

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 -

North Coast Forest Products Ltd.
and A. B. Lumber Co. Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April D. Katz

FILE No.: 2000/246

DATE OF DECISION: June 9, 2000

DECISION

APPEARANCES

| | |
|-------------------|--|
| For the Employees | No Written Submission |
| For the Employer | Peter Parsons of Farris, Vaughn, Wills and Murphy Barristers and Solicitors by Written Submission |
| For the Director | Theresa Robertson by Written Submissions with Attachments |

OVERVIEW

The Employer, North Coast Forest Products Ltd. (“North Coast”) and A. B. Lumber Co. Ltd. (“A. B.”), are associated corporations pursuant to Section 95 of the *Employment Standards Act* (“Act”). The Employer is appealing a Determination ER #087-670 in which the Employer was found to owe the 15 employees a total of \$103,192.00 for unpaid wages.

On December 2, 1997, during an organizing drive, the IWA filed a complaint with the Director of Employment Standards on behalf of 15 employees. The claim was for unpaid wages

1. for overtime worked and paid at regular time,
2. for statutory holiday benefits, and
3. for vacation pay.

The Employer provided no employment payroll records. The Delegate had to rely on the records provided by the employees.

The Employer’s appeal does not dispute that money is owed but argues that the amounts should be adjusted.

This decision is based on written submissions from the Employer and the Director’s Delegate.

ISSUE TO BE DECIDED

The sole issue to be decided is whether the Employer has met its burden of demonstrating that the Determination contains an error of fact or law.

FACTS

The facts in this claim were very difficult to determine. The Employer was not able to provide the investigator with any payroll records from December 2, 1995 forward.

Throughout the investigation the Employer was invited to submit any relevant pay records which could assist the investigation. The Employer indicated that the records were stolen and could not be provided. The Employer was invited to consult with the Employer’s accountant and the Canada Customs Revenue Agency to reconstruct the records. No information was forthcoming.

The employees provided what they had, which was incomplete. The employees continued to find some remnants of the pay stubs and T4 slips for the investigation throughout the time period. Many workers said they worked together each day but some had records and some did not. The Director's Delegate used the records provided and did not extrapolate any of the evidence available.

Based on the records available the employees worked long hours and were not paid overtime, were not paid for statutory holidays and were not given vacation or payment in lieu of vacation.

As a result of some employees having more records than others, the Determination has irregular entitlements among the employees because the findings were based on the best information available.

The investigation was delayed by a number of factors. There was a difficult organizing drive and first contract negotiations between the IWA and the Employer. The Employer indicated on several occasions that this complaint could be resolved and time was given to allow the settlement negotiations to occur. The settlement efforts were consistently unsuccessful.

THE LAW

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the submissions from the appellant must demonstrate some error in the Determination, either in the facts accepted, or the factual conclusions reached or in the Director's analysis of the applicable law.

Section 112 provides as follows

112 (1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.

EVIDENCE AND ANALYSIS

The Employer's letter in support of this appeal deals separately with the holiday pay assessed, the overtime wage assessment and the vacation pay. I propose to address the grounds of appeal in the order set out in the letter. The letter states that the Employer does not "dispute that some monies are owing pursuant to the filed complaint". The letter continues "the companies say that the quantum of the determination is excessive and specifically, in issue."

The first submission is on Statutory Holiday Pay and states as follows:

"Although the company was unable to produce records, its traditional practice was to invariably pay statutory holiday pay at Christmas time which would include Christmas Day, Boxing Day and New Years

The appellant companies say that the proper quantum of monies owing pursuant to statutory holiday should be adjusted by deleting three statutory holidays for each employee in the applicable period under the *Employment Standards Act*'

The Delegate's response points out that the Employer did not share this recollection during the investigation. She indicates that Boxing Day is not a statutory holiday under the *Act*. If the Employer paid any employees for these holidays it is not supported by any evidence given to her. The pay records provided show employees were paid for hours calculated as worked during the relevant pay periods. There is no indication in any ledger or any pay stub for this period of the year that any employee had been paid these holiday benefits. The Delegate specifically refers to Attachment A, which shows 3 employees end of year earnings in December 1996 and January 1997.

I do not find any new evidence to draw a conclusion that there is an error of fact in the Determination.

The second submission on Overtime Wages states:

“Again, the appellant companies do not deny that there is some liability in this area, however, they are not in agreement with the Officer's assessment.

Firstly, from the evidence adduced, it is clear that some overtime was paid. The Officer's calculations indicate this.”

The Delegate indicates that the Employer was credited with any overtime, which was paid. The calculations of the overtime are provided.

The Employer does not agree with the calculation but the Employer has not provided any evidence of error in fact on which to base an appeal.

The third submission on Vacation Pay states:

“The officer has included vacation pay from 1997 in her assessment when that vacation pay was only due to be paid in 1998. As such, the amount of vacation pay did not become payable within the period specified in Section 80 of the *Employment Standards Act*. The determination should be adjusted for the amount of vacation pay involved”

The Delegate indicates that the Determination calculates and requires payment of vacation pay earned during 1997. Section 80 provides the earliest date for which the employer is liable. The employer continues to be liable to pay vacation pay throughout the employees' period of employment. The amount owing is in calculation in the Determination. The employer is liable for any amount that became payable after December 3, 1995 in this complaint. The holiday pay for 1997 was payable after this date.

There is no suggestion of error of law or fact based on this submission.

The appellants have failed to meet the evidentiary burden on them to support a successful appeal. I find that there is no error in fact or law in the Determination based on the appeal submission.

The appellant asks that the complaint be referred back to the Director for further investigation but does not suggest that any additional evidence is available to assist an investigation. The letter suggests that settlement might be pursued if the matter was referred back. Settlement has been sought before over the last two and a half years without success. In any event, settlement is not precluded at any time.

ORDER

North Coast Forest Products Ltd. and A. B. Lumber Co. Ltd.'s appeal is denied.

Pursuant to section 115 of the *Act*, Determination ER: 087-670 dated March 13, 2000 which requires North Coast Forest Products Ltd. and A. B. Lumber Co. Ltd. to pay the employees \$103,192.00 along with any additional interest due from the date of the Determination is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal