

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 -

Vancouver Alpen Club
(the “Alpen Club”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 98/119

DATE OF HEARING: May 27, 1998

DATE OF DECISION: July 8, 1998

DECISION

APPEARANCES

Art Luebkemann

President of Vancouver Alpen Club

OVERVIEW

The Vancouver Alpen Club, pursuant to section 112 of the *Employment Standards Act* (the “Act”), appeals a Determination of the Director of Employment Standards dated February 5, 1998. The Determination orders the Alpen Club to pay Miodray Budic compensation for length of service and vacation pay.

ISSUES TO BE DECIDED

Only the order to pay vacation pay is appealed. The Alpen Club complains that it will mean that vacation pay is paid twice. And it complains of the investigation.

FACTS

The Alpen Club is a non-profit social club which includes a restaurant. Budic was a chef at the club from January 9, 1996 to May 28, 1996.

The Determination sets the rate of pay at \$2,808 to start and \$3,024 beginning April, and awards \$557.28 in vacation pay (4 percent on earnings of \$13,932). While the president of the Alpen Club in 1996, and its treasurer in that year, both wrote to say that Budic agreed to work for a salary of \$2,600 per month to start, then \$2,800 per month beginning April, 1996, with 8 percent in vacation and holiday pay being paid each month over and above salary; and while it produced pay stubs which are consistent with those amounts; Budic claimed that it was only his salary that he was being paid each month and he denied receiving any pay stub but one attached to the last of his pay cheques. The delegate disregarded statements by two former club officials on the basis that they were written long after Budic was hired. She decided that the employer’s allegations were without clear support. She stated, “A written agreement dated at the time Mr. Budic was hired that annual vacation pay and Statutory Holiday pay were being paid to him on each cheque would have been sufficient evidence to support the employer’s evidence”.

I am shown the cheque writing system used for pay cheques in 1996. It provides for both pay cheque and pay stub, and a record of each. The pay stubs breakdown pay and deductions for each month. Gross pay is shown as the sum of “regular” pay and “vacation”

pay. The latter is 8 percent. Regular pay is salary just as the Alpen Club alleges. What I am shown certainly appears to be above board in all respects. Art Luebkekmann, current President of the Alpen Club, testifies that the pay cheques were prepared by an accountant retained by the club for that purpose and that they were handed out by Ada Alakhverdians, the Alpen Club's former Office Manager. And he tells me that, on pay days, all of the Alpen Club's employees, Budic included, received pay cheques with proper stubs attached.

Luebkekmann complains to me of the investigation. He says that he made a number of telephone calls to the Employment Standards Branch, so that he could respond to the delegate and her letters, and no one returned a single one of his calls.

ANALYSIS

The delegate finds that Budic's monthly pay was salary alone. The decision reflects an absence of proof that there was agreement that salary would be \$2,600 to start and \$2,800 beginning April, or agreement that Budic was to be paid vacation pay on a monthly basis. That section of the Determination which deals with the vacation issue which is before me is largely devoid of comment on the evidence which was before the delegate. There is nothing more than the weighing of the statements by the two former Alpen Club officials.

As matters are presented to me, I find evidence of the employment contract. All of it points to salary and vacation pay being paid just as the Alpen Club portrays. Starting salary was either \$2,600 or \$2,808. A starting salary of \$2,600, some round number like that, is the more likely. The total of \$2,600 and 8 percent of that figure is \$2,808, and \$3,024 is \$2,800 plus 8 percent. The record of pay cheques and pay stubs is professional in appearance and it is entirely consistent with what the employer alleges. It is clear to me that, on hiring Budic, the Alpen Club was under the understanding that salary was \$2,600 to start, \$2,800 from April on, and that vacation pay would be paid on top of that and on a monthly basis. Yet none of the above is conclusive. Budic may still have been hired at \$2,808 per month to start, with salary moving to \$3,024 in April; or just allowed to think that he was hired on that basis in the absence of a clear setting out of salary and vacation pay.

Faced with two competing views on salary, and the Alpen Club convincing me that matters just may be as it claims, I find that there is a need to hear the evidence with respect to how employees of the Alpen Club were paid in 1996. At this point there is only Budic's denial that he received pay cheques with stubs attached on a regular basis. Evidence of whether or not Alakhverdians handed out pay cheques with stubs attached, whether the practice was or was not the same for everyone, and evidence that Budic might have been singled out for special treatment is crucial to establishing who is credible on the vacation pay issue.

Faced with two options in getting at the truth of matters, hearing from Alakhverdians and other employees directly, or referring matters back to the Director, I have decided on the latter course. It is the more efficient, a purpose of the *Act* (section 2 of the *Act*). Of course,

whatever delegate is assigned the task of investigating matters further, he or she will want to make sure that the Alpen Club is allowed to respond as section 77 of the *Act* requires.

I am told the club has failed in all attempts to contact Alakhverdians for the purpose of this appeal but the Director may have greater success. Even if she cannot be reached, there are current employees of the club that were there in 1996. They will no doubt remember whether they received pay cheques with stubs attached.

ORDER

I order, pursuant to section 115 of the *Act*, that the matter of vacation pay which is the subject of the Determination, dated February 5, 1998, and appealed, be referred back to the Director for the purpose of investigating matters as outlined, such further investigation as the Director may consider necessary, and variation of the Determination should that be found to be in order.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal