

An appeal

- by -

Stephen D. Lee and Chris Okey, operating as Pinpoint Timber Ventures
("Pinpoint" or "Employer")

- 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: Paul E. Love

FILE No.: 2002/502

DATE OF DECISION: December 2, 2002

DECISION

OVERVIEW

This is an appeal by an employer, from a Determination dated September 5, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”). The Delegate found that Ronald Klassen (the “Employee”) was entitled to the sum of \$7,383.73 in wages, and \$117.43 in interest. Mr. Klassen was employed as a forestry technician supervisor, in connection with a contract between the Employer and Ministry of Forests to probe, cut and burn trees infected with mountain pine beetle. The Employer paid cash advances, without a wage statement, during the contract. Following the contract the parties met. A further sum was paid to Mr. Klassen. The Delegate determined Mr. Klassen’s complaint on the basis of records submitted by him. The Employer did not submit any records when demanded by the Delegate. After the Determination was issued, in the course of this appeal, the Employer argued that Mr. Klassen was a manager and not entitled to overtime, argued that he was not provided with an opportunity to participate in the investigation, and that the complaints were settled during a meeting between Mr. Klassen, another person, and himself following the conclusion of the contract. The Employer argued that vacation pay was included in the rate he paid to Mr. Klassen. I determined that the Employer was granted a reasonable opportunity to participate in the investigation, and failed to provide records. I further determined that the argument relating to Mr. Klassen’s status as a manager, was not raised as a defence to the overtime claim, until after the Determination was made, and therefore this claim was dismissed on the basis of *Tri-West Tractor Ltd., BCEST #D 268/96*. I determined that it was unnecessary to address the settlement issue as a “settlement” does not preclude the filing of an employment standards complaint, by virtue of section 4 of the *Act*.

In relation to vacation pay, it is apparent that the Delegate did not err in the Determination. The *Employment Standards Regulation* provides a method for the calculation of vacation pay for silvicultural workers paid on a piece rate basis. It was also apparent, that Mr. Klassen was not a “silviculture worker” within the meaning of the *Regulation*, as he was not paid primarily on a piece rate basis, but rather on a daily rate. In any event the *Regulation*, provides for an additional amount for vacation pay. The Tribunal determined in *Golden Sikh Cultural Society, BCEST #D357/98*, *Kirkham Silviculture Ltd., BCEST #D260/97* that the *Act* does not allow the inclusion of vacation pay as part of an hourly rate or unit pay scheme.

I further determined that the Delegate did not err in its treatment of the Employer’s attempt to deduct an alleged debt from wages owing to the Employee.

Having found no error in facts or the application of the law, I therefore dismissed this appeal, and confirmed the Determination.

ISSUES:

The appellant alleges that the Delegate erred in finding facts, and applying the law to those facts. For the purposes of this appeal it is convenient to identify the following issues arising from the appellant's submission:

Did the Delegate fail to accord to the Employer a reasonable opportunity to participate in the investigation?

Did the Delegate err in finding an entitlement to wages when it was alleged by the Employer that the issue was settled?

Did the Delegate err in determining Mr. Klassen was entitled to overtime pay?

Did the Delegate err in the determining Mr. Klassen was entitled to vacation pay?

Did the Delegate err in failing to permit the Employer to deduct a loan payment from wages otherwise owing to an Employee?

FACTS

I decided this case after considering the written submission of the Employer, Employee and the Delegate. Ronald Klassen was employed by the Employer as a forestry technician supervisor for the period February to mid April 2002, in connection with detecting and burning trees infected with a mountain pine beetle infestation. He was to be paid \$200.00 per day. His duties included tree probing, falling and burning trees, supervision, expedition, camp and equipment maintenance.

During the course of the work, the Employer paid some cash advances to Mr. Klassen and other employees, without obtaining acknowledgments, or providing pay statements. The Employer indicates that it makes cash advances because of convenience to itself and to employees who work in the bush. At the conclusion of the work, Mr. Klassen met with Mr. Olney, of the Employer, to make arrangements for payment of outstanding wages. As a result of that meeting, together with cash advances received, the Employer paid \$3,926.50 (gross) to Mr. Klassen. The basis of the Employer's calculation was \$200.00 for 16.75 days of probing, \$150.00/day for 6 days of supervision, \$826.50 for 29 trees felled and burned, and a \$250.00 lump sum of for all other supervisory duties, less \$1,400 for an alleged debt owing by Mr. Klassen to the Employer. Mr. Klassen filed his complaint with the Employment Standards Branch after the meeting with the Employer. Each party has a different account of the post-work meeting, and it is unnecessary for me to make findings as to what occurred during that meeting, as the meeting is not germane to the disposition of this appeal. The RCMP, however, had some involvement in the retrieval of the Employer's property from Mr. Klassen. No charges were ever laid against Mr. Klassen in connection with his safekeeping of the Employer's property at the conclusion of the work.

The Delegate determined Mr. Klassen's hours of work based on records kept by Mr. Klassen. Mr. Klassen provided a list of all days and hours worked over the course of his employment. The Employee did not provide to the Delegate the daily time records that he kept. A copy of these documents were supplied to the Tribunal on this appeal. The Delegate found that Mr. Klassen's hourly rate of pay was \$200 per day or \$25.00 per hour for an eight hour work day. The Employer did not maintain any records relating to

Mr. Klassen's hours of work, and operated this business from a location remote from where the work was performed. The Delegate found that Mr. Klassen was entitled to total wages of \$10,875.22 and \$435.01 in vacation pay, \$156.47 for statutory holiday pay, less payroll advances. The Delegate found that Mr. Klassen received wages of \$3,926.50 by way of cash payroll advances from the Employer. The Delegate rejected Mr. Klassen's assertion that he was entitled to a further \$28.50 for each tree that he felled and burned, as there was no documentary evidence.

The Delegate also found that the Employer had wrongfully deducted a loan in the amount of \$1,400 from the wages owing to Mr. Klassen. The Delegate found that the amount owing to Mr. Klassen was \$7,383.73 plus interest in the amount of \$117.43, for a total of \$7,501.16. In issuing the Determination, the Delegate credited the Employer with \$3,926.50 payments, which included cash advances.

At the time of the investigation, the Employer did not raise the issue of manager/employee that is raised for the first time on this appeal. The Employer submits that Mr. Klassen was a manager and is not entitled to work overtime.

The Delegate found that the Employer contravened a number of sections of the *Act* in particular, sections 18(1), 34(2), 36(1), 40(1), 40(2), 45 and 58(1).

Employer's Argument:

The Employer submits that the Delegate erred in finding facts, and in applying the law. In relation to the investigation, the Employer alleges:

I received a call from the Terrace office of E.S.B., and after a lengthy conversation with the adjudicator there, who seemed to completely side with me, I was told that all that was remaining to do was for him to send me some paperwork to fill out, and the whole matter would be over with. I subsequently never received any paperwork, from Terrace, and as the months went by assumed that my phone conversation had been sufficient, and that the whole matter was over with. Then, many months later, in Sept., I received a bill from the same adjudicator for (approx.) \$7500. Clearly, this case needs to go back to a new adjudicator, or be resolved by your office.

The Employer argues that he has had a multitude of "other contracts" which he treated in a similar manner, without any previous contravention of the *Act*. The Employer submits that Mr. Klassen was a manager and therefore is not entitled to overtime. The Employer submits that he met with Mr. Klassen at the end of the contract and made agreements on all extra claims arising out of the contract made by Mr. Klassen. The Employer asserts that Mr. Klassen kept radios and other equipment in an attempt to extort the payment of additional funds. The Employer argues that the vacation pay was included in the wages, and that all employees are informed of this at the beginning of the employment relationship.

I have not summarized other arguments of the Employer which are not relevant to the issues before the Tribunal.

Employee's Arguments:

The Employee submits that the Delegate's calculations of wages earned are similar to his calculations, and that the appeal should be dismissed. The Employee submits that he was not a manager. The Employee disputes the Employer's right to deduct the sum of \$1,400 from wages earned. The Employee

disputes the Employer's argument that he was a manager. I have not summarized other arguments of the Employee which are not relevant to the issues before the Tribunal

Delegate's Argument

The Delegate says that the Employer did not raise the issue that Mr. Klassen was a manager during the course of the investigation. Further, the Delegate submits that Mr. Klassen was not a manager, and was hired for his skill in "probing". The Delegate submits that Mr. Klassen spent most of his time probing and burning, but had a degree of supervisory authority.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

The Employer has raised a number of issues relating to the finding of facts, and the application of the relevant law, which I considered and determined below.

The Investigation:

The Employer argues, in effect that he was not accorded a reasonable opportunity to participate in the investigation. Section 77 provides as follows:

If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

I have reviewed the Employer's argument and a submission provided by the Delegate, dated November 12, 2002 containing the Employee's complaint, the Delegate's letters to the Employer dated May 8, 2002, and a Demand for Employer records dated June 7, 2002. It is apparent after a conversation with the Employer on May 7, 2002, the Delegate, on May 8, 2002, sent a letter to the Employer requesting records. The Delegate followed this up with a demand for employer records, sent on June 7, 2002, requiring employer records by June 17, 2002. No records were provided by the Employer. I am satisfied on the basis of the information presented to me, that the Delegate provided a reasonable opportunity to the employer to participate in the investigation.

This is a case where the Delegate relied on records kept by the Employee. The *Act* provides a record keeping duty for the Employer set out in sections 27 and 28 of the *Act*. If an Employer fails to keep records, and provide them to the Delegate, the Delegate is left with very little alternative other than to consider the records kept by the Employee, determine whether this information forms an adequate basis to make findings of fact, and make findings of fact accordingly. An Employer that does not comply with its statutory duty to keep the required records, is in significant peril, that the only acceptable evidence to the Delegate will be records kept by the Employee at the time of the work. I note that the Delegate did not consider oral information communicated by the Employee related to the felling and burning of trees an adequate basis for finding a wage entitlement. It appears that the Employee did not submit all the daily time records to the Employer, but submitted a summary of the records to the Delegate. In my view, there was evidence before the Delegate which the Delegate could rely on to issue the Determination. The

Employer did not demonstrate that there was any material difference between the summary and the actual records.

Settlement Issue:

The Employer alleges that he received a demand from Mr. Klassen for extra money, met with Mr. Klassen and settled Mr. Klassen's outstanding claims at the end of the work. Mr. Klassen argues that he met with the Employer to settle his claims, but Mr. Olney did not negotiate with him or pay the balance of the claims. In my view, it is unnecessary to resolve this conflict in the written submissions. Section 4 of the *Act*, makes it very clear that an agreement which is contrary to the *Act*, is not enforceable. Section 4 reads as follows:

The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61, and 68.

An Employee cannot agree to dispose of his employment standards claims, or agree to terms and conditions of employment contrary to the minimum standards set out in the *Act*. For the above reasons, it is my view that Mr. Klassen was not precluded from raising the wage issues before the Delegate. Further, it is my view that if an agreement was reached, which is disputed, the agreement would not preclude the Delegate from issuing a Determination finding an entitlement of Mr. Klassen to wages, based on the standards set out in the *Act*.

Overtime Issue:

The Employer says that it is not obliged to pay overtime because Mr. Klassen was a manager. The Employer did not raise the issue of whether Mr. Klassen was a manager during the course of the investigation. Without an exhaustive consideration of the merits, it is apparent that this argument is ill founded and without a proper factual foundation. I, however dismiss this argument on the basis that it was not advanced during the investigation and therefore should not be considered by the Tribunal on appeal: *Tri-West Tractor Ltd., BCEST #D 268/96*. The Tribunal is a forum for correcting errors that were made by a Delegate during an investigation. It is not a forum for presenting one's case for the first time.

Vacation Pay Issue:

The Employer argues that vacation pay was included in the piece rate for the work, and refers to the minimum piece rate for hand harvested agricultural crops. The *Employment Standards Regulation* relating to piece rate agricultural workers has no bearing on Mr. Klassen's entitlement to vacation pay. The *Employment Standards Regulation* provides a method for the calculation of vacation pay for silvicultural workers paid on a piece rate basis. It was also apparent, that Mr. Klassen was not a "silviculture worker" within the meaning of the *Regulation*, as he was not paid primarily on a piece rate basis, but rather on a daily rate. In any event the *Regulation*, provides for an additional amount for vacation pay. It is apparent from the Employer's submission, that Mr. Klassen was not paid vacation pay in addition to the daily rate for the work. The Tribunal determined in *Golden Sikh Cultural Society, BCEST #D357/98*, *Kirkham Silviculture Ltd., BCEST #D260/97* that the *Act* does not allow the inclusion of vacation pay as part of an hourly rate or unit pay scheme. It is apparent that the Delegate did not err in the Determination, with regard to Mr. Klassen's vacation pay entitlement.

Loan Deduction Issue:

It is apparent that the Employer did not have a written authorization from the Employee to deduct the sum of \$1,400 from wages that were owing to the Employee. The terms and conditions of that loan are not in dispute, and it is not necessary for me to make any factual findings, in order to consider the appeal point raised by the Employer. Section 21 of the *Act* clearly provides that deductions may not be made from wages, without an authorization in writing provided by the Employee:

Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not directly, or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

Section 22, provides for "wage assignments", however, a "loan from a former employer arising from an earlier business relationship" does not fall within any of the permissible categories, for deduction following a written assignment.

For all the above reasons, I find that the Employer has not established any error in the facts, or law, and therefore dismiss the Employer's appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated September 5, 2002 is confirmed

Paul E. Love
Adjudicator
Employment Standards Tribunal