

An appeal

- by -

Park Lane Furniture Mfg. Ltd., aka Parklane Furniture Mfg. Ltd.,
aka Parklane Hotels-Motels Furniture Mfg. Ltd.

(“Parklane”)

- 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: Lorne D. Collingwood

FILE No.: 2001/694

DATE OF HEARING: March 18, 2002

DATE OF DECISION: March 26, 2002

DECISION

OVERVIEW

Park Lane Furniture Mfg. Ltd., aka Parklane Furniture Mfg. Ltd., aka Parklane Hotels-Motels Furniture Mfg. Ltd., (referred to as just “Parklane” and “the employer”) has appealed, pursuant to section 112 of the *Employment Standards Act* (“the Act”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 17, 2001. The Determination orders Parklane to pay Sukhdev Singh Birdi \$2,371.19 in wages and interest.

The Determination is that the employer failed to pay vacation and statutory holiday pay and that Birdi has yet to be paid for much of his work. The employer, on appeal, admits that it has yet to pay Birdi for some of his work but it argues that the delegate is wrong on the extent of his work.

At the heart of this case are two competing sets of time cards. Evidence of one set was supplied by the employee and the delegate has preferred that evidence of work over a set of time cards which was supplied by the employer. Parklane appeals that decision in the hope that it will obtain a result which is more favourable to it. I have decided to confirm the Determination. The Appellant fails to show me that the Determination contains an error in fact or law. It is not for me to second guess the delegate but to decide whether her decision is reasonable given the evidence. And from what I can see of matters, the delegate’s decision is entirely reasonable.

An oral hearing has been held in this case. Mr. Birdi required an interpreter and one was supplied.

APPEARANCES:

Sunny Chohan	On behalf of Parklane
Sukhdev Singh Birdi	On his own behalf
Surjit Bahia	Interpreter

ISSUES

At issue is the number of hours worked by the employee. Underlying that issue is one of credibility as two sets of time cards surface in this case.

What I must ultimately decide is whether it is or is not shown that the Determination ought to be varied or cancelled, or a matter referred back to the Director, for reason of an error or errors in fact or law.

FACTS

Parklane is a manufacturer of furniture in British Columbia. Birdi is a carpenter. He was employed by Parklane from October 23, 2000 to January 24, 2001. At that point he quit.

Birdi was not paid in full for his work and that led him to file a claim for wages with the Employment Standards Branch of the Ministry of Skills, Development and Labour. An investigation was begun in July of 2001.

The employer was, on the 18th of July, ordered to produce payroll records for Birdi. None were produced by the deadline for producing the documents.

On August 15, 2001, the delegate made another effort to obtain employment records for the employee. This time she was able to get in touch with Sunny Chohan, Parklane's owner. Mr. Chohan had not been previously available for reason of a badly broken foot and the delegate had only been in contact with the company's foreman, Raymond Beaver.

Chohan, like Beaver, indicated that he could not provide a record of hours worked by the employee. Chohan also said that he did not provide the employee with any wage statements (the sort of wage statement that is required by section 27 of the *Act*). He suggested that one of the company's ex-employees might have Birdi's time cards, a Mr. Cheema. He led the delegate to believe that he would contact Cheema for the records and that led the delegate to give the employer another day or two in which to produce records.

No records were received and nothing was heard from the employer. On August 17, 2001, the delegate issued a Penalty Determination against the employer for a failure to provide records which an employer is required to keep pursuant to section 28 of the *Act*. On August 21, 2001, Chohan called to say that he had found Birdi's time cards.

Parklane does accept that it has yet to pay Birdi for some of his work. It is the amount of wages that is disputed or, more specifically, the number of hours worked. The employer does not provide me with a set of detailed calculations which show the amount earned, amounts paid and the net amount owed, nor does it produce a summary of hours worked. I am not, moreover, shown anything which resembles a proper set of payroll records. All that is produced by the employer is evidence of two cancelled cheques and several sets of time cards, one of which has Birdi's name on it.

In this case there is evidence of two different sets of time cards for the employee. There is the set produced by the employer ("the employer's set of time cards") and the employee has photocopies of another set of time cards ("the employee's set of time cards"). The two sets of time cards differ greatly from one another. Mr. Birdi's name is not in the same handwriting. There are different start and finish times and they differ in terms of days worked. The employer's cards show less work. The employer's set of time cards are dated October,

November, December and January. The employee's set of time cards show only November dates and they are repeated as if the time clock was stuck on the month of November.

While it was not until after the Penalty Determination had been issued that the employer's set of time cards surfaced, the employee produced his set of time cards at the outset of the investigation.

The delegate had the employee write his name out for her five times. She then compared his handwriting to the two sets time cards that had been submitted and she concluded that it matched the writing on the employee's time cards and that it was not at all like that on the employer's time cards. She reports that Birdi writes each letter separately while the employer's time cards reveal "a flowing hand". She reports that Birdi wrote the letter "r" in a way that matches the employee's time cards but not the employer's time cards. There are in her view "numerous other differences" as well.

I have had the employee write his name for me. By my eye, that handwriting matches the handwriting on employee's time cards and it does not resemble the handwriting on the employer's time cards. To my surprise, however, it not making the point before, I find that the employer now agrees that, in fact, it is not Birdi's handwriting that is on its set of time cards. The employer claims that Birdi was unable to write his name in English when he was employed by Parklane and, as such, someone had to write his name for him on his time cards.

As matters are presented to me, there is not a person or persons that step forward to say that they wrote Birdi's name for him on his time cards. And there is not evidence to confirm that the employee could not write his name in English in the period of the employment. The employee claims that there is a bank record to show that he was in fact able to write his name in English when he was employed by Parklane, yet that information is also not before me.

The employer's time cards cover the period October 23, 2000 to January 23, 2001. The employee's time cards show only November dates. Birdi's explanation for this is that the time-clock was broken. During the course of her investigation, the delegate asked Chohan and separately, Beaver, if Parklane ever had problems with its time-clock. Chohan is reported to have said that it was not working for a period but he could not remember when that was. The delegate also reports that Beaver said that the time-clock would at times stick on a month.

On appeal, Parklane claims that the time clock was never broken and as proof of that it produces time cards that are for Beaver and another employee, Sonu Humpal. They, like the employer's cards for Birdi, are dated October, November, December, and January. I have examined the cards and find that they provide no obvious clue as to their authenticity.

The employee has produced a copy of a time card for a person named "Daljeet". All start and finish times on the card are dated November but the delegate was led to believe that it was not until December 24, 2000 that Daljeet came to Canada. The delegate asked Parklane if it was not

impossible that Daljeet worked in November for the employer in that he was not yet in the country. She reports that Parklane did not have any answer for how that could be.

Beaver, Humpal and two other employees, on appeal, all write to deny that anyone named “Daljeet” ever worked at Parklane. Chohan also denies that he employed a Daljeet.

After the Determination was issued, the delegate received a call from a Mr. Bayama, an accountant friend of Chohan, and a meeting was set up on the condition that the employer bring payroll records and timecards for all employees. The delegate reports that on meeting with the employer, she found that it had brought only a few time cards and no payroll records whatsoever. The delegate reports that she told Parklane that it was in the employer’s interest to show that its time cards matched its payroll records. Chohan is said to have said that he would fax the records to her by the next day. Nothing was received but a couple of paystubs for Humpal.

ARGUMENT AND ANALYSIS

It cannot be that there are two sets of time cards for the employee. One set must be false.

The Appellant would have me order recalculation of the Determination on the basis of its time cards. But it has not shown me that the delegate is wrong on the facts or that she has failed to consider some important fact(s), nor has it produced new evidence that proves that its time cards are in fact the employee’s actual time cards. It remains that this case is all about credibility.

The delegate has decided that the employee’s set of time cards are to be preferred over the employer’s set of time cards. It is not for me to second guess that finding of credibility. It is for me to decide in this case only whether that decision is reasonable or not given the facts.

Deciding what is credible can be a very difficult task. There are many factors to consider. The manner of a witness is of some interest (Is the witness clear, forthright and convincing or evasive and uncertain?) but of greater importance are factors like the ability of the witness to recall details; the consistency of what is said; reasonableness of story; the presence or absence of bias, interest or other motive; and capacity to know. As the Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 354, B.C.C.A., has said, the essential task is to decide what is most likely true given the circumstances.

“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

The delegate has decided that it is more likely that the employee's set of time cards are the one true set of time cards, certain facts being clear. One, the employer at first said that it did not have a record of hours worked, then it suggested that an ex-employee might have that sort of record. Two, the employer's set of time cards does not surface until after the Penalty Determination is issued. Three, the employer did not produce a proper set of payroll records and was not providing the employees with wage statements. Four, the employer indicated that the time-clock was broken and would stick on a month and the employer was unable to explain why Daljeet's time card also has November stamped on it. And five, the employee's handwriting matches that which is on the employee's time cards and not the employer's time cards. In my view, that is reason to prefer the employee's set of time cards over those of the employer. Birdi's time card evidence is odd, it being stamped with only November dates as it is. But the delegate had reason to believe that that was because of a sticking time-clock. It is, moreover, unlikely that an employee that wanted to produce a set of false time cards for several months of work would then produce cards that were all stamped with November dates as that would unnecessarily draw suspicion to the records. The employer had given the delegate, on the other hand, really no reason to believe it. It is preposterous to suggest that an ex-employee might have records as is suggested in this case. And the employer had failed to produce records so as to verify its claims.

In presenting matters to me, the employer changes its story and in doing so it offers explanations which may possibly explain why things are as they are. It is now claiming that the time clock was not broken. It is on appeal claiming that the reason that its time cards are not in Birdi's handwriting is that Birdi could not write his name in English during the period of employment. And it is now denied that Daljeet was never employed by Parklane. I see this as nothing but an attempt to tailor evidence. The employer fails to prove any of this.

I will not attach much of any weight to what Chohan and the employees have to say in regard to Daljeet. The employees are open to direct and indirect pressure from their employer.

I can accept that the employer's initial failure to produce records may well be due to Chohan's foot injury but that is all that the Appellant explains to my satisfaction. And the foot injury can only explain why the employer could not produce records prior to the point when he was able to return to work. It does not explain why the employer did not produce payroll records and a record of hours worked on or about if not prior to the 15th of August. It had, after all, been ordered to produce the records.

It remains the case that it is only when a Penalty Determination is issued that the employer's set of time cards was produced and the Appellant does not have a convincing explanation for why that is so. It remains the case that the employer has not produced a proper set of payroll records. It is therefore impossible to square its time cards with payroll records. There is in fact nothing to verify the employer's claims.

The Appellant in this case does not show that the delegate failed to consider some important fact or that she is wrong on the facts. It is not shown the delegate's decision is in some way unreasonable. It is not shown that the Determination ought to be varied or cancelled, or a matter referred back to the Director for reason of any error in fact or law. The Determination is therefore confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated September 17, 2001 be confirmed and to the amount of the Determination is added what further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal