Employment Standards TRIBUNAL

An appeal

- by -

Schlumberger Canada Limited
("Schlumberger")

- 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: David B. Stevenson

FILE No.: 2001/595

DATE OF DECISION: October 29, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Schlumberger Canada Limited ("Schlumberger") of a Determination that was issued on July 24, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Schlumberger had contravened Part 4, Section 40 of the *Act* and Section 37.6 of the *Employment Standards Regulation* (the *"Regulation"*) in respect of the employment of Ramiah Desrosiers ("Desrosiers") and ordered Schlumberger to cease contravening and to comply with the *Act* and to pay an amount of $1,323.19.

Schlumberger says the Determination was wrong to have included a Northern Living Allowance (NLA) as part of Desrosiers regular wage and asks that the Tribunal recalculate the claim made by Desrosiers without reference to the NLA. The appeal also requests a recalculation of the wages paid to Desrosiers while employed as a shop helper/mechanic's assistant. Specifically, Schlumberger says the Director ought to have included the payment of a "job bonus" relating to work performed by Desrosiers on March 16, 17 and 19, 2000.

ISSUE

The issue is whether the Director was correct in deciding that the NLA should be included in Desrosiers' salary for the purpose of administering Section 37.6 of the *Regulation*. A second issue relates to whether, in any event, the Director erred in calculating wages owed to Desrosiers.

FACTS

Schlumberger operates cementing and wireline operations in Northeastern British Columbia. Desrosiers was employed by Schlumberger from November 1, 1999 to July 31, 2000 as a shop helper/mechanic's assistant at a rate of $10.00 an hour and from August 1, 2000 to February 17, 2001 as an equipment technician. In the latter position he was paid on a salary plus bonus compensation plan. A letter to Desrosiers outlining the terms of the offer of employment for the equipment technician position, dated July 19, 2000, stated:

> In view of your training and experience, we can offer you a starting salary of $2,000 per month with a Grade Level of 82, plus $400 per month as a Northern Living Allowance. You will also receive job bonus of $30 under the Dowell field bonus plan.

Schlumberger pays the NLA to employees working in Norman Wells, NWT, High Level , AB and Ft. St. John, BC.

The Determination concluded that Desrosiers' employment as an equipment technician fell under the scope of Appendix Four and Regulation 37.6, oil and gas field workers.

One of the issues in the Determination was deciding Desrosiers' salary for the purpose of calculating his regular wage in Section 37.6 of the *Regulation*. The Determination concluded that his regular wage included his salary and the NLA.

ARGUMENT AND ANALYSIS

Schlumberger argues that the NLA does not fall within the definition of "wage" and should not have been included in the monthly salary for the purpose of calculating Desrosiers' "regular wage" in Section 37.6 of the *Regulation*. Schlumberger says the NLA is not related to hours of work, production or efficiency and is an "allowance" paid to offset the higher cost of living in a northern community. There is no dispute that Desrosiers had approved in writing a compensation system other than an hourly rate and, accordingly, the definition of "regular wage" in Section 1 of the *Act* did not apply, being replaced by provisions in Section 37.6 of the *Regulation*. The relevant portion of that provision states:

> ***"regular wage"*** *means*
>
> *(a) if an employee is paid a monthly salary, the monthly salary multiplied by 12 and divided by 2080, . . .*
>
> *(b) paragraphs (a) and (b) of the definition of "wages" in section 1 of the Act do not apply to those employees and, in place of those paragraphs, the following paragraph applies:*
>
> *(a) the greater of*
>
> *(i) the salary and bonus to which the employee is entitled under the compensation system for the period of employment, and*
>
> *(ii) the remuneration for the period of employment that would be calculated under section 37.5 of this regulation if that section applied to the employee, . .*

Section 37.6 of the *Regulation* does not affect the application of any part of the definition of "wages" other than paragraphs (a) and (b). Accordingly, the following in Section 1 of the *Act* continues to be operative to Desrosiers employment:

> ***"wages"*** *. . .*
>
> *. . . does not include. . .*
>
> *(g) money that is paid at the discretion of the employer and is not related to the hours of work, production or efficiency,*
>
> *(h) allowances or expenses . . .*

Schlumberger says if the NLA is either a discretionary payment not related to hours of work, production or efficiency or an allowance, it cannot be included as part of the "wage" or the "regular wage" in Section 37.6 of the *Regulation*. Schlumberger says the NLA is not paid in reference to an employees labour or services, but is paid to set off some of the additional expenses of living in a northern community.

In reply, the Director argues that it was proper and correct to include the NLA in Desrosiers' salary. The NLA was not a discretionary payment, but was an obligation in the employment contract. Desrosiers was hired to work in Fort St. John and the NLA was part of the salary package for him agreeing to do so. The Director says that treating the NLA as anything other than salary could lead to the mischief of employers paying "allowances" to avoid higher hourly rates for overtime. Finally, the Director argues that the provisions of Section 37.6 of the *Regulation* are exclusions from the *Act* and must be narrowly construed. A narrow construction of the exclusion justifies including the NLA as part of Desrosiers' monthly salary.

In respect of the position of Schlumberger that the overtime calculation for the period Desrosiers was employed as a shop helper/mechanic's assistant, the Director says there is no error in the calculation but if the job bonus is included in wages, the Determination would have to be amended to show a higher regular wage rate for the period during which the job bonus was paid.

I will address the question of whether the NLA is excluded from wages because it is a discretionary payment.

On that question, I am not persuaded that the NLA is *"money paid at the discretion of the employer and is not related to the hours of work, production or efficiency"*. Clearly, Schlumberger obligated itself under the employment agreement to pay the NLA. The existence of that obligation obviates any element of discretion. I agree with the Director that to suggest Schlumberger has a "discretion" to not pay the NLA confuses what is meant by *"money paid at the discretion of the employer"* in paragraph (g) of the definition of "wages", which is simply an amount of money paid under no obligation, with a "discretion" to breach or alter a contractual obligation to pay an employee an amount of money. As stated in the Determination:

> An employer always retains the discretion to reduce (or increase) an employee's salary.
>
> Schlumberger states in its own policy that it **will** pay $400 NLA to employees in Fort St. John. Schlumberger has not retained its discretion as to whether to make the payment each month; it did not use permissive or discretionary language in its provision for the local co-efficient.

Schlumberger contracted to pay the NLA and while it is correct that they have the authority to vary the terms of the agreement, until they do such payment is legally required and compliance with that contractual obligation is in no way a matter of discretion.

On whether the NLA is an allowance, the material and submissions of Schlumberger contain several relevant comments. In a letter to the Director from Ms. Dewart, Employee Services Manager for Schlumberger, dated June 22, 2001, she stated:

> The intent of this allowance is to provide employees, with an incentive to move to these remote locations, usually for a defined period of time.
>
> . . .
>
> As areas develop through growth and development, Schlumberger has reserved the right to discontinue this allowance if it is determined there is no longer a required need. We review on an annual basis cost of living reports such as the Runzheimer Report, commissioned by the Petroleum Services Association of Canada, and determine our policies accordingly.

In the appeal submission, Ms. Dewart says:

> The [NLA] is paid not in reference to an employee's labour or services, but with regard to the employee's residence. The [NLA] is a fixed monthly payment provided to help the employee offset some of the expenses of living in a northern community.

In the final submission filed by Schlumberger, received by the Tribunal on October 2, 2001, Ms. Dewart argues:

> . . . [Schlumberger] has developed compensation schemes, which dictate salary/wages payable for **positions** and **services rendered**, without regard to location. In certain circumstances, an employee may be eligible for an allowance **in addition** to the wage scheme in place.
>
> - The fact that an employee may be entitled to an additional **allowance** does not equate to an agreement to pay Fort St. John employees a higher **salary/wage**. Instead Schlumberger has agreed to pay Fort St. John employees a salary equivalent to what they would receive elsewhere, supplemented by an allowance to cover the additional expense and higher cost of living in a remote location.
>
> - The discretionary basis upon which Schlumberger pays the NLA is **location**.

What is apparent from those submissions and arguments is that the NLA is unrelated to any perceived or actual cost incurred by Desrosiers in his employment. That point was made in the Determination in the following way:

> The NLA does not retain the characteristics of a reimbursement payment for Mr. Desrosiers' out of pocket expenses or use of Mr. Desrosiers' personal items for business use.

While I am concerned the above comment may be an overly narrow view of what would be considered an "allowance" for the purpose of defining wages under the *Act*, I agree that to be considered an "allowance" for the purposes of administering the definition of "wages", the amount paid to an employee by the employer must be demonstrably related to an expense or a cost incurred by the employee in his or her employment. In my view, the $400.00 a month which Desrosiers received was part of the remuneration attached to the position he occupied. While the rationale for paying it may have been based on the location of the position, it was nonetheless attached to the position. I do not accept that an amount paid to an employee as an incentive to live and work in a specific location can be considered as an "allowance" for the purposes of the *Act*. Such an amount is no more than an adjustment to base salary in order to attract employees to that location. It also seems to me impossible to maintain on the available evidence that the NLA was paid to offset any costs or expenses incurred by Desrosiers related to his employment.

On the issue of the alleged error in calculating overtime for Desrosiers while he was employed as a shop helper/mechanic's assistant, it will suffice to say that the payment of an incentive bonus is not a substitute for the statutory obligation to pay overtime and may not be set off against it.

The appeal is dismissed.

I also decline the invitation of the Director to vary the Determination to increase the amount owing.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 24, 2001 be confirmed in the amount of $1,323.19, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal