

An appeal

- by -

317184 B.C. Ltd. operating as Elkin Creek Guest Ranch  
("Elkin Creek")

- 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.:** 2002A/3

**DATE OF DECISION:** March 11, 2003

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by 317184 B.C. Ltd. operating as Elkin Creek Guest Ranch (“Elkin Creek”) of a Determination that was issued on December 5, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Elkin Creek had contravened Part 3, Sections 18 and 28, Part 4, Section 40, Part 5, Section 45 and Part 8, Section 63 of the *Act* in respect of the employment of Richard Culos (“Culos”) and ordered Elkin Creek to cease contravening and to comply with the *Act* and to pay an amount of \$8,167.72.

Elkin Creek has appealed the Determination for the following reasons:

1. The Director erred in accepting the complainant’s assertion of hours worked;
2. The Director erred in concluding the complainant was an employee of Elkin Creek during the first part of May, 2001; and
3. The Director erred in concluding the complainant was entitled to compensation for length of service.

Elkin Creek asks the Tribunal to cancel the Determination.

None of the parties have requested an oral hearing. The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

### ISSUE

The issue in this case is whether Elkin Creek has shown the Director has committed an error in the Determination that justifies the Tribunal exercising its authority under Section 115 of the Act referring the matter back to the Director for further investigation.

### FACTS

The following background information is provided in the Determination:

317184 B.C. Ltd. operates the Elkin Creek Guest Ranch (the “Ranch” or the “Employer”), which is under the jurisdiction of the Act. Richard Culos (“Culos” or the “Complainant”) worked seasonally from June 4, 1999 to September 23, 2001 as a chef at a rate of \$3200.00 per month at the end of his employment. The time period covered by this investigation is limited to May 1, 2001 to September 23, 2001.

Elkin Creek Guest Ranch is located in the Chilcotin, specifically in the Nemaiah Valley.

The Determination identified the following issues:

- whether Culos was owed regular wages for the period May 1, 2001 to May 15, 2001, and if so, what amount was he owed;
- whether Culos was owed overtime wages for the period May 1, 2001 to September 23, 2001, and if so, what amount was he owed;
- whether Culos was owed statutory holiday pay for Canada Day, BC Day, and Labour Day, and if so, what amount was he owed;
- whether Culos was owed compensation for length of service equivalent to one weeks' wages, and if so, what amount was he owed;
- if Culos was owed any wages, what amount vacation pay was he owed; and
- whether Culos was owed wages in respect of expenses incurred on behalf of the business and for tips not paid to him.

The Determination found he was owed regular wages, overtime wages, statutory holiday pay, compensation for length of service and vacation pay on the amounts owed calculated at 4%. The Determination concluded there was no evidence to support Culos' allegation that he was owed money in respect of expenses that he has paid on behalf of the business or for tips that he alleged were not paid to him.

In the context of analysing the above issues, the Determination made certain findings of fact and reached certain conclusions of fact.

The Determination found that Elkin Creek had not kept a record of the information required to be kept under paragraphs (d) and (h) of subsection 28(1) the *Act*. That finding has not been challenged in this appeal. The Determination noted that no time sheets were available.

Paul Zoeller ("Zoeller"), who was the General Manager of Elkin Creek during the relevant period and represented the position of Elkin Creek investigation of the complaint, provided what he believed was an accurate estimate of the daily hours worked by Culos. He said that 'to his recollection' Culos worked 5 days a week and no more than 8 hours a day. The Director did not accept the estimate provided:

The statement made by Zoeller . . . was merely his estimation based on his "recollection", not on actual time sheets and stated in general terms. There are no records to support his statement as, by his own admission, he (the Employer) did not track or records [sic] the hours of any employees. The estimation of the Employer's own bookkeeper was that long hours were being worked seven days per week.

The Determination noted that it was Culos' practice to record the hours he worked. The original of that record was provided to legal counsel for Elkin Creek during the investigation, who raised several objections to the Director relying on that record. Elkin Creek also submitted statements from three persons who had been guests at the ranch for varying periods in 2001, one for a period from July 7 to July 27, 2001 and two from July 29 to August 13, 200, giving their 'recollection' of the hours worked by Culos during those periods.. The Director placed little weight on the statements, indicating that, "it is not the responsibility of guests to keep track of hours worked by employees at the Ranch".

Notwithstanding the objections, the Director accepted the record provided by Culos, on the basis that:

. . . it was the Complainant's practice to record the hours worked, and the Employer has no accurate time sheets to refute these hours.

There is a reference in the Determination that Ian Harwood ("Harwood"), the Ranch Manager during the 2001 operating season indicated that on occasion he had seen the book in which Culos was recording his daily hours worked.

Culos claimed he was asked by Zoeller and Harwood to start work on May 1, 2001 doing fencing and field work and he did so, working from that date until May 15, 2001 - primarily as a 'ranch hand', and also doing some prep work in the kitchen. Zoeller neither admitted nor denied he had asked Culos to start on May 1, 2001. He acknowledged that Culos was at the ranch May 1<sup>st</sup>, but said that it was "not accurate" to say "he was working as a ranch hand for Elkin Creek" during that period. Zoeller said when he first arrived at the ranch for the 2001 season, on May 7 or 8, Culos was building a fence on the ranch property relating to a horse breeding partnership that he and Harwood had begun. In a statement provided to the Director during the investigation, Harwood denied that Culos was building fences "on his own time" during the period in question. He confirmed that Culos had been asked to begin work at the ranch on May 1, that he had done so and that he had worked in the kitchen, preparing it for May 15 opening weekend, and helped in the fields, "driving the tractor, dragging [sic] tires to spread the horse manure". The Determination found that during the period from May 1 to May 15, 2001, Culos was performing 'work' for Elkin Creek.

The Director found that Culos was not "*employed for a definite term*", "*employed for specific work to be completed in a period of up to 12 months*" or employed on any other basis that would exclude the application of Section 63 of the *Act* to his employment. The Director also found Culos' employment with Elkin Creek had been terminated without written notice effective September 21, 2001, that he had not quit his employment and was entitled to compensation for length of service in an amount equivalent to one weeks' wages.

## **PRELIMINARY ISSUE**

This appeal was filed with the Tribunal on December 17, 2002. On February 12, Elkin Creek submitted additional documents consisting of:

1. a typed note from Zoeller dated 2/7/2003;
2. a 'summary of events' relating to Harwood and Catherine Mikle prepared by Zoeller dated 04/22/02; and
3. what are identified as a series of e-mail messages between Elkin Creek (Zoeller) and Harwood between February 8, 2002 and March 5, 2002.

The Tribunal sought submissions from the parties on whether the Tribunal should receive and consider these documents. The Director and Elkin Creek have filed submissions. The Director says the documents filed are not related to the issues raised in the appeal; that except for the 2/7/2003 note, all of the information existed at the time the investigation was being done and should have been submitted at that time if it was considered by Elkin Creek to be relevant; and that, in any event, the information contained in the documents is not relevant to the issues raised in the appeal.

Elkin Creek says the documents speak against the Director relying on information provided by Harwood in reaching conclusions about Culos' hours of work and are being provided in the appeal process because no opportunity was given to them to make comment on that information during the investigation. The response from Elkin Creek also notes the following submission made to the Director on April 26, 2002:

The branch has also relied upon, it appears, conversations with Ian Harwood. Little weight should be placed on Mr. Harwood's comments as they are unsworn and there is a dispute at present between Elkin Creek and Mr. Harwood. Additionally, it is presumed that if Mr. Harwood aids Culos, and Culos is successful, Harwood may then attempt a false claim for wages.

It is apparent the appropriateness of the Director accepting comments made by Harwood was raised in the early stages of the investigation. All of the e-mail communications which have been submitted to the Tribunal existed on the date of the above comment. They were not provided to the Director notwithstanding a concern that the Director may have relied upon statements made by Harwood. The same holds for the document dated 04/22/02. This is not new evidence - it existed during the period the investigation was taking place. Nor is there anything in the appeal or in the submission of Elkin Creek indicating this information was not reasonably available at the time the Determination was made. The Tribunal does not normally allow new evidence to be submitted in the appeal process that could have been submitted during the investigation without good reason (see *Kaiser Stables Ltd.*, BC EST #D058/97). There is also some merit to the submission of the Director that the relevance of these documents to the appeal is not apparent. The only apparent objective of the documents, which is confirmed in Elkin Creek's submission on the admissibility of these documents, is to prop up the position stated in the April 26, 2002 submission - that the Director should not have relied on statements made by Harwood in reaching conclusions about Culos' hours and days of work. These documents are not accepted.

The February 2003 note contains no useful information at all concerning Culos' claim. All of the critical assertions relating to Harwood's 'character' are hearsay two or three times removed. It provides no assistance whatsoever to the general argument that the Director should not have relied on statements made by Harwood or to the issues of whether the Director erred in finding Culos' was an employee of Elkin Creek in the period May 1, 2002 to May 15, 2002 and in accepting Culos' record of hours worked.

## **ARGUMENT AND ANALYSIS**

The burden in this appeal is on Elkin Creek to persuade the Tribunal there is an error in the Determination.

Elkin Creek has provided several reasons in support of the assertion that the Director erred in accepting Culos' record of hours worked. They say the Director "ignored a significant amount of evidence" that either supported their position or did not support the position of Culos. Reference is made in the arguments by Elkin Creek to the failure of the Director to give effect to affidavit evidence provided by Zoeller, the failure of the Director to give significant weight to the statements provided by the three guests; the reliance by the Director on statements made by Harwood, and the failure of the Director to give Elkin Creek an opportunity to respond to those statements; the suspicious nature of the record provided by Culos'; the contradictions in Culos' statements; and the inexplicable failure of Culos to complain earlier about not being paid overtime.

Except for the matter relating to the failure of the Director to provide Elkin Creek with an opportunity to respond to the information received from Harwood, this aspect of the appeal essentially challenges factual findings and conclusions made by the Director during the investigation in deciding what hours were worked by Culos during the period in question. In this appeal, Elkin Creek has re-stated all of the arguments made to the Director on how the available evidence should be handled and what conclusions should be reached from that evidence.

The response to this aspect of the appeal is that the *Act* does not contemplate that an appellant may simply re-submit their arguments on the evidence and information acquired during the investigation in the hope that the Tribunal will reach a conclusion different from the Director on that evidence. In this aspect of the appeal, it is quite apparent that Elkin Creek disagrees with the decision of the Director to give less weight to evidence presented by them in favour of the record provided by Culos, which was supported by information provided by Harwood; was consistent with the ‘understanding’ stated by Barbara Zoeller, an officer of Elkin Creek and Pamela Edison, the bookkeeper for Elkin Creek, that Culos worked more than 40 hours a week, and was consistent with the ‘assumption’ made by Ms. Edison that Culos was working 7 days a week, 10 hours a day. If Elkin Creek wishes this Tribunal to reach conclusions that are different from those made by the Director, they are required to show some palpable and overriding error on the facts has been made by the Director. Doing nothing more than restating a position that was not accepted in the first place does not satisfy that requirement. This aspect of the appeal is dismissed.

Elkin Creek says it was not given a copy of the statement provided by Harwood and had no opportunity to rebut the information provided in it. This argument raises the scope of the obligation stated in Section 77 of the *Act*, which states:

77. *If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.*

From my review of the material on file, there can be no argument that Elkin Creek was given an opportunity to respond to the complaint made by Culos. The statutory obligation found in Section 77 was met. Elkin Creek, however, says it also should have been given a copy of the statement made by Harwood, who was not a party to the process and had no direct interest in the outcome of the complaint, and allowed an opportunity to rebut it. The answer to that submission is found in the Tribunal’s decision *Argenti*, BC EST #D332/00:

I start with the proposition that Section 77 does not, nor was it intended to, create a “discovery” obligation such as that found in the B.C. Supreme Court Rules whereby documents are presumptively inadmissible - and therefore cannot be relied on by a party - in the absence of prior disclosure. As well, it is acknowledged that under the *Act*, there is no specific legislative requirement that the Director disclose all information received by the Director to all parties involved. As noted in the decision of the Tribunal *BWI Business World Incorporated* BC EST #D050/96:

When conducting an investigation, the Director will typically gather evidence from each of the parties but will rarely, if ever, convene a hearing at which both parties are present. Accordingly, neither the employer nor the employee will necessarily know precisely what the other has alleged or what particular documentation has been provided to the Director.

The following comment from *All Seasons Spa Ltd.*, BC EST #D419/99 is also applicable:

With respect to section 77, the record before me shows that the delegate gave the employer--through both letters and telephone communications--a more than adequate opportunity to respond to the substance of Ms. Shaw's complaint. As I noted in *Urban Native Indian Education Society* (E.S.T. Decision No. D309/99), section 77 does not create, in my view, a general disclosure obligation such as that found in the B.C. Supreme Court Rules. Thus, even if the delegate did not provide to the employer, during the course of her investigation, every single document that was contained in her file, the section 77 obligation was discharged if the general thrust of the complaint--and the supporting evidence-- was made known to All Seasons.

A review of the file shows that Elkin Creek was advised by the Director on March 22, 2002, that she had spoken with Ian Harwood and had received information from him. Among other matters, specific reference was made to Harwood confirming that Culos had worked from May 1<sup>st</sup>, the first few weeks as a ranch hand. Elkin Creek responded to elements of the complaint on three different occasions, February 22, 2002, April 26, 2002 and November 25, 2002. Nothing in the material indicates that Elkin Creek was unable to state their case fully or that the process was 'unfair'.

This argument is dismissed.

Elkin Creek argues that the Director's analysis leading to the conclusion that Culos was an employee of Elkin Creek from May 1, 2001 to May 15, 2001 "strains the language" of the *Act*. I disagree. The analysis done by the Director on this part of the complaint, and the conclusion reached on the accepted facts, is consistent with the plain and ordinary meaning of the applicable provisions of the *Act* - the definitions of "employee", "employer" and "work" - when those provisions are considered in their entire context with the scheme of the *Act* and with its objectives and purposes. As noted in the Determination, the *Act* defines employee, employer and work in following terms:

*"employee" includes*

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person the employer allows, directly or indirectly, to perform work normally performed by an employee, . . .

*"employer" includes a person*

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

*"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

The Act is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). I agree with the following comment from *Machtinger v. HOJ Industries Ltd.*, supra, that:

. . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

The argument made by Elkin Creek presumes the Director accepted that Culos and Harwood were pursuing their private business interests in the first few weeks of May 2001. That is an incorrect presumption. In fact, the central finding in this area was that the “work . . . was done on the ranch, for the benefit of the employer”. Additionally, the material amply supports a conclusion that Harwood was acting as manager of Elkin Creek during this period. This ground of appeal is dismissed.

The final issue raised is whether the Director erred in concluding Culos was entitled to compensation for length of service. Once again, there is no apparent error in the analysis done by the Director in this part of the Determination and nothing in the appeal has persuaded me that the Tribunal should intervene in the decision made.

This ground of appeal is based on the assertion that it was Elkin Creek’s evidence that Culos’ termination date had been discussed in early September and it was agreed that September 21, 2001 would be Culos’ last day worked and a complaint that the Director, once again, preferred Culos’ evidence in this area to that provided by Elkin Creek.

There are three problems. First, the Director concluded that Culos worked until September 23, 2001, rejecting, by inference, any suggestion that he had agreed to ‘quit’ on September 21, 2001. There is nothing in the appeal that shows that conclusion was wrong. Second, the only ‘evidence’ provided by Elkin Creek in this area was in the form of two statements made by Zoeller and the Record of Employment (the “ROE”) issued to Culos. In a February 22, 2002 letter to the Director, Zoeller said that Culos worked 4 hours on September 22, 2002, identifying that day as “his last day worked”. In an affidavit sworn April 12, 2002, he said that “Culos was laid off on September 21, 2001 and . . . did not work on either September 22-23, 2001”. The ROE issued to Culos on September 26, 2001, indicated he was being laid off because of a shortage of work and, in the box provided for comments, were the words “seasonal work”. In other words, I can see no evidentiary foundation for the assertion being made. Third, even accepting this assertion, it is irrelevant to Elkin Creek’s liability to Culos under Section 63 of the *Act*, which would only be discharged if the facts justified a conclusion that Culos quit his employment on September 21, 2001. The Determination correctly noted the need for ‘clear and unequivocal’ facts to support a conclusion that an employee had voluntarily terminated the employment. Even if Culos ‘discussed’ and ‘agreed’ in early September to be laid off on September 21, that could only be viewed, in all the circumstances, as a neutral act. Zoeller has stated that after September 4, 2001, the ranch was “not very busy” and the last guests left on September 20, 2001. Those comments suggest that any ‘agreement’ Culos would leave his employment on September 21, 2001 was based as much on the operational needs of Elkin Creek as on a desire by Culos’ leave the ranch earlier than September 30, 2001.

This ground is also dismissed.



**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated December 5, 2002 be confirmed in the amount of \$8,167.72, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**