

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-

Christopher M. Wilson operating Emcee Yard & Garden
("Emcee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 1998/819

DATE OF DECISION: February 19, 1999

DECISION

This is a decision based on written submissions by Christopher Wilson, Marco Vickers and G. Omstead for the Director of Employment Standards.

OVERVIEW

This is an appeal by Christopher Wilson operating Emcee Yard & Garden ("Emcee"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued December 1, 1998. The Director found that Emcee contravened Sections 40, 45, 46, 58 and 63 of the *Act* in failing to pay Marco Vickers ("Vickers") overtime wages and compensation in lieu of notice, and Ordered that Emcee pay \$590.12 to the Director on behalf of Vickers. After the appeal was filed, the Director's delegate noted a calculation error, and asked the Tribunal to adjust the amount owing to Vickers to \$529.23.

ISSUE TO BE DECIDED

Whether the Director correctly determined that overtime wages and compensation in lieu of notice were owed to Vickers.

FACTS

Vickers worked for Emcee as a gardener from March 16, 1998 until August 4, 1998. He worked 8.25 hours per day, and was paid a salary of \$1500.00 per month.

The Director's delegate found that Vickers in fact worked 8.25 hours of work per day, but was unable to find sufficient evidence to support Vickers' claim that additional time was worked over and above those hours. Vickers' claim for overtime in excess of 8.25 hours was denied.

The Director's delegate did find however that Vickers was entitled to overtime for those hours worked over 8 hours per day, which he calculated to be a total amount of 40 hours, at \$10.21 per hour, plus vacation pay and interest.

The Director's delegate found that Vickers was paid wages for the week of August 17 to 21, even though that he did not work that week. Emcee contended that the wages for four of those days were in lieu of statutory holidays, and one day was for overtime hours. The Director's delegate allowed four days wages to be deducted from the wages owing, but denied the deduction of pay for the fifth day, as that represented wages for "extra hours worked not related to the extra 15 minutes each day."

On the issue of termination, the Director's delegate found that Emcee had failed to meet the criteria outlined in *Kruger* (BCEST D#003/97) and found that Vickers was entitled to one week compensation in lieu of notice.

ARGUMENT

Emcee contends that Vickers was not entitled to overtime, and that he was dismissed according to the principles enunciated in *Kruger*. Further, Emcee contends that there were errors in the calculations used to determine the settlement amount.

Emcee says that Vickers was hired to work 41.25 hours per week (8.25 hours per day), which were his "normal hours." Emcee contends the overtime hours (0.25 hours per day) constituted normal hours of work, and were included in the monthly wage. Mr. Wilson stated that from March 16 to April 30, Vickers received \$8.27 per hour plus \$15.51 per week for the 1.25 hours of overtime per week as part of the monthly wage. On May 1, Mr. Wilson contended that Vickers received a monthly increase of \$134.62, which constituted \$9.01 per hour plus an additional \$16.89 per week for the overtime.

On August 4, following a discussion about hours of work and salary, Mr. Wilson stated that Vickers received a second raise of \$192.30 per month, which amounted to \$10.07 per hour and an additional \$18.88 per week for the overtime. Mr. Wilson denied that he contravened either Section 1 or 40 of the *Act*. He argues that the salary is not broken down into regular and overtime hours in his payroll because his accounting software does not provide for that.

Mr. Wilson contended that Vickers was dismissed for cause, specifically because he was unable to meet the requirements of the job, according to the principles established by *Kruger* (BCEST D#003/97). He argued that Vickers was "unable to properly manage company time, which resulted in significant losses to my business", and cited 6 specific incidents which supported this position. On July 29th, Mr. Wilson alleged that Vickers and an assistant took one full day to do an assignment which "historically" took one employee one half day to do. On July 30, Mr. Wilson spoke to Vickers about the amount of time he was taking to complete tasks. On August 4, Vickers and Mr. Wilson spoke again about job performance and expectations. Mr. Wilson indicated that during this discussion, he promised Vickers "long term employment and increased responsibility should his performance improve." During the week of August 4 through September 11, Mr. Wilson contended that Vickers "continued to leave jobs unfinished." Mr. Wilson contended that on September 11, Vickers was unable to plan his work day, taking he and his crew "30 man hours to do what normally takes 16 hours."

On September 14, Mr. Wilson stated he was "shocked to see a loss of \$300 for the month, and decided Mr. Vickers could not remain in my employ."

Mr. Wilson also outlined several other matters which he felt provided grounds for the termination, including breaking non smoking rules.

Mr. Wilson further contended that although he was found to have contravened Sections 45 and 46 of the *Act* which relate to statutory holidays, he was never advised that Vickers complained about them. He further contended that Vickers had both May 18 and July 1 off, and that he paid vacation pay.

Mr. Wilson further alleged calculation errors in the Determination.

Vickers stated that when he was hired, he was told he would be paid \$1500.00 per month, including vacation pay. He advises that he had never seen his wage broken down to an hourly rate as Mr. Wilson suggested. He contends that was told he would be expected to work on statutory holidays, and that he could choose another day off instead.

Vickers denied that he had ever received a written or verbal warning about his job performance, or that he was ever threatened with dismissal. He contends that when Mr. Wilson called him on September 23 to tell him he need not come to work the next day, no reason was given.

The Director's delegate argues that Emcee's calculations of overtime hours were not in accordance with the definition contained in the *Act*. He contended that Section 1 prescribes how an hourly wage is to be determined when an employee is paid a monthly wage. He argues that he calculated the wage based on the definition contained in Section 1 and the overtime rates prescribed in Section 40. He further contends that this analysis was done following each pay increase.

The Director's delegate states that Emcee's payroll records do not break Vicker's salary into anything but a monthly salary, and in fact does not show vacation pay as being paid. However, he stated that Vickers agreed that vacation pay was included in the monthly salary.

The Director's delegate also contends that Emcee failed to show any evidence which established just cause. He argued that even though Mr. Wilson indicated that he spoke to Vickers about his job performance, that does not indicate that Vickers was warned that if his performance did not improve, his employment would be terminated. The Director's delegate argues that Emcee's actions in giving Vickers two salary increases contradicts Mr. Wilson's submission that Vickers' performance was unsatisfactory. The Director's delegate suggests that the main reason Emcee terminated Vicker's employment was because it suffered a financial loss in August.

The Director's delegate contends that calculations are made according to the provisions of the *Act*, and that if wages are owing, vacation pay on those wages will also be owed.

The Director's delegate argues that even though Emcee contends that Vickers did not work on May 18 or July 1, no records were produced to substantiate that position. He did however, agree that two calculation errors with respect to two days work had been made, and sought an amendment to the Determination, as noted above.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am not persuaded that the Director erred.

I shall first address the issue of whether Vickers was properly terminated. The principles which an employer must follow which were enunciated by the Tribunal in *Kruger* (BCEST D#003/97) and other cases are as follows: If an employer is of the opinion that an employee is incompetent, it has an obligation to

- a) establish and communicate a reasonable standard of performance,
- b) give the employee an opportunity to meet the required standards and show that he was unwilling to do so,
- c) notify the employee that he had failed to meet the standards and that his employment was in jeopardy because of that, and
- d) dismiss only when the employee fails or is unwilling to meet those standards.

The burden of proving the conduct of the employee justifies dismissal is on the employer.

When the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the Tribunal will look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning.

There is no evidence to support the argument that the Director's delegate erred in concluding that Emcee did not have just cause to terminate Vickers' employment. Mr. Wilson contends that he spoke with Vickers about his performance on two occasions. Vickers denies that he was ever warned. There is no evidence in writing that Vickers was advised that he had failed to meet performance standards and that his job was in jeopardy. In fact, as the Director's delegate notes, on one of the occasions Mr. Wilson contends that Vickers was warned, his salary was increased. This action belies Emcee's arguments that Vickers was incompetent.

I deny this ground of appeal.

I shall next address the issue of overtime wages.

Section 1 of the *Act* defines "regular wage" as

- d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or weekly hours of work

This calculation is used to determine the regular hourly wage of an employee, and allows employees to determine their hours of work. By definition, it does not include overtime wages, since those are defined in Part Four of the *Act*.

Section 35 of the *Act* provides that an employer must pay overtime wages in accordance with Section 40 if the employer requires or, directly or indirectly, allows an employee to work

- (a) over 8 hours a day or 40 hours a week...

Section 40 (1) provides that

An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under Section 37 or 38

- (a) 1 1/2 times the employee's regular wage for the time over 8 hours, and
- (b) double the employee's regular wage for the time over 11 hours.

In spite of Emcee's argument that overtime was built in to Vickers' monthly salary, by operation of the *Act*, I am unable to conclude that it was. There is no evidence that Vickers was told what he was being paid hourly, and the payroll did not break that out. Emcee's calculation of an hourly regular wage and an overtime wage was determined, I suggest, only after the Determination was issued. I find that the hours Vickers worked in excess of 8 hours per day must be calculated according to the overtime provisions of sections 35 and 40, and dismiss this ground of appeal also.

Section 44 provides that after 30 calendar days of employment, an employer must either

- (a) give an employee a day off with pay on each statutory holiday, or
- (b) comply with Section 46.

Section 46 provides that an employee who works on a statutory holiday must be paid for that day

- (a) 1 1/2 times the employee's regular wage for the time worked up to 11 hours, and
- (b) double the employee's regular wage for any time worked over 11 hours.

It is not enough to provide an employee with one day off for each statutory holiday worked.

Emcee's evidence is that Vickers, even though he had not worked for the company for 30 days, took Good Friday off with pay. Mr. Wilson indicated that Vickers did not work on May 18 or July 1. He did work on August 3, but then took one week off in August, which was to compensate him for three future statutory holidays.

The Director's delegate states "Section 46 of the Act also deals with what an employer must pay to an employee who works on a statutory holiday. Those calculations were also included in the attached calculations."

In reviewing the calculations, I note that the Director calculated wages as if Vickers worked on the May 18, July 1, August 3 and September 7 statutory holidays. He stated that Mr. Wilson did not provide any daily time records to indicate what days Vickers worked or did not work. In fact, the initial complaint from Vickers was not in relation to unpaid statutory holidays, and Vickers did not dispute Wilson's claim that he did not work on May 18 and July 1. I refer the issue of statutory holiday pay back to the Director's delegate for reconsideration.

With respect to the claim that the Director's delegate erred in calculating the amount owed to Vickers, I accept the Director's submission that two calculation errors were made. I accept that there is at least one further calculation error in determining the hours of work on September 15. I also refer this issue back to the Director for recalculation of the hours worked.

With respect to the issue of vacation pay, that is also statutorily determined. Vacation pay will be added on to a determination of wages owed, which will be in addition to that vacation pay already paid to Vickers.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated December 1, 1998 be varied as follows:

I refer the determination of the amount owed back to the Director for recalculation of wages owed for statutory holiday and overtime wages. I direct that the Director determine the amount owing on an expeditious basis.

**Carol Roberts
Adjudicator
Employment Standards Tribunal**