

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.:	96/800
DATE OF HEARING:	June 10, 1997
DATE OF DECISION:	June 27, 1997
AMENDED DECISION:	August 6, 1997

DECISION

APPEARANCES

Richard Kirkham	Kirkham Silviculture Ltd.
Gary Wright	on behalf of Randy Eugene Kozeletski
Brenda Kozeletski	on behalf of Randy Eugene Kozeletski
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 is to pay Randy Eugene Kozeletski (“Kozeletski”) \$318.16 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 \$258.16 which is the basis for this appeal.

Kozeletski filed an appeal of the Director’s Determination on January 9, 1997. The deadline for the appeal was December 31, 1996. Since the appeal did not comply with the requirements of Section 112(2) of the *Act* it was not considered.

A hearing was held on June 10, 1997 at which time I took evidence under oath. Kozeletski was unable to attend the hearing as he was working at a remote job site. Gary Wright and Brenda Kozeletski appeared on his behalf.

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

ISSUE TO BE DECIDED

Is Kozeletski entitled to vacation pay from Kirkham, and if so, what is the amount?

FACTS

Kozeletski was employed by Kirkham as a Tree Spacer between December 4, 1994 and February 10, 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 Kozeletski 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.

Kozeletski'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.

Kozeletski 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 Kozeletski was last employed on February 10, 1995. He insisted Kozeletski 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 he 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 relevant.

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 Kozeletski agreed to have vacation pay paid on each scheduled pay day. On the contrary, Kozeletski'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 be amended to include vacation pay on Kozeletski's earning between December 4, 1994 and December 18, 1994. During that period he earned \$2588.26 therefore vacation pay in the amount of \$103.53 is to be added to the \$318.16 previously awarded for a total of \$421.69. In addition, the Determination should be amended to include the calculation of the appropriate interest on the amended award.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination No. CDET 017418 dated December 16, 1996 be varied as indicated above. The matter is referred to the Director to determine the appropriate amount.

James E. Wolfgang
Adjudicator
Employment Standards Tribunal