

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Foresil Enterprises Ltd.
("Foresil")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO.: 96/094

DATE OF DECISION: June 28, 1996

DECISION

APPEARANCES

Ron Joschko	For the Appellant
Michael Taylor	For the Director of Employment Standards
John Sylvester	Representing himself

OVERVIEW

This is an appeal by Foresil Enterprises Ltd. ("Foresil"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination by a delegate of the Director of Employment Standards ("the Director") issued January 8, 1996 (CDET #000585) wherein the Director found that the employer had contravened the Act in failing to pay vacation pay, and making unauthorised deductions from wages. The Director ordered that Foresil pay \$362.79 to the Director of Employment Standards.

ISSUE TO BE DECIDED

There are two issues on appeal:

- 1) Whether annual vacation pay is owing. Foresil contends that vacation pay was paid, even though it was not calculated according to the Employment Standard Branch's satisfaction; and
- 2) Whether the Director was correct in his determination that wage deductions were not permitted under the Act. The Employer contends that the deductions were necessary, as the records maintained by the employee were incorrect.

Foresil contends that the determination is unfair, and would have serious consequences for the continued economic viability of his business.

FACTS

Mr. Sylvester had worked as a tree planter for Foresil on a seasonal basis since August 1993. He filed a complaint under the *Employment Standards Act* on October 2, 1995, alleging that he was owed annual vacation pay for the work period February 14, 1995 to

September 15, 1995. He also alleged that unauthorised deductions had been made from his wages to adjust for an 'overcount' of trees planted.

Foresil calculates wages based on an average daily rate. 4% holiday pay is added to that rate, and the total is divided by an average production rate. The resulting rate paid to each employee included holiday pay. Foresil calculates the wages in this manner in order to streamline accounting and bookkeeping procedures, and to deliver the cheques to the employees, who were primarily transient workers, before they left the jobsite.

Foresil is under contract to plant a predetermined number of trees. The obligation of tracking the number of trees planted rests with the crews. At the end of the contract period, if the tree planter's indicated numbers are higher than the contract amount, the 'overage' is prorated by days for each crew member, and deducted from each employee's wages.

ANALYSIS

Mr. Joschko presented no new evidence, nor did he dispute the evidentiary basis on which the Director's delegate made his determination.

After considering the submissions of Mr. Joschko and Mr. Taylor, I confirm the decision of the Director's delegate.

I shall deal with each issue separately.

Vacation pay

The *Act* provides that vacation pay is payable after 5 days of employment. Foresil does not deny that vacation pay should be paid, but contends that it has already been calculated into the per unit rate of pay, and that no extra wages are owing.

Mr. Joschko argued that simply because his accounting practises were set up to make it easier for him to provide payment to the employees in one set amount, rather than separating out the wages separately from the vacation pay, he should not be penalised.

While I have some sympathy for Foresil's attempt to streamline his accounting by providing employees with wages and vacation pay in this way, I am unable to find that the Determination is incorrect. The Branch has prepared guidelines for employers and employees in the silviculture industry to avoid situations such as this from occurring. Although there is no evidence that the appellant had a copy of these guidelines prior to filing the appeal, he was provided with a recent version at the hearing.

The *Act* prevents the inclusion of annual vacation pay as a part of a unit pay scheme, or price per tree or hectare. If it were otherwise, employees would have no method of determining what the basic hourly or per tree rate would be for comparison purposes. In

addition, employees with more seniority entitled to a higher rate of vacation pay would actually be paid less on a per unit basis than more junior employees. In fact, this was the situation in the case of Atlas Travel Service Ltd. v. Director of Employment Standards (B.C.S.C. October 24, 1994). In that case, although the Employer did not comply with the procedural requirements governing the payment and records of the annual vacation pay, they argued that they did pay the required amounts in compliance with the Act. The Court found, at p. 6, that the employer's attempt to include vacation and holiday pay in the employee's commission did not comply with the requirements of the Act.

I deny the appeal in this respect.

Wage setoff for overage

Mr. Joschko stated that employee records indicated that more trees were planted than the company was contracted to plant. As a consequence, at the end of the planting period, the overage in the count was deducted from Mr. Sylvester and other employees. He contended that the determination was unfair, as it would have the effect of putting him out of business.

Section 7 of the *Act* provides that, "except as permitted or required by an enactment, an employer shall not, directly or indirectly, withhold...wages by way of a setoff, counterclaim, assignment or for any other purpose." (my emphasis).

There was no dispute to the finding that Foresil did not have written consent from Mr. Sylvester to deduct wages, and I am unable to find that the Determination was incorrect or in error.

The Determination found that any 'overcounts' were due to inadequate supervision, and represented a business loss which ought to be borne by the Employer, not the employee. Mr. Taylor contended that in any event, making deductions from all crew members without attempting to determine who may have been responsible for the errors had the effect of penalising all workers for the mistakes of one or more.

I am unable to find that the Determination was unfair. I agree that the practise of deducting wages on a pro rata basis is arbitrary and unfair to all employees, and deny the appeal in this respect.

In summary, I am unable to find that Foresil has discharged the burden of establishing that the Determination was in error, and I deny the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that CDET #000585 be confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal

CR:nc