Employment Standards TRIBUNAL

An appeal

- by -

Western Turf Farms Ltd.
("the Appellant")

- 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: E. Casey McCabe

FILE No.: 2001/426

DATE OF HEARING: September 26, 2001

DATE OF DECISION: October 22, 2001

DECISION

APPEARANCES:

Ron Rindt	for the employer
Nelson Michaud	for himself
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by the employer, Western Turf Farms Ltd., from a Determination dated May 28, 2001. That Determination found the employer liable to pay $1,647.19. The appeal proceeded by way of an oral hearing.

ISSUE TO BE DECIDED

1. Was the complainant properly paid for hours of work in each pay period?

2. Is the complainant entitled to compensation for length of service?

3. Did the complainant receive annual vacation pay?

FACTS

The employer operates a turf farm with locations in Abbotsford and Langley, B.C. The complainant was hired as a driver. His first day with the employer was August 23, 2000, and his last day worked was December 13, 2000. The complainant was initially hired at a rate of $15.60 per hour. His rate was increased to $16.00 following the pay period ending September 15, 2000. The complainant, at lay off, received a record of employment indicating an effective lay off date of December 9, 2000.

ANALYSIS

1. Payment of Wages:

Firstly I address the issue of compensation for hours of work commencing with August 23 and 24, 2000. The complainant testified that he reported for work on August 23, 2000. During that day he rode in a truck with Ron Marr who was a more senior employee. Mr. Marr made a

written statement which supports the complainant's evidence and outlines the time he spent with the complainant. That statement says in part:

> "I was the driver who trained Nelson on the 2 first days. He rode with me in the truck and watched my routine for delivery and how to drive the forklift. It was my job to make sure that he knew how to operate the machinery and all of the other job aspects."

The complainant testified that he also reported for duty on August 24, 2000.

He worked 8 hours that day training with Mr. Marr. He also testified that part of his time was spent learning how to drive a fork lift called "the mountie" which is used to load and unload the turf.

The employer testified that it had no record of hours worked by the complainant on August 23. It was the employer's position that the complainant had volunteered to attend that day in order to see if he liked the job. The employer asserts that this was not a training period but was a trial period. The employer asserts that it is not liable to pay wages for this day. With respect to August 24, the employer payroll records show eight hours worked and that the complainant was paid at one half the hourly wage rate. The employer maintains that it normally pays only half rate for training days. The employer asserts that the complainant was aware of this policy.

The complainant denies being told by either Ron Rindt or Ms. Heidi Rindt that he would be paid at half rate for August 24. The director's delegate determined that since there were no payroll records available for August 23, the complainant was entitled to 4 hours for call out. He also found that the employer was liable for 8 hours pay at $15.60 per hour for August 24.

I find that I must uphold the delegate's finding on this point. I agree that the complainant was engaged in a training period on August 23. The definition of employee in Section 1 of the Act includes "a person being trained by an employer for the employer's business." Employees are entitled to be paid for their work. Therefore the complainant is entitled to be paid for Augugt 23. I also accept the delegate's assessment that because there are no records available from the employer or the complainant regarding hours worked that day that the assessment of four hours as minimum call out pay must stand.

Turning to August 24, 2001, I find that that also was a training day on which the complainant worked 8 hours. I do not accept that the complainant was aware of the company policy or that the policy of paying only half the rate for a training day was explained to him. I uphold the delegate's finding that the complainant was entitled to be paid for a minimum of 4 hours on August 23 and that he was entitled to 8 hours pay at the rate of $15.60 per hour for work on August 24, 2000.

I turn now to the question of pay for the dates of November 1 and 5, 2000. Some background is necessary to understand this issue. As a truck driver the complainant would keep a daily record

known as a trip inspection report. These reports indicate that the complainant has done a pre trip inspection of his vehicle at the commencement of his shift and a post trip inspection of the vehicle at the end of the shift. The report contains a space for the driver to indicate the truck/tractor number that he was driving, the odometer reading, the date, and the number of the trailer that he was hauling. It also has a space for remarks and a space to certify that any defects were corrected or need not be corrected for the safe operation of the vehicle.

On the dates in question, being November 1 and 5, 2000, the trip inspection reports do not indicate a truck number or odometer reading. The document that was tendered as the November 1 trip inspection report is not dated but has a hand written note on the face of the report which states "work at home 9:00 a. 3:00 p.m.". For the November 5, 2000, trip inspection report there is a similar work at home "9:00 a. – 1:30 p."

The issue arising is whether the complainant was paid for the dates. The complainant alleges that he was not paid for the six hours on November 1, nor for the four and one-half hours on November 5. The complainant states that he was not driving the turf trucks on those days but was working from his home attempting to market water on behalf of the employer. The water marketing aspect arose out of the desire by the employer to attempt to sell fresh spring water from a spring on one of its properties.

The employer does not dispute that the complainant spent time attempting to market the spring water. However, the employer asserts that the 10.5 hours was paid to the complainant but on other days. A review of the payroll records by the director's delegate does not indicate that the 6 hours claimed for November 1 or the 4.5 hours claimed for November 5 were included in pay for some other day. In view of the fact that the employer agreed that the complainant had worked on marketing the spring water and that the employer was not able to show that the complainant had been paid for November 1 and 5 (nor had the pay been added to another day) I uphold the finding that the complainant is entitled to 10.5 hours pay for work on November 1 and 5, 2000.

I turn now to payment for the day of December 13, 2000. The complainant and the employer agree that the complainant on the morning of December 13, reported to the work site and travelled with Mr. Rindt to pick up and deliver some plate steel to Annacis Island. The complainant alleges that he injured his back while handling this plate steel. There is a disputed W.C.B. claim arising from these facts.

The employer takes the position that the delivery of the steel on the morning of December 13, was intended to be a labour exchange the consideration of which was the use of a company vehicle in the afternoon for the complainant to perform some personal chores. The employer points to the record of employment which is dated December 9, 2000, to show that the complainant had been laid off and that the work performed on December 13 was not in the nature of employment but rather was proof of the exchange of labour in the morning for the use of the truck in the afternoon.

The complainant states that there was no agreement to exchange labour for the use of the truck. It is the complainant's position that he was called on December 12, 2000, to report to work on the morning of December 13, and that he did so.

There is no ability under the Act for an employer to avoid the payment of wages on the basis that a deal has been made with an employee for alternative compensation or an exchange of goods. Section 20 of the Act states:

> **How wages are paid**
>
> **20** An employer must pay all wages
> (a) in Canadian currency,
> (b) by cheque, draft or money order, payable on demand, drawn on a savings institution, or
> (c) by deposit to the credit of an employee's account in a savings institution, if authorized by the employee in writing or by a collective agreement.

Additionally Section 4 of the Act prevents the parties from contracting out of the provisions of the Act with exceptions under Sections 43, 49, 61 and 69 which do not apply in this case. The employer is obliged to pay an employee wages in Canadian currency by cheque, draft, or money order, or by deposit to the credit of the employees account in a savings institution, if authorized by the employee in writing to do so. There is no provision in the Act for employers and employees to make an agreement that would essentially see the employee receive payment in kind. For these reasons I find that the employer is obliged to pay the complainant for the hours worked on December 13, 2000.

2. Compensation for length of service

The employer takes the position that the complainant's conduct after December 13 indicates that he quit his employment. The employer relies on the text in the Contact Record from the Workers Compensation Board where the officer indicates that the complainant stated that he did not want to go back to his previous job due to the strained labour/management relationship. The employer also points to a transcript of a message left on a voice message machine with employer after the complainant was laid off. That transcribed message reads:

> "You guys are gonna get caught in your stupid little lies. If this is how you treat people when somebody injures themselves on your property you know you guys have to live with this. I can't believe that you guys are lying. I am glad that I don't work for your guys anymore because working for inhuman people like you is ridiculous. Phone records are gonna sink you guys, hope you know that and witnesses. Thank you."

The complainant agrees with the gist of the above tape message although did not agree that the message was transcribed word for word. He also agreed that he made a statement to the same

effect as that recorded by the W.C.B. officer. However, he states that he was in an emotional state when he left the taped message with the employer, and that, due to the dispute with the employer over his W.C.B. claim, remained annoyed with the employer while that claim was being processed. He indicated that he was fit to return to work as of April 15, 2001, and, had the employer made work available for him at that time he would have returned to work at the turf farm.

In determining whether a person has quit employment it is necessary to review both objective and subjective elements. Subjectively, there must be an intent to quit employment and this intent should be manifested by some type of objective behavior. In this case, I do not accept that the emotional statements made by the complainant on a tape recorded message shortly after the receipt of the Record of Employment and at the time that the employer was disputing the W.C.B. claim constitute the subjective element.

In a recent case in the Ontario Superior Court (O'Neal vs Tower Perrin (unreported)) Mr. Justice Peter Jarvis found that an actuary's e-mail keyed in a moment of frustration did not constitute a letter of resignation. In that case the Plaintiff stated that he did not "wish to be part of any organization that not only accepts, but encourages and rewards this type of selfish attitude". The Judge said that there was not doubt that the e-mail was "somewhat florid and over the top" but it did not constitute a resignation. Since I have found that the subjective element is not present I need not determine whether the statement to the W.C.B. constitutes the objective of element. The director's delegate determined that the complainant was entitled to one week's pay as compensation for length of service and I uphold that finding.

3. Vacation Pay

Finally, the issue of vacation pay remains outstanding. This issue centers on the method the employer uses to pay vacation pay. The employer states that the intitial rate of $15.60 and the subsequent rate of $16.00 per hour included holiday pay. The employer points to an employee record for the year 2000 which contains pay roll entries and a statement that the "$15.60 includes holiday pay" at the top of the page. The employer further relied on the written statement of Mr. Ron Marr which was previously referred to in this award. In that statement Mr. Marr claims that:

> "I told him (the complainant) that vacation is included in the wage instead of in a lump sum at the end of the season because it saves us on tax. He told me that Heidi had already explained that and he liked that idea. I also told him that the job is based on the seasons and when the winter freeze up comes everybody gets laid off. He told me that he knew that already."

The employer also enclosed statements from two other employees indicating that they had signed statements with the employer to the effect that they wished to have vacation pay included in their hourly wage. However, those statements were signed on the 13th of March, 2001, after this issue had arisen.

The employer also relied on a letter that it had received from a Mr. Jim Ross who is also an Industrial Relations Officer with the Employment Standards Branch. The employer offered this letter as proof that the issue of the inclusion of holiday pay in the hourly rate had already been investigated by the Branch on a previous occasion and that the Branch had condoned the method that the employer used to include vacation pay in the hourly rate.

I take no exception to the principle that an employer may pay vacation pay and/or statutory holiday pay with each cheque. However, the problem in this case is that there is no indication on the employees pay stub that separately itemizes the vacation pay. Likewise the indication at the top of the employee record that "$15.60 includes holiday pay" without showing a separate itemization for that pay in the pay roll records leaves in doubt the calculation of those monies owing. If the employer intends to include the payment of holiday pay with the regular pay of employees on each pay day the intention and the amount should be itemized to avoid any questions. For these reasons I agree with the delegate and find that the employer is liable for vacation pay on the complainant's earnings.

ORDER

The determination dated May 28 is confirmed with interest payable to date.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal