

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 -

O'Brien & Fuerst Logging Ltd.
("O'Brien" or the "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 1999/580

DATE OF HEARING: December 15, 1999

DATE OF DECISION: December 30, 1999

DECISION

APPEARANCES:

Gloria O'Brien, Office Mgr.
Randy O'Brien, President for O'Brien & Fuerst Logging Ltd.

Luc Parisien on his own behalf

No appearance for the Director of Employment Standards

OVERVIEW

This is an appeal brought by O'Brien & Fuerst Logging Ltd. ("O'Brien" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the "Act") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 16th, 1999 under file number 028-246 (the "Determination").

The Director's delegate determined that O'Brien owed its former employee, Luc Parisien ("Parisien"), the sum of \$11,963.26 on account of unpaid overtime wages and interest.

The appeal hearing was conducted by teleconference on December 15th, 1999 at which time I heard evidence and submissions from Gloria and Randy O'Brien, on behalf of the employer, and from Parisien on his own behalf. Parisien testified through a certified French interpreter.

ISSUE TO BE DECIDED

The delegate calculated Parisien's overtime entitlement based on the employer's time records. Thus, there is no dispute regarding whether or not Parisien in fact worked the overtime hours awarded to him by way of the Determination. Parisien did not receive overtime pay during the period from January 1996 to June 1997; from June 1997 until January 28th, 1998 Parisien was paid overtime pay in accordance with the provisions of the *Act*.

The only issue raised by the employer is whether or not Parisien's unpaid wage complaint was filed within the 6-month time limit provided for in section 74(3) of the *Act* (in other words, was Parisien's claim under the *Act* time-barred?). It should be noted that if the complaint was not filed within the 6-month statutory time limit, Parisien could nonetheless pursue his claim in the civil courts (see section 118).

FACTS AND ANALYSIS

Parisien's complaint was filed on April 9th, 1998. According to the employer, Parisien quit his employment on July 26th, 1997 and was subsequently rehired on October 15th, 1997. Parisien's position, on the other hand, is that he did not quit on July 26th but, rather, was laid off at that time and then recalled on October 15th--since the layoff was for a period of less than 13 weeks,

Parisien's employment would be deemed to be continuous from May 1995 until January 28th, 1998.

If the employer's position is accepted, Parisien's complaint was statute-barred since it was not filed within 6 months after July 26th, 1997. However, if Parisien's position is accepted (*i.e.*, that he was only temporarily laid off on July 26th, 1997), his complaint was not time-barred and the delegate was thus properly entitled to make an award dating back 24 months from January 28th, 1998--*i.e.*, to the end of January 1996.

Having considered the evidence submitted by both parties I conclude, on the balance of probabilities, that Parisien did not quit his employment on July 26th, 1997 but, rather, was given a temporary layoff at that time. In arriving at this conclusion I am particularly influenced by the following evidence:

- It does not make sense that Parisien would quit steady employment to take up an acknowledged short-term position with another employer (Echo Bay Scaling and Grading--this job lasted less than 2 months). Further, the principal of Echo Bay understood that Parisien would leave as soon as he was recalled by O'Brien;
- Why would O'Brien rehire Parisien on October 15th, 1997 if Parisien, as is suggested, quit (thus leaving O'Brien short-staffed) only 2 1/2 months earlier?;
- If Parisien quit his employment on July 26th, 1997 why was no Record of Employment issued at that time? I note that a Record of Employment was issued on January 28th, 1998--consistent with Parisien's position that his employment ended in late January 1998. There is no evidence before me of O'Brien having ever issued any other Record of Employment to Parisien; and
- The employer's position is inconsistent with its letter of reference, dated January 27th, 1998, given in respect of Parisien which states, in part, "Luc Parisien worked for our company for approximately 4 years (1995-Present)".

I should add that I have not given any weight to the written (unsworn) statement apparently signed by Kim Shantz and submitted by the employer--this statement, not under oath, constitutes hearsay evidence and has little, if any, evidentiary value.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$11,963.26** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal