

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 -

Number 151 Holdings Ltd.
("Number 151")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr
FILE NO.: 1998/816
DATE OF HEARING: March 31, 1999
DATE OF DECISION: April 9, 1999

DECISION

APPEARANCES

Darren Wayne Jacobs	on behalf of Number 151 Holdings Ltd.
Stuart Ramsay	on behalf of Number 151 Holdings Ltd.
Angela Voldeng	on behalf of Number 151 Holdings Ltd.
Dave Ledinski	on his own behalf
Tim Tennisco	on his own behalf

OVERVIEW

This is an appeal by Number 151 Holdings Ltd. (“Number 151”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated December 7, 1998 issued by a delegate of the Director of Employment Standards (the “Director”). Number 151 alleges that the delegate of the Director erred in the Determination by concluding that additional wages, vacation pay, overtime wages and compensation for length of service were owed in various amounts to Bruce Green (“Green”), Tim Tennisco (“Tennisco”) and Dave Ledinski (“Ledinski”) in the total amount of \$7,863.28 (includes interest).

In addition to the Determination issued against Number 151 Holdings Ltd., the delegate of the Director also issued two Determinations against directors of Number 151 Holdings Ltd., however, those directors’ Determinations are not a part of this appeal.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Does Number 151 owe vacation pay to Green, Tennisco and Ledinski ?
2. Does Number 151 owe wages to Green for reimbursement of “business costs” ?
3. Does Number 151 owe compensation for length of service to Tennisco?
4. Does Number 151 owe wages for overtime work to Ledinski ?

FACTS

GREEN

Green filed a complaint seeking payment for vacation pay and reimbursement of “business costs”.

The following facts are not in dispute with respect to Green:

- Green was employed as a manager;
- Green was paid a monthly salary of \$3,300;
- Green commenced employment on April. 13, 1996;
- Green terminated his employment on June 8, 1996.

Angela Voldeng (“Voldeng”) testified on behalf of Number 151 and stated:

- she was the bookkeeper for Number 151;
- during his period of employment, Green took 2 days off work without loss of pay, for an amount paid to him of \$304.62;
- she calculated Green’s vacation entitlement to be \$252.81;
- as Number 151 had paid Green for 2 days off, she felt that amount (\$304.62) was vacation pay and no further vacation pay was owed;
- the receipts submitted by Green for fuel was for a personal trip he made during his days off and are not business costs;

Green states on his complaint form that:

- he was not paid for vacation pay;
- he normally submitted receipts to Number 151 for reimbursement of business costs and, with the exception of those costs on the last 2 receipts submitted, he received payment for all costs.

TENNISCO

Tennisco filed a complaint seeking payment for vacation pay and compensation for length of service.

The following facts are not in dispute with respect to Tennisco:

- Tennisco was employed as an installer from April 27, 1995 to July 15, 1996;
- Tennisco was initially paid a salary of \$2,000 per month which increased to \$2,250 and finally to \$2,500 from October 1995 until his employment was terminated;
- Tennisco suffered a work related injury on June 11, 1996 and did not return to work until July 10, 1996;
- Tennisco was presented with a notice of layoff upon his return to work, with the layoff to be effective July 15, 1996;
- The Record of Employment (“ROE”) indicated that vacation pay of \$403.83 had been paid on the final pay.

Voldeng testified with respect to Tennisco and stated that:

- all employees would indicate in the daily appointment book when they had either worked overtime or taken a day off;
- she reviewed all of the records available prior to Tennisco's last day of work and provided Tennisco with a copy of her "Summary of Holidays and Days Off Worked";
- those records indicated that Tennisco had accrued a total of 30.5 days for overtime worked and vacation but had only taken 9 days off;
- Tennisco's final pay of \$2,711.43 was calculated as wages \$576.90 and the balance being for overtime and vacation pay accrued but not paid for;
- the daily appointment books are not available and Number 151 does not know what happened to them;
- Number 151 was going to sell the business, therefore letters notifying each employee that July 15 was to be their last day of work were prepared and presented to all employees on July 1 except for Tennisco who was off on a WCB claim;
- she made some attempts to contact Tennisco prior to his return to work on July 10 but was unable to reach him;
- Tennisco was presented with his letter of notification on July 10;
- Number 151 was unable to conclude the sale by July 15 so the employees were offered the opportunity to work until July 31;
- Tennisco did not advise whether he agreed to work to July 31, he just did not come in to work after July 15;
- Number 151 did not issue a new letter to the employees extending the layoff notice to July 31.

LEDINSKI

Ledinski filed a complaint seeking payment for overtime wages and vacation pay.

The following facts are not in dispute with respect to Ledinski:

- Ledinski was employed as a sales person at a salary of \$2,000 per month plus 5% commission on the store profits;
- Ledinski commenced employment on November 10, 1994 and last worked July 13, 1996;
- Ledinski's employment was terminated upon the expiry of the notice period provided by Number 151.

Voldeng testified with respect to Ledinski and stated:

- she was approached by Ledinski about overtime after Ramsay had left;

- upon checking with Ramsay, she was advised that Ledinski had helped during the construction phase and to pay Ledinski 1/2 months salary which was done;
- she reviewed the appointment book and determined that Ledinski had accrued a total of 35 days for overtime and vacation and had taken 18 days off;
- Ledinski's final pay of \$2,472.99 included \$1,204.79 for overtime accrued and not previously paid of taken as days off;

Stuart Ramsay ("Ramsay") testified and stated that:

- during the construction phase only 2 employees were on the payroll, a Martin Funk and himself;
- Ledinski was hired as a "casual" labourer at the minimum wage from the 10th of November 1994 until the store opened;
- Ledinski did work the same hours as Ramsay and Funk and this included some overtime hours;
- Ledinski did not work more than 12 hours on any day and did not work on weekends during the period Nov. 10 - 30.

Darren Wayne Jacobs, Tennisco and Ledinski did not give evidence however, both Tennisco and Ledinski responded to questions of clarification from the panel.

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Number 151.

1. Does Number 151 owe vacation pay to Green, Tennisco and Ledinski ?

The *Act*, in Section 28 sets forth the requirement for an employer to keep certain records with respect to employees. Section 28 states:

Section 28, Payroll records

28. (1) *For each employee, an employer must keep records of the following information:*

(a) the employee's name, date of birth, occupation, telephone number and residential address;

(b) the date employment began;

(c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;

(d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;

(e) the benefits paid to the employee by the employer;

- (f) the employee's gross and net wages for each pay period;*
- (g) each deduction made from the employee's wages and the reason for it;*
- (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;*
- (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;***
- (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.*

(2) Payroll records must

- (a) be in English,*
 - (b) be kept at the employer's principal place of business in British Columbia, and*
 - (c) be retained by the employer for 7 years after the employment terminates.*
- (emphasis added)

There is no dispute that Number 151 did not keep records as required by Section 28 of the *Act* with respect to vacations for Green, Tennisco or Ledinski.

The requirements contained in the *Act* for an employer to grant an employee an annual vacation and to pay for such annual vacation are found in Sections 57 and 58.

In this case, Number 151 argues that the employees had taken a number of days off and, as they were being paid on a salary basis, those days off were paid for and should be properly classed as vacation.

Section 59 of the *Act* states:

Section 59, Other payments or benefits do not affect vacation rights

(1) An employer must not reduce an employee's annual vacation or vacation pay because the employee

- (a) was paid a bonus or sick pay, or***
- (b) was previously given a longer annual vacation than the minimum required under section 57.***

(2) Despite subsection (1) (b), an employer may reduce an employee's annual vacation or vacation pay because at the written request of the employee the employer allowed the employee to take an annual vacation in advance.

(emphasis added)

Tennisco agreed that he gave the delegate of the Director the summary prepared by Voldeng. Tennisco further agreed that he had taken days off with pay on May 2, 3, 4 and 6, 1996. Tennisco was unable to recall if he had taken off any of the other days identified by Voldeng in her summary.

Ledinski finally agreed that the days off shown as taken in the summary prepared by Voldeng are correct except for June 2, 1996 which he is unsure of.

The parties also referred to various written letters from different individuals which support their respective positions. Those letters were however, of little assistance to me as the authors were not available to testify as to the contents.

The documentary evidence (payroll records) did not identify the days off taken by Tennisco and Ledinski as “vacation days” and, in the absence of any agreement that those days off were actually vacation days, I am not prepared to retroactively classify those days off as *vacation* days.

Based on the evidence provided and on the balance of probabilities, I conclude that Number 151 owes vacation pay to Green, Tennisco and Ledinski as calculated by the delegate of the Director.

2. Does Number 151 owe wages to Green for reimbursement of “business costs” ?

With respect to the issue of “business costs” deemed by the delegate of the Director to be owed to Green, Number 151 did not provide any evidence to support their contention that this amount was not owed to Green. The uncontradicted evidence was that Green regularly paid for some business costs of Number 151 (fuel, cell phone) and, except for the last occasion, was reimbursed for these costs by Number 151.

The *Act* provides in Section 21:

Section 21, Deductions

(1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

Based on the evidence provided, I conclude that Number 151 owes \$169.82 to Green for reimbursement of business costs.

3. Does Number 151 owe compensation for length of service to Tennisco?

With respect to the issue of compensation for length of service deemed by the delegate of the Director to be owed to Tennisco, Number 151 concedes that the written notice of termination to be effective July 15, 1996 was presented to Tennisco on July 10, 1996.

The requirements in regard to when notice is given to an employee are found in Section 67 of the *Act* which provides:

Section 67, Rules about notice

(1) A notice given to an employee under this Part has no effect if

(a) the notice period coincides with a period during which the employee is on annual vacation, leave, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons, or

(b) the employment continues after the notice period ends.

(2) Once notice is given to an employee under this Part, the employee's wage rate, or any other condition of employment, must not be altered without the written consent of

(a) the employee, or

(b) a trade union representing the employee.

Pursuant to Section 63 of the *Act*, Tennisco was entitled to 2 weeks notice of termination. Number 151 does not dispute that Tennisco was entitled to 2 weeks notice, in fact, his notice letter was prepared on July 1 but Number 151 was unable to present the notice to Tennisco as he was off work due to a WCB injury. The evidence was that Tennisco received 1 week notice of termination upon his return to work on July 10, 1996.

Number 151 further contend that the written notice provided to Tennisco was verbally amended to extend to July 31, 1996. Number 151 agrees that they did not provide another written notice to Tennisco to confirm that July 31 would be his last day of work.

Based on the evidence provided, I conclude that Tennisco only received 1 weeks notice instead of the 2 weeks to which he was entitled therefore, Tennisco is entitled to 1 weeks pay in lieu of notice as calculated by the delegate of the Director.

4. Does Number 151 owe wages for overtime work to Ledinski ?

Number 151 did not keep records with respect to the overtime hours Ledinski claims he worked in November 1994.

In response to questions from the panel, Ledinski stated that he gave the delegate of the Director the summary prepared by Voldeng. Ledinski further stated that he was paid the amount of \$1,000 for the work performed Nov. 10 - 30, 1994. Ledinski finally stated that while he did initially keep some records in regard to his hours worked, he no longer had them and the information he provided to the delegate of the Director about his hours was verbal and based on his recollection.

Ramsay's evidence was that Ledinski may have worked 12 hours per day but he definitely did not work more than 5 days per week, in fact, Ramsay referred to Ledinski as a "Monday to Friday employee".

There was no evidence provided to support the conclusion reached by the delegate of the Director that Ledinski worked 239 hours between Nov. 10 -30, 1994.

In the absence of any documentary evidence in regard to the hours alleged to have been worked by Ledinski for the period Nov. 10 -30, 1994, based on the evidence provided and on the balance of probabilities, I conclude that Ledinski is entitled to be paid for hours worked in the amount of 12 hours per day, Monday to Friday from Nov. 10 - 30, 1994, a total of 15 days (180 hours).

I have recalculated the wages owing for that period as follows:

wages earned	\$2,509.95
wages paid	<u>\$1,000.00</u>
wages owing	\$1,509.95

This recalculation also affects the vacation pay owing to Ledinski which is now calculated as $(\$55,314.34 + \$1,509.95) \times 4\% = \$2,272.79$.

The appeal by Number 151 is allowed to the extent as outlined above with respect to the overtime wages owing to Ledinski.

Number 151 has not established that the delegate of the Director erred in the remaining portions of the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated December 7, 1998 be confirmed in the amount of **\$483.20** for Green and **\$1,833.48** for Tennisco together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

I further order that the Determination dated December 7, 1998 be varied to be in the amount of **\$3,782.92** for Ledinski together with interest calculated pursuant to Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal