



December 29, 2022

Ferndale Transport Ltd.
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Commissioner's Decision
Ferndale Transport Ltd. (CTC Decision No. 05/2022)

Introduction

1. Ferndale Transport Ltd. ("Ferndale") is a licensee within the meaning of the *Container Trucking Act* (the "Act").
2. Section 16(1)(b) of the *Act* states that a licensee must carry out the container trucking service in compliance with:
 - (i) this Act and the regulations,
 - (ii) the license, and
 - (iii) if applicable, an order issued to the person under the Act.
3. Under sections 22 and 23 of the *Act*, minimum rates that licensees must pay to truckers who provide container trucking services are established by the Commissioner, and a licensee must comply with those statutorily established rates. Section 23(2) states:

A licensee who employs or retains a trucker to provide container trucking services must pay the trucker a rate and a fuel surcharge that is not less than the rate and fuel surcharge established under section 22 for those container trucking services.
4. Section 25 of the *Act* also requires licensees to "prepare and keep records as required by the Commissioner."
5. Between July 1, 2018 and November 30, 2020, Ferndale operated under a container trucking services ("CTS") licence (the 2018 licence). Paragraph (g) of Schedule 2 of the 2018 licence requires the licensee to provide to the Commissioner payroll records, as defined and required by section 28 of the *Employment Standards Act* ("ESA"), upon request.
6. On December 1, 2020, Ferndale began operating under a new CTS license, with a comparable record keeping requirement (paragraph 4 of Appendix D to Schedule 1).

7. Section 28 of the *ESA* states:

(1) For each employee, an employer must keep records of the following information:

- (a) the employee's name, date of birth, occupation, telephone number and residential address;
- (b) the date employment began;
- (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
- (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
- (e) the benefits paid to the employee by the employer;
- (f) the employee's gross and net wages for each pay period;
- (g) each deduction made from the employee's wages and the reason for it;
- (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
- (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
- (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.

(2) Payroll records must:

- (a) be in English,
- (b) be kept at the employer's principal place of business in British Columbia, and
- (c) be retained by the employer for 4 years after the date on which the payroll records were created.

8. Under section 31 of the *Act*, the Commissioner may conduct an audit or investigation to ensure compliance with the *Act*, the *Container Trucking Regulation* (the "*Regulation*") or a licence.
9. Ferndale has been the subject of one other decision. In 2016, the Commissioner found that Ferndale had underpaid seventeen (17) drivers by a total of \$65,610.03: Ferndale Transport Ltd., CTC Decision No. 22/2016 ("Ferndale #1"). Ferndale was ordered to pay compensate the drivers and to pay an administrative find of \$10,000.00.
10. The current audit was initiated on November 20, 2020, as a random audit.

Audit Findings

11. On November 20, 2020, the OBCCTC directed Ferndale to produce relevant records for July 2017, August 2018, and September 2019 (the "Initial Audit Period"). The records requested included those that could establish whether all drivers who had performed CTS for the periods in question had been paid in accordance with the legislation and the Commissioner's Rate Order (the "Rate Order"), including:

- Company driver and IO listing including names, addresses, telephone numbers, email addresses, and truck license plate numbers, brief description of work performed, hire date and termination date for all driver during the audit period.
 - All daily trip sheets completed by the drivers.
 - Copies of all cancelled pay cheques or bank records confirming direct-deposit amounts for work performed during the audit period.
 - Pay statements showing total gross earnings in each pay period, all deductions from pay with the reasons for those deductions, and net pay amounts.
 - Where paid on a per-trip basis, records of remuneration for all containers moved during the audit period, including:
 - Origin and destination of each container moved,
 - Container number,
 - Amount paid for each move,
 - Where paid on an hourly basis, records of remuneration for all hours worked, including:
 - Number of hours worked each day,
 - Hourly rate of pay,
 - Where the hourly rate includes benefits, the type of benefit paid on behalf of the driver and the hourly value of each benefit,
 - Registration documentation for each truck owned by the company,
12. On December 3, 2020, Ferndale produced only the following records for the Initial Audit Period:
- Electronic copies of wage statements of the drivers
 - Cancelled cheques issued to the drivers
13. Following a conversation with the Auditor on December 8, 2020, Ferndale advised that the remainder of the information for July 2017 and August 2018 had been destroyed and relied on a OBCCTC 2016 audit report stating that Ferndale was only required to retain records for two years. The Auditor then asked Ferndale to provide the driver timesheets for September 1-30, 2019.
14. Mr. Rapinder Sanghera, a representative of Ferndale, then advised that many of his staff contracted COVID-19 after they had entered the storage unit where the records were kept and requested an extension to produce further records until December 11, 2020.
15. On December 15, 2020, the Auditor followed up with Ferndale to ascertain the location of the requested documents. Ferndale responded on December 16, 2020, that the records had been couriered, but the OBCCTC did not receive the records until January 5, 2021.
16. Upon reviewing the records provided by Ferndale, the Auditor recorded the following for the Initial Audit Period:

July 2017 and August 2018

17. Ferndale employed eight (8) company drivers in July 2017 and eleven (11) company drivers in August 2018.
18. The Auditor was unable to compare the drivers' timesheets which recorded the daily hours each driver worked to the drivers' wage statements as Ferndale's drivers' timesheets prior to August 2019 were reportedly destroyed.
19. In July 2017 and August 2018, Ferndale paid its drivers an hourly rate consistent with or higher than the regulated rates; however, the Auditor was unable to confirm the drivers were properly compensated for all their hours worked due to the destroyed timesheets.

September 2019

20. Ferndale employed twelve (12) company drivers in September 2019 and timesheets were provided for this period.
21. The Auditor confirmed the hours on the drivers' timesheets did not match the wage statements.
22. On June 28, 2021, the Auditor spoke with one driver who confirmed that Ferndale told him not to record the time spent in the yard to his total hours. The Auditor suspected that the missing hours on the wage statement were because the drivers were not paid for the last 15 to 30 minutes of the day. The Auditor then contacted the other drivers and confirmed that they were still completing CTS work during this time.
23. Ferndale was unable to explain why these drivers were not paid for this time at the end of the day and they responded that they do not add up the timesheet hours but only use the total that the drivers write down for the day.
24. The hours on the drivers' timesheets were always rounded to the nearest 15-minute interval while the hours listed on the wage statements were sometimes recorded to the 0.01 (six seconds) of an hour. Ferndale acknowledged the discrepancy and advised the wage statements were an accounting error.
25. The amount owing to drivers for September 1-30, 2019, totaled \$2,028.58 because of missing hours and rounding errors.
26. In the absence of proper payroll records, the Auditor's initial approach was to extrapolate the amount owing between September 1, 2016, and August 31, 2019, for each driver by multiplying the number of months the driver worked during that period by the corresponding amount owed in September 2019.
27. On July 27, 2021, the Auditor provided her calculations to Ferndale's accountant for review. The Auditor also required Ferndale to review its wage statements for the period of October 1, 2019 to June 30, 2021 to ensure they matched the driver timesheets during the same period, to calculate amounts owing if they did not, and to bring itself into compliance with the *Act*. Ferndale was alerted that another spot audit would be conducted following

the review. The review was initially due on August 13, 2021, but Ferndale's request for an extension to August 27, 2021 was granted.

28. The Auditor did not receive the calculations by the extended deadline and reached out to Ferndale on August 30, 2021. Ferndale advised they did not understand the instructions, their accountant had been diagnosed with COVID-19, and they did not have access to all the records as they were stored in the United States.
29. On August 31, 2021, the Auditor requested that Ferndale complete the review and calculation requested on July 27, 2021 and include July 1-31, 2021. The deadline set was for September 14, 2021.
30. In response, Ferndale advised the Auditor that they had conducted the calculations requested on July 27, 2021 and identified that they owed their drivers \$0.00.
31. At the request of the Auditor, Ferndale provided wage statements, cancelled cheques and drivers' timesheets for the periods November 1– 15, 2019, September 1– 15, 2020, and May 1– 15, 2021 (the "First Spot Audit Period") so that a spot audit could be conducted to confirm Ferndale's assertion that no wages were owed.
32. On October 25, 2021, the Auditor advised Ferndale of the First Spot Audit Period results. The Auditor noted the wage statements did not match the corresponding timesheets, the hours on the wage statements were rounded to the nearest 0.01, and some drivers were not paid for the last 15-30 minutes of the day. In addition, the Auditor found that during the November 1-15, 2019 pay period, Ferndale paid one driver \$25.00/hr and another \$25.78/hr – both below the regulated rate of \$26.30/hr.
33. The Auditor advised that Ferndale owed the drivers \$644.04 for the First Spot Audit Period and gave Ferndale the opportunity to redo its calculations or pay its drivers for the period of October 1, 2019 – September 15, 2021 based upon an extrapolation of the amounts owing in the First Spot Audit Period. Ferndale was also asked to provide records for the October 1-15, 2021 pay period to demonstrate that it had updated its payroll practices.
34. After being granted deadline extensions and missing those new deadlines, Ferndale continued to provide insufficient records and calculations to confirm the drivers were paid for all hours worked and in accordance with the *Act* and *Regulation*.
35. After giving Ferndale multiple opportunities to complete the outstanding pay calculations requested, which Ferndale did not accept, the Auditor extrapolated an amount owing and provided the calculations to Ferndale on December 15, 2021.
36. On January 10, 2022, Ferndale's legal counsel advised the OBCCTC that Ferndale did not deny there was an underpayment in September 2019. However, counsel suggested that the errors were isolated and not recurring mistakes and that September 2019 was therefore not the proper period to use for the extrapolation. Ferndale suggested "using October 2019 as the basis for the spot audit and extrapolating the amounts owing to drivers from September 1, 2016, to August 31, 2019."

37. On January 18, 2022, the OBCCTC advised Ferndale it was prepared to have the Auditor review records for the months of October, November and December 2019 and use an average of the money owing during the months of September to December 2019 to extrapolate the total amounts owing for the period between September 2016 and October 2019. Ferndale was required to provide the Auditor the requested payroll records for the months of October, November, and December 2019.
38. Following the receipt of Ferndale's records for these months, the Auditor again learned that the wage statements did not match the corresponding timesheets, the hours on the wage statements were rounded to the nearest 0.01, and some drivers were not paid for the last 15-30 minutes of the day. Two drivers were found to be paid less than the regulated rate for all hours worked during these months.
39. On April 13, 2022, the Auditor advised Ferndale that their payroll records demonstrated that they had not corrected their payroll practices and adjusted the audit period of October 1, 2019 -- December 31, 2021, to include January 1, 2022 -- March 31, 2022. The Auditor provided Ferndale with a revised amount owing. Ferndale was also requested to deliver payroll records for the March 16-31, 2022 pay period (the "Second Spot Audit Period") that demonstrated that they had corrected their payroll practices. The records were to be delivered by April 27, 2022.
40. On April 14, 2022, Ferndale requested an extension until May 31, 2022, due to staff contracting COVID-19, a long weekend, and Ferndale's retaining new legal counsel who would need to be caught up with the audit. The Auditor granted an extension until May 4, 2022.
41. On May 9, 2022, after reviewing the materials provided by Ferndale by the extended deadline, the Auditor provided Ferndale with the findings of the Second Spot Audit Period and noted that the driver timesheets did not match their wage statements. Two timesheets and wage statements were provided that showed the underpayment. The records suggested that Ferndale had not corrected its payroll records. To ensure compliance with the *Act* and *Regulation* the Auditor requested the payroll records for April 16 -30, 2022 (the "Third Spot Audit Period")
42. On May 30, 2022, the Auditor advised Ferndale that the audit of the Third Spot Audit Period had confirmed that Ferndale was compliant with the *Act* and *Regulation* between April 16 – 30, 2022.
43. On June 8, 2022, the OBCCTC sent an audit report to Ferndale (the "Audit Report") with the calculation of wages owed to their drivers for their review and requested that they respond by June 22, 2022.
44. On June 20, 2022, the OBCCTC received a letter from another law firm on behalf of Ferndale requesting the following information:
 - Detailed explanation on how the Auditor calculated the drivers' daily hours

- Detailed reports of phone calls made to the drivers
 - Detailed explanation of how the extrapolation period was calculated
45. The Auditor shared the calculations and information that went into the Auditor's report with counsel.
 46. Counsel for Ferndale identified some errors in the Auditor's calculation and she also advised that Ferndale did not maintain payroll records beyond two years because of alleged conflicting directives from the OBCCTC and destruction of payroll records due to a flood.
 47. The Auditor corrected the errors and agreed to calculate the extrapolated amount owing to drivers starting from the two-year period prior to date of the initiation of the audit on November 20, 2020. The Auditor provided Ferndale with a revised amount owing to their company drivers. The total amount payable to Ferndale's 11 drivers was \$14,971.87 for the period of November 20, 2018 to April 16, 2022.
 48. On August 31, 2022, Ferndale confirmed the total payment of \$14,971.87 had been made by providing the Auditor with wage statements and copies of cheques written for all 11 drivers. The documents were reviewed by the Auditor and no discrepancies were noted.
 49. On September 29, 2022, the Auditor provided a final audit report (the "Final Audit Report") advising that Ferndale paid the adjustment amounts to its company drivers and confirming that Ferndale had corrected its payroll structure as of April 16, 2022.
 50. I accept that Ferndale has paid the amounts owing and that it has corrected its payroll structure as of April 2022.

Analysis and Decision

51. The *Act* is beneficial legislation intended to ensure that licensees pay their employees and independent operators in compliance with established rates. Licensees must comply with the legislation, as well as the terms and conditions of their licenses, and the Commissioner is tasked with investigating and enforcing compliance.
52. Section 34 of the *Act* provides that, if the Commissioner is satisfied that a licensee has failed to comply with the *Act* or the terms and conditions of the licensee's license, the Commissioner may impose a penalty or penalties on the licensee. I first must determine if Ferndale failed to comply with the *Act* or its license.
53. It is clear, and I find, that Ferndale failed to comply when it failed to:
 - keep accurate payroll records as required, resulting in drivers' wage statements not accurately reflecting their actual hours worked;
 - keep payroll records as required;
 - pay two drivers in accordance with the regulated rates for all hours worked between October and December 2019; and

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- pay drivers for all hours worked between November 20, 2020 to April 16, 2022.
54. Ferndale's non-compliance resulted in 11 drivers being owed a total of \$14,971.87 the period of November 20, 2018 to April 16, 2022.
 55. The Act gives the Commissioner a broad discretion as to whether a penalty should be issued for any particular case. The administrative penalties made available under the legislation are designed to encourage compliance. Penalties are intended to have a deterrent effect -- that is, to discourage non-compliance with the legislation -- and to protect drivers.
 56. Under section 28 of the *Regulation*, an administrative fine for contravention relating to the payment of remuneration, wait time remuneration or fuel surcharge can be an amount up to \$500,000.
 57. In keeping with the above-described purpose of the legislation the factors which will be considered when assessing the appropriate administrative penalty include the following as set out in Smart Choice Transportation Ltd. (OBCCTC Decision #21/2016):
 - The seriousness of the respondent's conduct;
 - The harm suffered by drivers as a result of the respondent's conduct;
 - The damage done to the integrity of Container Trucking Industry;
 - The extent to which the Licensee was enriched;
 - Factors that mitigate the respondent's conduct;
 - The respondent's past conduct;
 - The need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of having a Container Trucking Services Licence;
 - The need to deter those Licensees from engaging in inappropriate conduct, and
 - Orders made by the Commission in similar circumstances in the past.
 58. The maintenance of complete, accurate and up-to-date records by licensees is essential to the OBCCTC's fulfillment of its rate compliance mandate and its ability to properly perform audits in a timely and accurate way.
 59. The OBCCTC reinforced the importance of keeping proper record keeping through its Industry Bulletin on August 10, 2016, and again in an Industry Advisory on February 19, 2021.
 60. The OBCCTC also communicated the consequences of improper record keeping to the CTS community through a variety of published decisions, including Hutchison Cargo Terminal Inc. (CTC Decision No. 27/2018), MDW Express Transport Ltd. (CTC Decision No. 01/2017), and AMK Carrier Inc. (CTC Decision No. 3/2020).
 61. In Olympia Transportation (CTC Decision No. 02/2016), the Commissioner closed by reminding all license holders that:

With the publication of this decision, licensees have express notice that a failure to maintain required records will almost certainly result in a penalty.... All licensees should accordingly review their record keeping practices and ensure their payroll and driver records are complete, up-to-date and accurate.

62. In HAP Enterprises Ltd, (CTC Decision No. 17/2016), the Commissioner built on the seriousness of proper record keeping by noting:
- Failure to keep proper records...directly interferes with the audit process, will not be tolerated, and will be regarded as a serious violation of licensees' obligations under the legislation and their licence.
63. In this case, Ferndale's deficient record-keeping seriously impeded the audit process and delayed compensation to its drivers. I note that the auditor's statement to Ferndale in 2016 was correct at the time it was written. On May 30, 2019, however, the government of British Columbia passed amendments to the *ESA* that increased the length of time employers needed to keep payroll records from two (2) years to four (4) years. This case has a unique set of facts including the 2016 auditor's report and the auditor's prior agreement to only go back two years from the date of the audit. Setting aside the question of whether the licensee was required to maintain employment records for more than two years prior to the November 20, 2020 audit initiation, I find that Ferndale failed to retain all the required payroll records even between November 20, 2018 and August 31, 2019. Ferndale was in breach of the two-year period record retention requirement that it argues applies. Furthermore, I do not accept that a flood is a sufficient reason that excuses Ferndale from keeping proper records.
64. Additionally, of the records that were provided by Ferndale, I find there were discrepancies between the hours recorded by drivers on their timesheets and the hours paid on the wage statements. These discrepancies resulted in drivers not being paid for their last 15 minutes of work. It is significant that they continued even after the Auditor brought them to Ferndale's attention. While Ferndale acknowledged these "accounting errors" resulted in the underpayment of drivers for their last 15 minutes of their workday, the licensee continued to underpay drivers after the errors were brought to its attention. Setting aside the question of whether the licensee's underpayment of driver was in fact due to "accounting errors," Ferndale's failure to correct this error when it was first brought to their attention weighs in my consideration of penalty.
65. I also find Ferndale paid two drivers less than the required hourly rate between October 1 and December 31, 2019.
66. I note that in 2016 Ferndale was found to be paying its company drivers non-complaint rates over a lengthy period and was ordered to pay more than \$65,000.00 to its drivers and to pay a \$10,000 administrative fine. In this case Ferndale has also failed to pay in accordance with the Rate Order.
67. I must also consider mitigating factors. While Ferndale was not attentive to deadlines or the Auditor's direction early in the audit process, with the assistance of counsel, Ferndale

appears to have introduced the needed reforms and taken their obligations seriously. Ferndale ultimately accepted the findings of the audit and brought itself into compliance during the April 16-30, 2022 pay period.

68. Considering all the above referenced circumstances, I find that this is an appropriate case to impose an administrative fine of \$25,000.00. In my view, this fine is needed to meet the objective of deterring non-compliance while balancing the mitigating factors. I note that Ferndale paid the \$10,000.00 administrative fine imposed in Ferndale #1; however, the previous fine did not sufficiently deter Ferndale from further non-compliance. This fine responds to the serious form of misconduct and sends a warning to all licensees that they must take all necessary steps to ensure that hours of work are properly and accurately recorded and paid and that records are kept for the appropriate period of time.
69. In the result and in accordance with section 34(2) of the *Act*, I hereby give notice as follows:
- a) I propose to impose an administrative find against Ferndale in the amount of \$25,000.00;
 - b) Should it wish to do so, Ferndale has 7 days from receipt of this notice to provide the Commissioner with a written response setting out why the proposed penalty should not be imposed.
70. If Ferndale provides a written response in accordance with the above, I will consider its response, and I will provide notice to Ferndale of my decision to either:
- a) Refrain from imposing any or all the penalty; or
 - b) Impose any or all the proposed penalty.

Conclusion

71. In summary, Ferndale has been found to have violated the *Act*, the *Regulation*, and its license by failing to maintain and make available proper records, paying its company drivers non-compliant rates and failing to pay company drivers for all hours worked. While Ferndale eventually paid the amounts owing to its drivers and brought itself into compliance, I have determined that it is appropriate to propose the imposition of a \$25,000.00 penalty.

Dated at Vancouver, B.C., this 29th day of December, 2022



Glen MacInnes, Commissioner