

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 -

Jugraj Singh Sidhu
(the “Employee”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/373

DATE OF HEARING: November 20, 2000

DATE OF DECISION: December 6, 2000

DECISION

APPEARANCES

Mr. Jugraj Singh Sidhu (“Sidhu”)	on behalf of himself
Mr. Sam Sohal (“Sohal”)	on behalf of Cariboo Tree Service Ltd. (“Cariboo” or the “Employer”)

OVERVIEW

This is an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on September 17, 1999. The Determination concluded was not owed wages.

A hearing was held on January 5, 2000 and a decision was issued on January 13, 2000 (*Sidhu*, BC EST #D002/00). In that decision, I accepted Sidhu’s claim for a higher wage rate, \$13.00 per hour. I ordered that Determination be varied to the extent that the Employer was ordered to pay \$604.12 plus interest and referred the calculation of the exact amount owed, including interest, back to the Director. Some of the background facts are set out in the following from that decision:

“.... Sidhu was employed by Cariboo, which operates a tree planting business. He worked for the Employer between May 17 and August 4, 1997, for the first month as a “tree planter” and then as a “brusher”. At the end of the employment, following a complaint to the Employment Standards Branch, he was paid an amount owing on account of wages owed. Apparently, Sidhu was paid some \$800 during his employment. A further amount, \$3,236.57 was paid through the offices of the delegate. ... The Employer alleged ... that Sidhu’s hourly rate was \$12.00 while working as a tree planter and \$11.00 while working as a brusher. Sidhu claims that the hourly rate should be \$13.00 for the entire period of employment....”

The original decision did not deal with hours worked. It was my understanding that “[h]ours of work was not in dispute.” Based on that, Sidhu applied for reconsideration. In a decision dated May 15, 2000, a reconsideration panel of the Board concluded that the issue of hours of work was “very much a live issue that still requires resolution” and referred the matter back.

ISSUES

A hearing was convened at the Tribunal’s offices on November 20, 2000, to deal with the issue of hours worked by Sidhu. At the hearing, both parties expressly agreed that the only issue before me was the determination of the hours worked by Sidhu.

FACTS AND ANALYSIS

Both Sidhu and Sohal testified at the hearing. The Employer also brought two other witnesses. The evidence was brief. The witnesses, including Sidhu, were assisted by an interpreter in the Punjabi language.

Sidhu explained that the delegate erred in relying on the Employer's payroll records. He explained that he kept track of the hours worked on a calendar. This calendar was in evidence at the hearing. It had also been produced to the delegate. Sidhu claimed to have worked on May 18 and 25, June 8 and 22, and July 13 and 30. He confirmed at the hearing that those were the only days for which he disputed the delegate's findings.

The Employer's evidence was that it does not operate on Sundays, it operates Monday through Saturday, *i.e.*, six days a week. Mr. Singh and Mr. Johal, who testified for the Employer, confirmed this. The Employer also says that the delegate's calculation sheets are based on its payroll records. These were part of the record before me.

The appellant has the burden to show that the Determination is wrong. In my view, he has met the burden. The delegate did not deal with the allegations that Sidhu worked hours in excess of those indicated on the payroll records. It appears from the Determination that he simply accepted the hours indicated on those records. He was of the view that he did not have to "make any findings as to the respective credibility of the parties." On the issue of the weight attributed to the Employer's payroll records, I refer to my comments in the initial decision:

"... I agree with the delegate that "properly maintained" payroll records must be given considerable weight. In this case, however, I am reluctant to accord the payroll record the weight accorded to it by the delegate. [I]t appears from the context of the evidence that Sidhu was not paid as required by the Act, namely at least semi-monthly (Section 17). ... Section 27 require that on every payday, the employer provide the employee with a written statement stating, among others, the employee's wage rate. This allows the employee to question discrepancies in the wages paid. If the wage statements had, in fact, provided the information alleged by the Employer with respect to the hourly rate(s), I would have more readily accepted the payroll record as reliable evidence of the hourly rate. In this case, it would appear that Sidhu was paid only once during his employment, which lasted for more than two months. In my view, and in the circumstances, the delegate erred when he accepted the payroll record as conclusive of the issue of the applicable hourly rate.

In my view, these comments are relevant here. The delegate erred. Given the payroll records, the credibility of the parties was very much an issue--in fact, that is what the case turns on.

Based on the Employer's own evidence at the hearing, further doubt was cast on the accuracy of the payroll records. While the Employer's witnesses, two other employees, explained that the Employer generally does not operate on Sundays, Sohal and Mr. Singh, explained that employees sometimes work on Sundays. The Employer characterized it as "reworking," *i.e.*, employees having to redo substandard work on their own time and not getting paid for it. The

Employer explained that it provided transportation to the work site for these employees. The Employer explained that this was “practice” in the industry. The Employer candidly admitted that this practice was not reflected in the payroll records. Practice or not, I do not accept that “reworking” is not “work” as defined in the Act--“labour or services an employee performs for an employer”--and as such must be recorded and compensated. As such, the Employer’s records do not comply with the *Act*.

I have some doubts with respect to Sidhu’s calendar as accurately reflecting the hours worked by him. There are certainly minor inaccuracies and inconsistencies. As well, on July 13, the calendar notes “rework”--apparently a term used for employees having to redo substandard work on their own time. I asked Sidhu how many hours he worked that day and he answered eight. On July 15, the calendar simply states “rework” (in Punjabi) and “8”--and does not indicate start or finish time. Moreover, the document contains numerous changes. On the other hand, for the most part there is a rough symmetry between Sidhu’s records and the Employer’s.

With respect to the specific days worked--May 18 and 25, June 8 and 22, and July 13 and 30--all except July 30 are Sundays. The Employer’s records do generally not indicate hours worked on Sundays. However, that reflects to an extent “reworking” which, in my view, is work that must be compensated. I do not give much weight to the testimony of the two Employer witnesses. Singh did not work with Sidhu. Johal’s evidence was that the Employer generally does not work on Sundays. The practice with respect to “reworking” was confirmed as an accepted practice by Singh. Sohal’s evidence was that Sidhu did not work on July 30 because the Employer did not do any work between July 18 and July 30. Between July 31 and August 3, the Employer worked in the Chilliwack area, doing roadwork. The Employer’s records indicate that Sidhu worked those four days. Aside from the records, Sidhu testified that he worked on the Sunday’s in question. It was Sidhu’s evidence that he worked approximately 8 hours on each of those Sundays.

In all of the circumstances, I am prepared to accept that Sidhu worked the days claimed. He is entitled to be paid at the rate of \$13.00 per hour for 8 hours of each day except July 30 where he is to be compensated for 5 hours, for a total of \$585. Sidhu is entitled to interest on this amount.

ORDER

Pursuant to Section 115 of the Act, I order that Determinations in this matter, dated September 17, 1999 be varied to reflect the additional hours worked by Sidhu.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal
ISP/bls