

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 -

Paul Creek Slicing Ltd.
("Paul Creek")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No: 1999/650

DATE OF HEARING: January 17, 2000

DATE OF DECISION: February 4, 2000

DECISION

APPEARANCES:

for Paul Creek Slicing Ltd.	Ron Rhodes Jim Caughill Bob Fraser
for the individual	in person
for the Director	Ken Copeland

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Paul Creek Slicing Ltd. (“Paul Creek”) of a Determination which was issued on October 8., 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Paul Creek had contravened Sections 45 and 58 of the *Act* in respect of the employment of Dan Vetter (“Vetter”), ordered Paul Creek to cease contravening and to comply with the *Act* and ordered Paul Creek to pay \$1447.27

Paul Creek challenges the Determination on two grounds. First, Paul Creek says that the Director was wrong to conclude that there was no evidence to show Paul Creek had paid Vetter annual holiday pay. Second, Paul Creek says the Director was wrong to not allow a deduction of \$110.00, which represented the amount of a court fine paid by Paul Creek for Vetter, from any wages owing to him.

ISSUES TO BE DECIDED

The issue to be decided is whether Paul Creek has shown that the Determination is wrong in fact or in law and ought to be varied or canceled.

FACTS

Vetter was hired by Paul Creek in January 1998 as a driver. It is Vetter’s position, and was his evidence, that at the time of hiring he was told by Bob Fraser, one of the principles of Paul Creek, that his rate of pay would be 28% of gross truck earnings and \$20.00 an hour if he was asked to do extra work. He said that there was no indication that his rate would be 26% as wages and 2% as holiday pay. Vetter terminated his employment on or about August 18, 1998. During his employment he received 14 paycheques and an equal number of pay statements.

Mr. Fraser also gave evidence. He testified that when he hired Vetter, the rates were explained to him. He said that Vetter was told his rate of pay would be 28% of gross and that rate was based on wages of 26% of gross and holiday pay of 2% of gross. Jim Caughill, the office manager for

Paul Creek also gave evidence. That evidence included reference to a discussion that he and Vetter had in May, 1998. Vetter received a pay statement that showed he had been paid only 24% and 2%, instead of 26% and 2%. A discussion ensued between he and Mr. Caughill during which Vetter asked why the company paid 26% and 2%, to which Mr. Caughill replied to the effect that it worked out better for them that way. Mr. Caughill was specifically asked in cross-examination whether Vetter was ever told in that conversation what the 2% was for. Mr. Caughill could not recall telling Vetter that the 2% was for holiday pay, but said it was his impression that Vetter understood what it was for.

An examination of payroll records was done by the Director. The following comments from the Determination outline the findings made during that examination:

All the complainant's statements of earnings up to the pay period ending March 24, 1998, showed the complainant received 26% plus 2% of truck earnings. An example of this is shown for the pay period ending February 8, 1998, as Exhibit I, 2 pages.

From March 25, 1998, on through to the complainant's last day of work, all the complainant's statements of earnings, with the exception of two pay periods, showed hours worked at \$20.00 per hour plus loads at 26% and 2% with holiday pay shown on total earnings. The holiday pay shown was never paid on the complainant's corresponding pay cheque.

Example of this is shown on the pay period ending May 24, 1998, as Exhibit II, 2 pages. Finally, there was no mention of statutory holiday pay in any of the complainants statements of earnings.

Based on the examination of payroll records, the Director stated:

The employer has not produced any evidence showing that 2% of what the truck brought in was annual vacation pay. No evidence was produced showing payment for statutory holidays.

ANALYSIS

Sections 45 and 58 contain the statutory provisions applicable to this appeal:

45. *An employee who is given a day off on a statutory holiday or instead of a statutory holiday must be paid the following amount for the day off:*

- (a) *if the employee has a regular schedule of hours and the employee has worked or earned wages for at least 15 of the last 30 days before the statutory holiday, the same amount as if the employee had worked regular hours on the day off;*

(b) *and in any other case, an amount calculated in accordance with the regulations.*

58. (1) *An employer must pay an employee the following amount of vacation pay:*

(a) *after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;*

(b) *after 5 consecutive years of employment, at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay.*

(2) *Vacation pay must be paid to an employee*

(a) *at least 7 days before the beginning of the employee's annual vacation, or*

(b) *on the employee's scheduled pay days, if agreed by the employer and the employee or by collective agreement.*

(3) *Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for payment of wages.*

Paul Creek challenges several conclusions of fact made by the Director. The onus in this appeal is on Paul Creek to show that there was no rational basis upon which those conclusions of fact could have been made by the Director (see *Mykonos Taverna operating as the Achillion Restaurant*, BC EST #D576/98).

Paul Creek says the portion of the pay statement showing an amount as "2% gross" represented Vetter's holiday pay and Vetter was well aware of that. Paul Creek acknowledged some confusion could have arisen from their placing a "holiday pay" category on the pay statements from March 25, 1998. They explained the holiday pay category was only intended to show holiday pay on wages paid at \$20.00 an hour, not on the truck earnings. As it was explained, holiday pay was, in fact, shown in two places on Vetter's pay statements, in the "2% gross" and in the holiday pay category. Paul Creek argues that showing the latter amount on total earnings (*ie*, the 26% and 2%) instead of just Vetter's hourly earnings, was a bookkeeping error and a technicality that does not change the fact that the 2% represented annual and statutory holiday pay on the truck's gross earnings and the holiday pay category represented annual vacation pay on hourly earnings.

Since the 2% was, from Paul Creek's perspective, supposed to meet their obligation under the *Act* to pay annual vacation and statutory holiday pay, I will address whether the scheme satisfies either aspect of that obligation.

The calculations done by the Director show that Vetter was entitled to be paid for 4 statutory holidays - Good Friday, Victoria Day, Canada Day and B.C. Day and, calculating the amount payable for each statutory holiday according to the regulations, that Vetter was entitled to \$703.84 statutory holiday pay. In their appeal submission, Paul Creek asked the Tribunal to assume Vetter's statutory holiday entitlement was simply equivalent to 8 hours pay at his agreed hourly rate (\$20.00 an hour) and that over his employment he had received that much. There is no basis for this assumption in fact nor is such an assumption consistent with requirements of the *Act* for payment of statutory holidays. The *Act* requires that earned statutory holiday pay be paid in the pay period in which it is earned, just like any other earned wages. For an employee such as Vetter, who has no regular schedule of hours, the amount of statutory holiday pay he is entitled to receive is calculated on his total wages in the 30 day period preceding the statutory holiday. Not only is Vetter entitled to know how much he is receiving for each statutory holiday, but also, for the purposes of administering Part 5 of the *Act*, it is important that the statutory holiday entitlement of the employee, and the corresponding obligation of the employer, be readily and easily identified.

I agree with the Director that there is no evidence that Vetter was ever paid for the statutory holidays that occurred during his employment and Paul Creek has not overcome that conclusion. The appeal as it relates to statutory holiday pay is dismissed.

The appeal as it relates to whether I should conclude that Vetter's annual vacation pay was included in the "2% gross" amount is somewhat more difficult, but in the final analysis, it must also be dismissed. There are several reasons for this result. First, the Tribunal has said in several decisions that the *Act* does not allow for the inclusion of vacation pay in an hourly or unit wage scheme: see *Foresil Enterprises Ltd.*, BC EST #D201/96; *W.M. Schluz Trucking Ltd.*, BC EST #D127/97; *Frank Markin*, BC EST #D 228/98. One of the reasons for this conclusion is based on a concern that such a scheme has the potential to cause an employee's regular wages to be decreased as their annual vacation entitlement increases. Whether this concern actually arises in any case is irrelevant. It is the potential for this result that impacts on any such scheme. For this reason, even if Vetter had agreed to a wage scheme that included payment of 2% of gross as holiday pay, such an agreement would not be given effect because it is inconsistent with the minimum requirements of the *Act*.

Second, the *Act* requires an employer to give each employee a wage statement (Section 27) and to maintain a payroll record for each employee (Section 28). The objective of these requirements are consistent with several of the *Act's* purposes: to ensure employees receive at least basic standards of compensation and conditions of employment; to encourage open communication between employers and their employees; and to provide fair and efficient procedures for resolution of disputes arising under the *Act*. Paul Creek argued I should accept that the "2% gross" amount was intended, and they say understood by Vetter, to meet their statutory obligations respecting payment of holiday pay. That argument fails to recognize that the

statutory obligations set out in Section 27 and 28 are, for the purposes of the *Act*, as important as the statutory obligation found in Section 58 and it is apparent from the confused state of the pay statements and payroll records that those obligations were not met. Whatever Paul Creek “intended” the “2% gross” amount to represent, it was not shown on either the pay statements or the payroll records. In the absence of pay statements and payroll records that comply with the requirements of the *Act*, it was open to the Director to conclude that there was no evidence that annual vacation had been paid. As indicated above, the onus on Paul Creek is to show there was no rational basis for the Director’s conclusion and they have not done so.

Third, paragraph 58(2)(a) of the *Act* requires that any annual vacation pay entitlement be paid to an employee at least 7 days before the beginning of an employee’s annual vacation. In a sense, this requirement is the “default” obligation of the employer. Paragraph 58(2)(b) of the *Act* does allow annual vacation entitlement to be paid to an employee on the employee’s scheduled pay days, but only if that manner of paying vacation pay is agreed by the employer and the employee. Even if the question of whether Vetter knew that the “2% gross” amount was his holiday pay was not rendered irrelevant by the reason first stated above, that question would in any event have been largely academic unless Paul Creek could also show that Vetter agreed to have annual vacation entitlement paid on each scheduled pay day. Any suggestion that an employer and employee agreed to have annual vacation entitlement paid on the employee’s scheduled pay days that is not also accompanied by some reasonably clear evidence of such an agreement is unlikely to have the effect of avoiding the “default” obligation.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 8, 1999 be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal