

An appeal

- by -

Norm McFayden operating NHM Contracting

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2001/97

DATE OF DECISION: May 31, 2001

DECISION

OVERVIEW

This is an appeal filed by Norm McFadyen operating as “NHM Contracting” (“McFadyen”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. McFadyen appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on January 12th, 2001 under file number ER071-597 (the “Determination”) pursuant to which McFadyen was ordered to pay a total sum of \$2,346.84 to two former employees, namely, Sam Lyons (“Lyons”) and Ellen Nunn (“Nunn”), on account of unpaid wages and interest. Lyons was awarded \$1,944.45; Nunn was awarded \$402.39.

Further, by way of the Determination, the Director also assessed a \$0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

In a letter dated May 7th, 2001 the parties were advised by the Tribunal that this appeal would be adjudicated based on the parties’ written submissions and that an oral hearing would not be held (see section 107 of the *Act*). I have before me written submissions from the Director’s delegate and a joint submission from the two respondent employees. Mr. McFadyen did not file any submission with the Tribunal other than the 2-page submission (plus some ancillary documents) appended to his original notice of appeal.

ISSUES ON APPEAL

McFadyen’s reasons for appealing the Determination are set out in a 2-page letter addressed to the Tribunal dated January 31st, 2001 and appended to his appeal form. As previously noted, this letter represents the *only* submission filed by McFadyen in support of his appeal. For the most part, McFadyen’s January 31st letter simply reiterates facts and circumstances that are either not contentious or not particularly relevant.

So far as I can gather, McFadyen appeals the Determination based on the following grounds:

- Statutory holiday pay for the Labour Day holiday ought not to have been awarded to either Lyons or Nunn since neither worked on Labour Day because the park was closed due to a freak snowstorm;
- Nunn took 10 days’ paid vacation to attend the B.C. Summer Games and this paid time off was not properly accounted for in the Determination; and
- Lyons may not have been working full-time throughout July and August, 2000.

I should add that none of these assertions is corroborated in any way by documentary or other evidence (such as *bona fide* payroll records).

FACTS AND ANALYSIS

According to the information set out in the Determination (which has not been contradicted), McFadyen contracts with the British Columbia Parks Service to manage certain B.C. provincial parks. In turn, McFadyen hired Lyons and Nunn to operate the Charlie Lake Provincial Park for which they were paid a monthly salary and gas allowance. As I understand the situation, McFadyen ran into cash-flow difficulties and was unable to pay Lyons and Nunn all of the monies to which they were entitled under their contract and under the *Act*.

Although the material before me is quite sparse, I shall endeavour to address each issue raised by McFadyen's appeal.

First, with respect to the Labour Day holiday, the delegate's uncontradicted evidence is that the B.C. Park in question was *not* closed on Labour Day (although it was closed on September 1st and 2nd due to a snowstorm). This position was confirmed by Lyons and Nunn in their February 21st, 2001 submission to the Tribunal. Further, as is evidenced by the "campground attendance sheet" (Appendix 1 to the Determination), Charlie Lake Provincial Park was open for business on both Labour Day and the preceding day during which time 7 "camping parties" overnighted at the park.

Second, vacation pay is a statutory entitlement and there is no evidence before me--nor was there, apparently, any such evidence before the delegate--that either Ms. Nunn or Mr. Lyons was ever paid 4% vacation pay as required by the *Act*. I might add, in addition, that there no evidence before me that Ms. Nunn took 10 paid vacation days as was asserted by McFadyen.

Finally, the third ground of appeal is wholly unsupported by any evidence and is denied by Mr. Lyons. McFadyen has not discharged his burden of proof on this, or indeed any other, issue.

ORDER

It would appear that the appellant's name was misspelled in the Determination (spelled "McFayden" instead of "McFadyen") and thus, pursuant to section 115 of the *Act*, I order that the Determination be varied accordingly.

In all other respects, I order that the Determination be confirmed as issued in the amount of **\$2,346.84** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

In light of the foregoing, it follows that the \$0 monetary penalty levied by way of the Determination is similarly confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal