *Irvine J. Millar* BC EST #D208/97 several questions were raised relating to marshalling points and travel. In part, it asks whether the employer assigns duties to the employees en route, does the employer pay for the vehicle expenses that result from transporting the employees, does the employer provide a vehicle, is the use of the provided vehicle mandatory or optional, and does the employer have a policy or is there an agreement between the employer and the employees about compensation for travel time that does not offend the provisions of the *Act*.

While these points do not exactly parallel the situation here, the intent is the same. If an employee is traveling at the request or direction of the employer in company supplied transportation and no other transportation is reasonably available, it is considered to be time worked. The purpose of the *Act* is to promote fair treatment of employees and employers.

I do not agree with the Determination when it states:

“Required to take water-taxi: It was not the employers obligation or requirement to provide you with free transportation to your place of work. There is nothing in the Employment Standards Act that would require him to do. It is you responsibility to see that you get to your place of employment in a timely fashion.”

It is reasonable to expect employees to travel to the end of the primary road system. Travel beyond that should be the responsibility of the employer. In this case that location would be the company wharf for those on the 5-2 shift schedule. To have employees report to a location that is not reasonably accessible is beyond the intent of the *Act*.

I find the employees on the 5-2 shift are entitled to be paid for time spent in travel from the company wharf to Bud’s Mover and return at the end of each shift. This is referred back to the Branch for the calculation of the proper amount to be paid.

Section 32 (2) of the *Act* states:

An employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.

If the employees did not have a boat at their disposal, as was the case where Smyrichinski normally worked, they were limited in their freedom during lunch breaks. We have no evidence Pacific required Smyrichinsky to be available for work during his lunch break and therefor there is no obligation to pay him for that time.

Section 31 of the *Act* requires the employer to display hours-of-work notices in each workplace in locations where the notices can be read by all employees. The notice must contain information on when work starts and ends, when each shift starts and ends, and the meal breaks scheduled during the work period. Pacific admits it may have been in violation of this section. It has a notice posted at the main office and believed a notice was posted at Bud's Mover but admits it may have been taken down. There were no notices posted at the work sites. I would expect this has now been corrected.

Pacific took the position it was covered under the definition of "farm worker" in the former *Employment Standards Act* and *Regulations*. The former *Act* was silent on whether that definition applied to the Aquaculture industry, however the current *Act* specifically excludes Aquaculture workers from the definition of “farm worker” and, therefore, Pacific’s employees are not exempted from the *Act’s* provisions.

Part 1 of the *Regulations* states:

"farm worker" means a person employed in a farming, ranching, orchard or agricultural operation, but does not include

(c) a person employed in Aquaculture;

There was a question raised by Smyrichinsky over pay for a statutory holiday he had worked. Pacific agrees they had not paid him properly for October 13 at the time however the error was corrected in the following pay period. This matter is no longer in dispute.

Finally, there is the question of Smyrichinsky's hours of work. Pacific admits the hours of work recorded on the time sheets do not always reflect the actual hours worked. For example, it submits that additional hours worked in the Summer is offset by working reduced hours in the Winter without a reduction in the hours on the time sheets. This system may have worked up to the time of the restructuring but there it changed and the employees lost the opportunity to work fewer hours in the Winter and still receive the same pay. The employees went from working 10-hour days, 7 days a week with 7 days off to 8-hour days, 5 days a week with 2 days off. There was no system in place to record the number of extra hours anyone may have worked during the Summer.

For example, there is evidence that the payroll record for the two week period October 4 to October 17 was completed on October 10 showing the hours worked for the full period. We do not know what actual hours were worked after October 10th or if more hours were worked before October 10. I believe it should be possible to establish the hours worked if a more comprehensive investigation is undertaken.

It is a clear violation of Section 28 (1)(d) if a proper record of hours worked is not maintained by the employer. A proper system must be developed to record actual hours worked. Each work site is under a supervisor and they should be charged with the responsibility of maintaining those records.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination issued July 17, 1998 be referred back to the Director for a further investigation of the hours worked by Smyrichinsky and the wages owed to him by Pacific.

**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**