

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 -

Blackburn Developments Ltd. operating as
The Falls Golf and Country Club
("Blackburn")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/010

DATE OF HEARING: May 16, 1997

DATE OF DECISION: May 22, 1997

DECISION

APPEARANCES

Brad Friesen	on behalf of Blackburn Developments Ltd.
Rick Wellsby	on behalf of Blackburn Developments Ltd.
David F. Harris	on his own behalf

OVERVIEW

This is an appeal by Blackburn Developments Ltd. operating as The Falls Golf and Country Club (“Blackburn”), under Section 112 of the *Employment Standards Act* (the “*Act*”), against Determination # CDET 004926 which was issued by a delegate of the Director of Employment Standards (the “Director”) on December 10, 1996.

The Determination found that Blackburn was required to pay \$14,523.88 to David F. Harris (“Harris”) (a former employee) on account of unpaid overtime wages and statutory holiday pay plus interest in accordance with Section 88 of the *Act*.

In its appeal, Blackburn seeks to have the Determination cancelled and argues that Harris was employed as a “manager” and, therefore, was excluded from the hours of work and overtime requirements of the *Act*. Blackburn also challenges the wage rate used by the Director’s delegate in calculating the wages payable to Harris.

A hearing was held on May 16, 1997 at which time evidence was given under oath by Rick Wellsby (President and CEO, Blackburn Developments Ltd.) and by David Harris.

ISSUES TO BE DECIDED

Was Harris employed as a Manager, as defined in the *Employment Standards Regulation*?

Was the correct hourly wage rate used by the Director’s delegate to determine total wages payable to Harris?

FACTS

Harris was employed by Blackburn from April 5, 1995 to January 17, 1996. There is no dispute that his salary was to be \$30,000.00 annually. He was employed to work on the construction, drainage and overseeding of The Falls Golf and Country Club, which is owned and operated by Blackburn.

The Determination shows that the Director's delegate concluded that Harris "...was an employee entitled to overtime rates of pay and Statutory Holiday pay and that the Employer was in contravention of Section 40(1) and Section 40(2) and Section 44 of the *Employment Standards Act*. Using records provided by the complainant, wages are deemed to be owed as set out in the attached schedule.

In the Calculation Schedule which was attached to the Determination, the Director's delegate used a wage rate of \$14.42 per hour to calculate the total amount of wages owing to Harris.

With respect to Harris' hours of work and his managerial status, the following statements appear in the Reasons for Appeal:

Given the seasonal nature of the work involved, both the Employer and the Employee understood that there would be an extended period (2 to 3 months) in which the Employee would be "under-employed" but that there would also be periods of time when the Employee's services would be required for a customary work day period of 8 hours, and other times when more than 8 hours would be required. It was the understanding of both the Employer and the Employee that such was the nature of work for salaried persons;

The Employee had a managerial position in that he was in control (except for being under the supervision of our Superintendent) of drainage, overseeding and construction requirements for the golf course. In that regard, he held a position superior in command to those workers who were subject to his direction;

It was understood as a condition of employment that the Employee, while working for the Employer, would not be obligated to work a certain, set number of hours in any particular work day, week or month; instead, due to the seasonal nature of the work and the fluctuating requirements for work at the golf course throughout the year, that the Employee would only have to work a particular number of hours during the year. That being said, it was also understood that if the Employee was required to work in excess of 8 hours in any particular day, he would do so, as would be the case for any salaried person (salaried persons being expected to work according to the needs of the Company, and not on a "punch the clock" basis).

At the hearing, Brad Friesen confirmed that Blackburn "did not keep time cards" to record the hours worked by Harris. However, he acknowledged that Harris' records of hours worked were "more or less accurate."

Harris' records, which were submitted to the Tribunal, show that he worked a total of 2,140 hours during the period of his employment (April 5, 1995 to January 17, 1996). During that same period he worked for 41 weeks, taking two weeks vacation for the period December 24, 1995 to January 3, 1996. Thus, Harris' records show that his average weekly hours of work was 52.2 hours during his period of employment with Blackburn.

Rick Wellsby is the President and CEO of Blackburn Developments Ltd. Darrell Mercer is the Superintendent, Grounds and Maintenance at The Falls Golf and Country Club. Darrell Mercer recruited David Harris. Harris reported to Mercer throughout his employment. Darrell Mercer did not testify at the hearing and no explanation was offered on behalf of Blackburn to explain that.

Rick Wellsby testified at the hearing that, as CEO, he was responsible for setting salary levels and signing the salary cheques for all employees. Wellsby testified that he or Mercer would give instructions to Harris and that Harris "was responsible for ensuring that the work was done." According to Wellsby, Harris directed the work of about four or five employees and approximately half of this time would be required to show those employees what to do.

Wellsby also testified that he had the ultimate authority to "hire and fire" although he most often upheld Mercer's decisions on such matters and "overruled" Mercer only occasionally. According to Wellsby, Mercer believed that Harris' work would require approximately 50 hours per week. Wellsby also testified that there was no specific discussion between Harris and himself concerning hours of work before Harris commenced employment.

Harris testified that most of his duties entailed physical work such as construction and landscaping which he did by himself while operating a tractor or a "bobcat". He estimated that no more than 20 percent of his time was taken up showing other employees what to do. During the entire period of his employment, Darrell Mercer was the Superintendent and Gerry Casavant was the Assistant Superintendent.

Harris also testified that when he accepted the position (with an annual salary of \$30,000.00), it was on the basis of assurances given to him by Mercer that he would continue to receive his regular monthly salary during the winter months, when he would be expected to work fewer hours than during the summer months. According to Harris' evidence, he complained to Mercer several times about his hours of work and each time he received the same assurances about a reduction in hours during the winter months. However, Harris testified that when he was "laid-off" in mid-January, 1996 he concluded that the assurances given to him by Mercer would not be realized.

ANALYSIS

Was Harris a manager?

Section 1(1) of the *Employment Standards Regulation* (B.C. Reg. 396/95) defines a “manager” as:

- (a) a person whose primary employment duties consist of supervising and directing other employees, or*
- (b) a person employed in an executive capacity.*

In this appeal, Blackburn does not assert that Harris was employed in an executive capacity. Therefore, the issue which I must decide is whether Harris’ **primary** employment duties consisted of supervising and directing other employees.

The evidence establishes that part of Harris’ duties included directing or showing other employees how to do the work assigned to them. However, the evidence does not support a conclusion that supervising and directing other employees was his primary responsibility. Harris’ direct evidence on this point was not challenged by Wellsby’s evidence nor in cross-examination. Harris did not have any responsibility for employing, disciplining or dismissing employees. Harris’ primary employment duties entailed the construction, drainage and overseeding of a new golf course.

For all of these reasons I find that Harris was not a “manager” as defined in the *Regulation*. Therefore, Section 34(1)(f) of the *Regulation* cannot be relied on to exclude Harris from the hours of work and overtime requirements of the *Act*.

What is the correct Hourly Wage Rate?

In the Calculation Schedule which was attached to the Determination a wage rate of \$14.42 per hour was used to calculate the total wages owing to Harris. The evidence does not support a finding that Harris’ hours of work were to be 40 hours per week. There is clear evidence that his hours of work would vary while his monthly salary would remain constant.

In Section 1 of the *Act* “regular wage” is defined, for those employees who are paid an annual salary, as follows:

- (e) If an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee’s normal or average weekly hours of work.*

There is no dispute that Harris was to be paid an annual salary (“yearly wage”) of \$30,000.00. Harris’ records of his hours of work were not disputed by Blackburn and they show that he worked an average of 52.2 hours per week over 41 weeks of work. Thus, Harris’ “regular wage”, for purposes of the *Act*, must be calculated as follows:

$$\$30,000.00 \div (52 \times 52.2) = \$11.05 \text{ per hour}$$

It can be seen from this calculation that the Calculation Schedule uses an incorrect wage rate of \$14.42 per hour.

ORDER

I order, under Section 115 of the *Act*, that Determination No. CDET 004926 be varied such that the total amount payable be calculated using a “regular wage” of \$11.05 per hour with interest calculated according to Section 88 of the *Act*.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC/da