

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 -

Northwest Angling Adventures Ltd.
operating as King Pacific Lodge
("Northwest")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/359

DATE OF DECISION: July 25, 1996

DECISION

OVERVIEW

This is an appeal by Northwest Angling Adventures Ltd. operating King Pacific Lodge (“Northwest”), under Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 002451 which was issued on June 3, 1996 by a delegate of the Director of Employment Standards. Northwest denies that it owes any wages to Ronald Shane Knoke (“Knoke”).

I have reviewed and considered the Determination, Reason Schedule and Calculation Schedule as well as the information provided to the Tribunal by the Director’s delegate.

ISSUE TO BE DECIDED

Does Northwest owe wages to Knoke as set out in the Determination?

FACTS

Knoke was employed by Northwest at King Pacific Lodge from May 5, 1995 until July 2, 1995. Between May 5, 1995 and May 22, 1995 Knoke worked as a labourer at the Lodge. He worked as a fishing guide between May 29, 1995 and July 2, 1995. King Pacific Lodge is located in Barnard Harbour, a remote coastal location, approximately 100 miles south of Prince Rupert, B.C. The Determination shows that Northwest owes Knoke wages in the amount of \$2,356.00 plus interest.

Northwest’s appeal (dated June 24, 1996) states only:

“We feel we have been more than fair toward Shane (Knoke) and owe him nothing more.”

Knoke submitted an appeal to the Tribunal on June 12, 1996 which he withdrew on June 22, 1996. His reason for doing so was that “...The appeal was filed in error.”

Northwest and Knoke were provided with copies of all documents submitted to the Tribunal by the Director’s delegate and were invited to make a written response by July 16, 1996. Neither Northwest nor Knoke made any response.

The Reason Schedule attached to the Determination notes that following facts are not in dispute:

1. Both parties agree on the dates and days of employment.

2. There is agreement that Mr. Knoke worked initially as a labourer and subsequently as a fishing guide. There is no dispute regarding the dates employed in each capacity.
3. For the period of employment as a fishing guide, it is agreed that the rate of pay was \$100.00 per day.

In his complaint to the Employment Standards Branch, Knoke states that his rate of pay was \$100.00 per day. In a letter dated April 19, 1996 he states:

“I worked from May 5 to May 22, 1995 under the understanding I was getting \$100.00 a day, not \$50.00. When Pilly Mezerand phoned me on May 4, 1995 to come to work, she told me I would get paid and did not specify \$50.00 a day as the wage. I was under the understanding I would get paid the same amount as the summer, which is \$100.00 a day.

In a letter dated January 23, 1996 from Serge and Pilly Mezerand (owners/operators of King Pacific Lodge), the employment agreement with Knoke is described as follows:

“we had made a very informal “gentleman’s agreement” that we would have him join us to help out for room and board and a nominal fee that would not exceed \$50.00 per day....”

The Reason Schedule sets out the various findings made by the Director’s delegate. Of particular relevance to this appeal are his findings that:

Based on the balance of probabilities, I find that the agreed rate of pay was \$100.00 per day or \$12.50 per hour based on an 8 hour day. According to the employer’s own evidence it is clear that the above rate of pay applied to the bulk of the complainant’s employment. If the rate of pay for the period worked as a labourer was \$50.00 per day based on 8 hours, the hourly rate of pay would be below minimum wage. In addition, the employer contradicts himself in his correspondence of January 23, 1995 saying the rate of pay was \$50.00 but the complainant was only paid a nominal fee of \$400.00 for 17 days of work.

. . .

Mr. Knoke provided a calendar outlining days worked and acknowledged working between 8-14 hours per day while employed at the Lodge.

Based on the balance of probabilities I find that the complainant worked an average of 10 hours per day throughout his employment including time spent as a labourer and as a fishing guide.

. . .

*I have determined that the complainant is owed outstanding regular and overtime wages. During this period of employment as a fishing guide overtime does not apply pursuant to the exclusion under 34(1)(a) of the **Employment Standards Act Regulations**. No exemption applies to the period of employment as a labourer and I find that overtime was not paid in accordance with Section 40 of the **Employment Standards Act** based on a 10 hour day.*

ANALYSIS

The nub of this appeal is the wages owed, if any, to Knoke for the period of his employment from May 5, 1995 to May 22, 1995 when he worked as a labourer. The Calculation Schedule attached to the Determination shows “Total Wages Earned” for this period to be \$2,900.00 plus 4% vacation pay of \$116.00 for a total of \$3,016.00. This amount is calculated on the basis of Knoke working 10 hours per day for each day between May 5th and May 29th inclusive. However, the wage rate used by the Director’s delegate in the calculation schedule is \$12.50 per hour (\$100.00 per day for 8 hours).

I concur with the Delegate’s findings of fact but I conclude that he erred by using an hourly wage rate of \$12.50 per hour to calculate the wages owed Knoke. Section 1 of the *Act* defines “regular wage” for various kinds of payment methods. If an employee is paid a flat rate (as is the case in this appeal), then “regular wage” means “...the employee’s wages in a pay period divided by the employee’s total hours of working during that pay period.” This statutory definition yields \$10.00 per hour as Knoke’s “regular wage” (\$100/day ÷ 10 hours/day = \$10.00/hour). At \$10.00 per hour, the total wages earned by Knoke for the period May 5 to May 29, 1995 inclusive, amounts to \$2,320.00 plus 4% vacation pay of \$92.80.

In summary, I find that Knoke is owed wages for the period May 5, 1995 to May 29, 1995 as follows:

Total Wages Earned	\$	2,320.00
plus: 4% Vacation Pay	\$	<u>92.80</u>
	\$	2,412.80
less: Wages paid by Employer	\$	400.00
Total Wages	\$	<u><u>2,012.80</u></u>

Owing _____

Interest is payable on this amount in accordance with Section 88 of the *Act*.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination No. CDET 002451 be varied to show the total wages owing to Knoke as \$2,012.80 plus interest in accordance with Section 88 of the *Act*.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:nc