

# An appeal

- by -

# Richard D. Melnychuk Operating as Acer Plants & Gardens (the "Employer")

- 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:** Ib S. Petersen

**FILE No.:** 2000/835 & 2000/836

**DATE OF DECISION:** March 23, 2001



## **DECISION**

#### **SUBMISSIONS:**

Mr. Richard Melnychuck on behalf of the Employer

Ms.Lynne Fanthorpe on behalf of the Director

#### **FACTS AND ANALYSIS**

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against two Determinations of the Director of Employment Standards (the "Director") issued on November 14, 2000 which found that Guy Henney was entitled to \$5,252.12 on account regular wages, vacation pay and compensation for length of service. The Determination, in brief, found that Henney was employed as a horticulturalist by the Employer, who operates landscaping and maintenance business, from the summer of 1981 to June 23, 1999. Henney's hourly rate was \$18.00. The other Determination was also issued on November 14, 2000 and imposed a \$500 penalty on the Employer for failing to produce records (the "Penalty Determination").

Aside from what I already set out, the Determination sets out the following material facts. Melnychuck explained to the delegate that he had become seriously ill in June 1999 and was shutting down the business. He acknowledged that he owed some \$225.81 on account of vacation pay. He also stated that the work for which Henney was engaged was seasonal and that he was "laid off" every year. The Employer was not, however, able to provide the dates to the delegate. Moreover, the Determination states, among other things, that the Employer failed to respond to the delegate's letters and demands for employer records.

The Employer says in its appeal that the Determination is wrong. The Employer acknowledges that it ceased operations in June of 1999. The Employer says that Henney was employed "as per agreement on a weekly basis" and that he worked four days [presumably per week] on a part time basis. The Employer also says that Henney's employment was terminated at the end of each fiscal year with a Record of Employment and T4 and that "therefore there was never any discrepancy that he was lawfully dismissed" (sic.). According to the appeal submission, each "fiscal" year started in March and ended in November "depending on amount of work would be reflected by weather conditions" (sic.). The Employer also says that Henney has kept certain equipment and materials that belong to the Employer and that he will not pay the regular wages and vacation pay owing until this is returned.

The appeal, and subsequent submissions, attach a number of documents, including what appears to be Record of Employments for Henney for 1998 and 1999 (his name is not on the ROEs). The ROE for 1998 appears to indicate that Henney's first and last day worked in that year was March

3 and December 12. The ROE for 1999 appears to indicate that the first and last day worked in that year was February 22 and June 21. Other records, which on first glance, appears to be payroll records for Henney were also attached. There are deletions and changes to these documents.

The delegate's submissions, dated December 22, 2000 and January 18, 2001 states that the ROE and other documents were not provided to her in the course of the investigation. The December 22 submission details her attempts to obtain information from the Employer.

The Employer does not take issue with the delegate's assertions and I accept them.

From the correspondence on file, the following facts may be extracted:

- On April 6, 2000, the delegate contacted Melnychuch. He committed to providing records of Henney's employment. He did not do so.
- On May 17, 2000, the delegate sent a Demand for Employer Records. The Employer did not respond to the demand.
- On August 22, 2000, the delegate sent a letter to the Employer. The letter set out the particulars of the claim: regular wages for two days in June 1999 (\$297.00), vacation pay (\$225.81), travel expenses (\$108.00) and compensation for length of service based on a employment start date of the summer of 1991 (\$4,608.00). The latter was based on \$18.00 per hour and an average of 32 hours per week. The letter stated that the Employer had confirmed that Henney worked for him four days a week. The letter also stated:

"If you disagree that money is owed please forward all records and relevant information by September 15, 2000. Subsequent to that date I will be writing a Determination based on all available information. Failure to participate in the investigation may affect your ability to appeal the Determination."

• On November 14, 2000, the delegate issued the Determinations: one for the wage claim and another for the penalty.

In my view this appeal turns on whether the Employer failed to cooperate with the delegate's investigation such that the Employer is barred from now arguing the merits of the Determination?

Considering all of the circumstances of the instant case, I am of the view that the Employer failed to cooperate with the delegate's investigation. The demand for records was sent to the Employer. The Tribunal will generally not allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the merits of the Determination. There is no reasonable explanation of why the Employer did not cooperate with the investigation. The Employer simply asserts that "[d]ue to extended health problems responses to [the delegate's]



requests were not dealt with quickly." The delegate sought information and documentation with respect to the issues raised in Henney's complaint with Melnychuck between early April and mid September, or about six months. The Determination was not issued until about a month after the expiry of the last deadline given to him. Surely, if there had been a health problem--and there is nothing else but Melnychuck's assertion to that effect--he would have raised it with the delegate. There is nothing in the appeal to suggest that he did. In fact, as stated by the delegate, he committed to providing her with information and documentation already in April 2000. He just did not live up to his commitment. Subsequently a Demand for Employer Record was issued. Again, this was not responded to. Later, again, the delegate provided him with a further opportunity to provide information and documentation. He did not. In my view, Melnychuch had ample opportunity to provide information and documentation to support his case. The issues raised by the Employer-in particular, compensation for length of service--could have been addressed during the investigation. In my view, the Employer refused to participate in the investigation and I will not allow the Employer to raise these issues at this stage. As such, the appeal must fail.

#### **ORDER**

Pursuant to Section 115 of the Act, I order that the Determinations in this matter, dated November 14, 2000, be confirmed together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

### IB S. PETERSEN

Ib S. Petersen Adjudicator Employment Standards Tribunal