Employment Standards TRIBUNAL

An appeal

- by -

Lansdowne Barber Shops Ltd.
("Lansdowne")

- 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.: 2002/076

DATE OF DECISION: May 7, 2002

DECISION

OVERVIEW

Lansdowne Barber Shops Ltd. ("Lansdowne" and the "employer" for ease of reference) appealed, pursuant to section 112 of the *Employment Standards Act* ("the Act"), two Determinations which were issued on June 25, 2001 by a delegate of the Director of Employment Standards (the "Director"). One of those decisions, the "Corporate Determination", ordered Lansdowne to pay Shahin Hosseini $1,458.30 in wages, interest included. By the second Determination, the "Penalty Determination", Lansdowne was fined $500 for a failure to produce records required by section 28 (a) of the *Employment Standards Regulation* (the "*Regulation*").

In Lansdowne Barber Shops Ltd., BC EST # D664/01, I cancelled the Penalty Determination. In that same decision, I found that the Corporate Determination contained errors which needed to be addressed. I also found that, contrary to what the delegate appeared to believe, there were cash register records to establish whether the employee did in fact work 6 days a week for a period, his claim, and I, for that reason, referred the matter of days worked and wages owed back to the Director for further investigation.

The Director has had another of her delegates review the employer's cash register records. That Delegate, on reviewing the records, found that Mr. Hosseini did in fact work six days a week for a period. The Delegate then recalculated the net amount of minimum wages owed for that period. According to the Delegate, Hosseini is owed another $251.61 over and above the amount awarded by me in Lansdowne.

The report of the Delegate was sent to the parties. The employer responded with a written submission. The submission is such that what remains to be decided can be decided on the basis of the written submissions. The employer makes a valid point regarding the Delegate's calculations, but it is for the most nothing but an attempt to reargue my earlier Decision and to introduce new issues.

ISSUE TO BE DECIDED

Is the employee owed $251.61 in addition to the $221.81 that he is awarded in *Lansdowne*?

The employer seeks to raise new issues that have nothing to do with the decision to refer matters back to the Director. The employer also seeks to reargue issues that were decided by me in *Lansdowne*. I will not allow the employer to raise new issues, nor am I prepared to revisit any of the issues which are addressed by my earlier decision. The employer has had a full opportunity to present its case on all matters but that which is newly decided by the Director. It is only appropriate that I hear the employer on the above noted issue.

FACTS

In the Corporate Determination, Mr. Hosseini is awarded $1,381.64 in wages and vacation pay plus interest. The decision was found to be in error because it was assumed that Hosseini was paid twice monthly when in fact he was paid biweekly. Adjusting for that error reduced the amount of the determination to $808.40 plus interest.

The Delegate had the amount paid for the pay period ending February 6, 1999 wrong. That reduced the amount of the determination by another $55.

The employer claimed on appeal that the employee was overpaid by $149.00 in the pay period ending July 10, 1999 and that the amount was deducted from his next pay cheque (July 24, 1999) but there was not evidence to establish a $149 overpayment.

> "… All that I am shown is a cash register summary for June 28, 1999 on which the employee's identification number ("4") is circled and "5" is written in the margin. That is not proof that there was an overpayment. The employer does not have a record of hours worked. Payroll records are produced but they do not show an overpayment, nor a $149 deduction for the July 24 pay period. I find, moreover, that the employer is just too confused on this point to be believed. On filing the appeal, the overpayment was $69.63 and in the year 2000. Only later does the employer claim that the overpayment is $149 and in 1999."
>
> (*Lansdowne Barber Shops Ltd.*, BC EST # D664/01, page 3)

In *Lansdowne*, it was also found that the delegate's calculations were as if the employee worked two weeks in the pay period ending November 13, 1999 and another two weeks in the pay period ending August 19, 2000 but that the employee in fact had a week off in each of those pay periods. I found that Hosseini was not owed $263.89 for work in the pay period ending November 13, 1999 but no more money at all, and that the employer owed Hosseini $41.82 for his work in the pay period ending August 19, 2000, not $309.52.

Adjusting for the above errors, I found that Hosseini is not owed $1,381.64 plus interest but $221.81 plus interest [$808.40 - 55 - 263.89 - 309.52 + 41.82]. I also realized that, contrary to what the delegate appeared to believe, there was a way to establish whether the employee did work 6 days a week for a period, the employee's claim. The employer's cash register record of sales is by day and by barber.

We now know that the employee did in fact work 6 days a week. It follows that it is not $221.81 in minimum wages that the employee is owed but more than that. The Delegate has calculated the amount which the employee earned for work between July 25, 1999 and January 8, 2000 and found that it is $7,712.41 when one takes into account statutory holiday pay and vacation pay owed for reason of the August 2, 1999 statutory holiday. The amount that the employee was paid for work in that period, vacation pay included, is $7,460.80. On that there is no dispute. It follows that Mr. Hosseini has yet to be paid $251.61 plus interest for work in the period July 25, 1999 to January 8, 2000.

The employer questions the $7,712.41 figure but it does not show me that it is in error. And from what I can see, no error has been made. The Delegate's calculations are straightforward and he has used the computer program which has been developed by the Director as an aid in making detailed weekly wage calculations.

The employer complains that it is wrong for the Delegate to have assumed, as he has, that Hosseini worked an additional 8 hours in the weeks that he worked six days a week. The employer is at this point claiming that it was common for the employee to work a 7 ½ hour workday. I find, however, that it does not provide clear evidence of that and there is not a compelling reason to believe the employer on this point because the current claim of the employer is unlikely to be true. The employer did not keep a daily record of hours worked, it is relying on memory. And the employer has previously demonstrated an inability to remember even that the employee worked six days a week. The position of the employer at

the appeal hearing, and months before that, at the investigative stage, is moreover that the employee worked a five day 36 hour workweek in general, one that included three 8 hour workdays. It is only now that it is known that the employee did in fact work six days a week for a period of several weeks that the employer appears to recall 7 ½ hour workdays. The Delegate's assumption of 8 hour days is entirely reasonable given the employer's earlier recollection of matters. Our memories are less reliable with the passage of time and there is reason to believe that the employer's memory has been clouded by self interest.

The employer claims that the Corporate Determination, as amended by me, awards wages in the same period covered by the Director's new set of calculations.

ANALYSIS

It is not that the employer owes Hosseini $221.81 plus $251.61 plus interest. That would be to order the paying of wages twice. The problem is that the periods covered by the two sets of calculations overlap one another, $251.61 is owed for work between July 25, 1999 and January 8, 2000 and the $221.81 figure also includes wages owed for work between July 25, 1999 and January 8, 2000. The amount which Mr. Hosseini is owed is $251.61 plus the amount of wages owed for work before July 25, 1999 and the amount of wages owed for work after January 8, 2000.

In a submission to the Tribunal dated July 19, 2001, it was the position of the Director that the employee is owed $808.40 (see table on page 2 of the letter). Of that amount, only $139.22 is for work prior to July 25, 1999, part of it is for work between July 25, 1999 and January 8, 2000, and a further $350.84 is for work after January 8, 2000. Correcting for that (removing the amount awarded for work between July 25, 1999 and January 8, 2000 so that there is not a double counting of earnings) leaves a sum of $490.06. From the $490.06 must be subtracted $55, the amount of the above noted error for the pay period ending February 6, 1999. There is also a need to correct for the fact that Hosseini only worked one week in the week ending August 19, 2000. As noted above, he is not owed $309.52 for work in that pay period but only $41.82. That all considered, I find that Hosseini is owed $251.61 plus $167.36 ($490.06 – 55 – 309.52 + 41.82 = $167.36). That is a total of $418.97 and, in addition to that, Mr. Hosseini is entitled to interest pursuant to section 88 of the *Act*.

ORDER

I order, pursuant to section 115 of the *Act*, that the Corporate Determination dated June 25, 2001 be varied. It is not $1,458.30 that the employer owes Shahin Hosseini but $418.97 plus the interest that the employee is owed for reason of section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal