

An appeal

- by -

Randy Loiselle, operating as Swede's Towing
("Swede's")

- 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.: 2001/720

DATE OF DECISION: December 31, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Randy Loiselle, operating as Swede’s Towing (“Swede’s”) of a Determination that was issued on September 24, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Swede’s had contravened Part 3, Section 21, Part 4, Sections 34, 36 and 40 and Part 5, Sections 45 and 46 of the *Act* in respect of the employment of Gurprit Malhi (“Malhi”) and ordered Swede’s to cease contravening and to comply with the *Act* and to pay an amount of \$11,760.79, of which \$2,055.83 had already been paid to trust.

Swede’s says the method of calculating hours worked was wrong. Swede’s says that Section 34 should not have been applied or, alternatively, if it was applied, the operative part of that provision should have been Section 34(2)(b), rather than Section 34(2)(a). Swede’s also says some relevant information was not reviewed by the investigating delegate and asks that the matter be referred back to the Director for further investigation. Finally, Swede’s asks for an oral hearing on the claims made by Malhi.

ISSUE

The issue in this appeal is whether Swede’s has demonstrated an error in the Determination sufficient to justify the variance sought or a referral of the matter back to the Director for further investigation and set down an oral hearing on the complaint made by Malhi.

FACTS

Swede’s operates a towing business in Fort St. John and Dawson Creek, B.C.. Malhi worked for Swede’s from April 29, 2000 to September 30, 2000 as a tow truck driver in Fort St. John.

Malhi complained to the Director that he had not been all wages for hours and overtime worked and had not been paid all statutory holiday pay owed. Malhi also complained that Swede’s had made unauthorized deductions from his wages.

The Director made the following findings of fact:

FINDINGS OF FACTS

Hours of Work and Overtime:

I find that the daily log sheets form the best available record of the days and hours of work that Mr. Malhi performed.

I find that Swedes paid Mr. Malhi an hourly rate and a commission rate of pay.

I find that the regular wage rate for each pay period is calculated by determining the total wages earned in a pay period, and dividing that amount by the total hours worked in the pay period .

I find that Mr. Malhi on occasion did refuse to complete tow calls dispatched to him.

I find that there is insufficient evidence to find that Mr. Malhi was required and did drive around Fort St. John in his tow truck, performing work, from 7:00 p.m. to 3:00 a.m. every third week, during Swede's "police week".

I find that Mr. Malhi worked in excess of eight hours per day during weeks as indicated on the attached wage calculation report and Swedes did not provide additional wages for daily overtime hours.

I find that Mr. Malhi worked hours in excess of forty in one week on the weeks as indicated on the attached wage calculation report and Swedes did not provide additional wages for weekly overtime hours.

I find that Mr. Malhi worked seven days consecutive in a week and that Swedes did not pay additional compensation to Mr. Malhi for not receiving 32 hours free from work in a week.

I find that Mr. Malhi worked less than four hours per day during weeks as indicated on the attached wage calculation report. I find that Swedes paid Mr. Malhi a "top up" to his commission and hourly wages for the following pay periods:

September 19 to October 2, 1999;
October 10 to November 6, 1999;
November 14 to 27, 1999; and
December 26, 1999 to January 1, 2000.

I find, however, that Swedes failed to provide additional compensation for minimum daily pay requirements on other dates.

Statutory Holiday Pay:

I find that Swedes did not pay statutory holiday pay to Mr. Malhi.

Cash Short Deductions:

I find that Mr. Malhi received cash from customers that was not deposited to Swedes.

I find that Mr. Malhi paid for expenses for the cost of business from the money he kept from customers.

I find that the hand-written daily log sheets and the cash invoices provided to customers provide the best evidence of cash Mr. Malhi received and transactions made.

I find that Swedes deducted amounts from Mr. Malhi's wages for the cash he received from customers, and characterized those amounts as cash advances received on wages.

I find that there is insufficient evidence to conclude that Mr. Malhi received \$100.00 cash at the start of his employment for a cash float.

I find that Swedes deducted amounts from Mr. Malhi's wages for cash short in excess of that supported by the records as cash received from customers.

There are few additional facts added to those found in the Determination and few disputes of fact. Swede's implies that some of the 'expenses' paid for by Malhi were not business expenses. The appeal attaches a copy of one month's bills, but provides no indication which of these amounts were not business expenses.

Swede's also says the investigation was incomplete and should have included a review of the daily dispatch sheets. It says these records were available to the investigating delegate. Swede's submits these records would have shown there were many more days that Malhi refused to call dispatched to him.

ARGUMENT AND ANALYSIS

The burden is on Swede's, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. This burden has been described by the Tribunal in *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96) as the "risk of non-persuasion":

Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L.Rev. 34 puts it, "the allocation (of the burden of

proof) is determined according to considerations of fairness, convenience and policy”. In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of “burden of proof” is only of significance where the tribunal has not been persuaded.

Placing the risk of non-persuasion on an appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director.

I will first address the argument that Section 34 of the *Act* should not have been applied or, alternatively, if it was applicable, the operative provision was Section 34(2)(b), not Section 34(2)(a). Section 34(2)(a) and (b) state:

34. (2) An employee is entitled to be paid for a minimum of
- (a) 4 hours at regular wage rate, if the employee starts work unless the work is suspended for a reason completely beyond the employee’s control, including unsuitable weather conditions, or
 - (b) 2 hours at the regular wage, in any other case unless the employee is unfit for work or fails to comply with the Industrial Health and Safety Regulation of the Workers’ Compensation Board.

The appeal implies that Section 34 should not have been applied at all:

We request that the Determination be varied to eliminate the effect of applying Section 34.

No authority or other basis for that submission has been provided and I do not accept it.

I also do not accept that the applicable provision should have been Section 34(2)(b). Swede’s relies on the Tribunal’s decision *Labour Ready Temporary Services Ltd.*, BC EST #D457/99 (Reconsideration denied, BC EST #D426/00) (“*Labour Ready*”). The circumstances of this case

are not at all like those in *Labour Ready*. As the Tribunal noted in *Labour Ready*, that decision was particular to the circumstances:

. . . in the particular circumstances of the case where the start of the work and its length could not be predicted or controlled by either the Employer or the employee, and she would automatically revert to a statutory status of not being at work on completion of the work, the complainant was not entitled to be paid under s. 34(2)(a) . . .

The Director points out that in this case, the start of the work was entirely controlled by Swede's; the work was started by a pager call from Swede's dispatcher instructing Malhi to attend the call. The Director also submits that the length of the work was not "completely beyond the employer's control". The evidence supports that submission and distinguishes the facts of this case from *Labour Ready*.

It follows that I do not accept that the Director was wrong to apply the minimum daily wage provisions in Section 34(2)(a) to the circumstances of this case.

The Director, quite properly in my view, did not require payment of a daily minimum wage on those days where it was established the Malhi had refused available work. As well, the Director applied the "top up" paid to Malhi in four pay periods to Swede's minimum daily wage obligation. That was fair and reasonable.

Swede's says there were many more weeks than those accepted by the Director where Malhi refused available work. There is, however, nothing in the appeal to support that submission. There is reference by Swede's to the dispatch records, but none of those records are attached to the appeal.

The failure of Swede's to provide support for their position is fatal to this ground of appeal. If the dispatch sheets show that Malhi refused work on more days than accepted by the Director, then Swede's should provide that information. It is part of their burden. In many respects, the manner in which this appeal is framed seems to be little more than a continuation of the manner with which Swede's dealt with the investigation. In several parts of the Determination, the Director notes that Swede's took a position on a matter of fact related to the complaint, but failed or refused to respond when requested to provide documentary or other support for that position:

Mr. Bird was asked to provide specific examples of dates he alleges Mr. Malhi refused work, based on the telephone records. No further submissions or details were received in support of Mr. Bird's assertions.

. . . Mr. Bird was asked to provide evidence and documentation in support of his assertion that the daily driver log sheets could not be relied upon, however, no further submissions or documents were received in support of that allegation.

...

Swedes claimed that some fuel transactions that were recorded on the daily driver logs as cash transactions were actually completed on their charge account, and not paid for in cash by Mr. Malhi. Swedes was requested to provide proof by way of statements or invoices of the charge transactions, however, Swedes failed to provide documents in support of their allegation . . .

In filing this appeal, Swede's may not presume their request for an oral hearing will be met. The Tribunal makes it clear in its correspondence to the parties acknowledging the appeal that it may be decided on written submissions. Nor can they assume the Tribunal will accept that the dispatch sheets should have been reviewed during the investigation without some indication they have the relevance claimed and some explanation of why they were not provided during the investigation.

Swede's has not met its burden. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 24, 2001 be confirmed in the amount of \$11,760.79, less \$2,055.83 which has already been paid to trust, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal