

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 -

Kirkham Silviculture Ltd.
("Kirkham")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Jim Wolfgang
FILE NO.:	96/798
DATE OF HEARING:	June 10, 1997
DATE OF DECISION:	June 27, 1997

DECISION

APPEARANCES

Richard Kirkham Kirkham Silviculture Ltd.
Gary Wright on behalf Randy MacKinnon
Bob Krell on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Kirkham Silviculture Ltd. (“Kirkham”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 017418 which was issued by a delegate of the Director of Employment Standards (the “Director”) on December 16, 1996.

The Determination found Kirkham had contravened Sections 17, 27, 28, and 58 of the *Act*, and was to pay Randy MacKinnon (“MacKinnon”) \$584.84 in wages.

A number of issues relating to how employees were paid, and amounts owing were resolved by the parties with the assistance of the Director’s delegate following the issuing of the Determination.

Kirkham accepted the findings of the Determination except for the award of vacation pay in the amount of \$509.64 which is the basis for this appeal.

A hearing was held on June 10, 1997 at which time I took evidence under oath. MacKinnon was unable to attend the hearing as he was working at a remote job site. Gary Wright (“Wright”) appeared on MacKinnon’s behalf.

This case falls within the Transitional and Consequential Provisions, Section 128(3), of the *Act*.

ISSUE TO BE DECIDED

Is MacKinnon entitled to vacation pay from Kirkham?

FACTS

MacKinnon was employed by Kirkham as a Tree Spacer between December 4, 1994 and March 29, 1995. His rate of compensation varied between hourly, daily, and piece (per hectare) depending on the nature and location of the work. He normally worked with four other co-workers.

Kirkham has a regular crew that seasonally works for him. They were falling behind in meeting the schedule and Kirkham hired MacKinnon and the others to catch up on the contract.

Kirkham claimed all contact and negotiations were with another party, Buchanan, and he was aware the rates quoted were inclusive of vacation pay.

MacKinnon's position was vacation pay had never been discussed. There were a large number of pay related issues with Kirkham that were substantive and his first objective was to get those resolved.

Kirkham claimed his method of payment was a common industry practice and named two other silviculture firms whom he said paid in similar fashion.

Kirkham's method of reporting vacation pay on the statement was to show the gross earnings, then reduce that amount by the vacation pay producing a net pay. He then added the vacation pay back to the net and issued a check for the original gross earnings less deductions.

MacKinnon had worked in the silviculture industry for a number of years and claims the practice is to pay vacation pay on gross earnings. He submitted letters from several silviculture companies confirming that practice.

Kirkham claimed the issue of vacation pay was not raised until October 10, 1996 but that MacKinnon was last employed on March 29, 1995. He insisted MacKinnon was aware of his method of payment and it was not disputed until questioned by the delegate of the Director.

Kirkham claimed he has been in business for 12 years and has always paid vacation pay in this manner without complaint.

ANALYSIS

It was agreed that adjustments of the financial arrangement such as the hourly rate, day rate or price per hectare are made on the job site and are by way of verbal agreement.

This appears to be a common practice in the silviculture industry. However, this practice should not extend to the method of paying vacation pay in violation of the *Act*. Whether the employees agreed with Kirkham's method of calculating vacation pay is not relative. The fact is Kirkham failed to pay vacation pay in accordance with the *Act*. Section 58(1) of the *Act* states:

(1) An employer must pay an employee the following amount of vacation pay:

(a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;

...

(2) Vacation pay must be paid to an employee

(a) at least 7 days before the beginning of the employee's annual vacation, or

(b) on the employee's scheduled pay days, if agreed by the employer and the employee or by collective agreement.

(3) Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.

We have no evidence to support the position that MacKinnon agreed to have vacation pay paid on each scheduled pay day. On the contrary, MacKinnon's evidence was vacation pay had not been discussed. In the absence of agreement, vacation pay should be paid on termination if the employment is for less than one year.

The question of the inclusion of vacation pay in contract or piece work has been dealt with at some length.

As set out in *Foresil Enterprises Ltd.* BC EST #D201/96 at page 3:

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).

Further, the Silviculture Industry Handout from the Employment Standards Branch states at page 2:

Enclosed is a copy the Guide to the Employment Standards Act. I draw your attention to the following:

2. Tree Planters/Spacers/Weeders/Brushers - Are Eligible To Receive Annual Vacation Pay

Annual vacation pay must not be included as part of the unit price per tree or hectare. Annual vacation pay should be paid once the employee terminates, however, the ESA allows for payment of vacation pay on every paycheck, provided the employee agrees and the amount of vacation pay is clearly identified on the pay-stub and separated from normal wages....

Kirkham denies any knowledge of this document. The Handout has been available at least since March 25, 1996 and contractors in the silviculture industry should be aware of its contents.

For the above reasons, I find the Determination should not be amended except for the addition of appropriate interest.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination No. CDET 017418 dated December 16, 1996 be confirmed except for the addition of interest. The matter is referred to the Director to determine the appropriate amount.

James E. Wolfgang
Adjudicator
Employment Standards Tribunal