

An appeal

- by -

Canadian Lawn Care Services Ltd.
("CLC")

- 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: Lorne D. Collingwood

FILE No.: 2002/171

DATE OF HEARING: June 12, 2002

DATE OF DECISION: July 15, 2002

DECISION

OVERVIEW

Canadian Lawn Care Services Ltd. (I will use “CLC” and “the Appellant” for ease of reference.) has appealed, pursuant to section 112 of the *Employment Standards Act* (“the *Act*”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 5, 2002. By that Determination, CLC is ordered to pay Wayne Kozak, Dan Lenihan, Darren Macklin, and Ian Backus wages, \$10,701.53 in total, interest and vacation pay included.

The Determination orders the payment of overtime and statutory holiday pay. In appealing that decision, CLC accepts that it has to pay overtime pay to each of the above employees. It claims, however, that statutory holiday pay has been paid in full in the case of Kozak, Macklin and Backus (Lenihan has not been awarded statutory holiday pay) and it claims that the delegate has made a number of errors in calculating the amount that Kozak, Lenihan and Macklin are owed. I have concluded that the employer’s own records show a failure to pay statutory holiday pay and that I should not upset the decision to award statutory holiday pay. That said, I have found that the Determination should be varied for reason of calculation errors.

An oral hearing was conducted in this case.

APPEARANCES:

Athena MacInnis	On behalf of CLC
Wayne Kozak	On his own behalf
Dan Lenihan	On his own behalf
Darren Macklin	On his own behalf
Ian Backus	On his own behalf

ISSUES

The Appellant raised a number of issues in filing written submissions but it chose to drop all but three issues at the appeal hearing. Of the three, only two have a bearing on the Determination. They are as follows:

1. Are there or are there not records to show that Kozak, Macklin and Backus have been paid the statutory holiday pay to which they are entitled? According to the Appellant, its records show that statutory holiday pay has been paid in full.
2. It is argued in the case of Kozak, Macklin and Lenihan that the delegate’s calculations are in error.

The Appellant raised a third issue. It sought to argue that the employees had some sort of ulterior motive in filing their complaints. On hearing from the employer on this matter, I ruled that I would not hear

further from the employer on the matter of motive as it is not in any way important to the Determination and the appeal.

Mr. Lenihan, at the appeal hearing, indicated that he wanted the Tribunal to review the delegate's decision that he was not owed statutory holiday pay. He was advised that I would not do so because he did not appeal the Determination and the employer's appeal does not raise the issue, at least directly.

What I must ultimately decide is whether it is or is not shown by the Appellant that the Determination ought to be cancelled or varied or a matter(s) referred back to the Director for reason of an error or errors in fact or law.

FACTS

The employer has in this case produced payroll records. Those records appear to be a daily record of work.

Both Kozak and Lenihan kept a record of work. The payroll records differ from the employees' work records.

The delegate has decided that both Kozak's record of work and that kept by Lenihan are credible. The delegate has reached the conclusion that the employer's records may have been altered so as to limit their liability under the *Act*.

The Appellant, in written submissions, argues that its payroll records are credible and that it is unreasonable to believe in the accuracy of the employees' records. But the Appellant's representative, during the course of the appeal hearing, indicated that she had decided to concentrate only on the calculations and the issue of statutory holiday pay, and she said that she had decided that the employer would accept a Determination based on the employees' records, they not being, in her view, vastly different than the employer's records. There is, therefore, nothing that I must decide in respect to the delegate's choice of records.

The delegate has relied on the employer's payroll records to some extent. There is simply nothing else on which to rely. The employer's original set of work records have been destroyed. Neither Backus, nor Macklin, kept a record of their work. Kozak's record is for only the latter part of his employment.

As noted above, the matter of whether statutory holiday pay has or has not been paid is a major issue in this case. The employer claims to have paid all of the statutory holiday pay that the employees are due. All four of the employees say that they were not paid statutory holiday pay. The Determination is that there is reason to believe that the employer did pay a certain amount of statutory holiday pay but there is not evidence to show that it was paid in a majority of the holidays which are of interest. I find that as well.

There are not pay slips to indicate the payment of statutory holiday pay (even though that is what section 27 of the *Act* requires). The delegate had only the employer's payroll records on which to rely. They have been altered.

Athena MacInnis is the person charged with keeping up the employer's payroll records. It is her testimony that employees were given each and every statutory holiday off. Ms. MacInnis has told me that

it was her habit to mark statutory holidays with an “8” and that the 8 signifies the payment of one day’s pay. She also tells me that, in discussing matters with the delegate, she realised that it would be better to mark statutory holidays with the letters “ST” and that she went back and altered her year 2001 records replacing 8’s with ST.

I find, contrary to what is argued by the employer and claimed by MacInnis, that the employer’s payroll records do not show that the employer has been paying statutory holiday pay as the *Act* requires. It is clear and obvious from the employer’s own records that Kozak was not paid any statutory holiday pay in the case of the December 25, 1999; January 1, 2000; May 20, 2000; September 4, 2000 (wrongly listed in the Determination as September 2); November 11, 2000 and December 25, 2000 holidays.

According to the employer’s payroll records, Kozak was paid for 8 hours in the case of only three statutory holidays, the October 11, 1999; November 11, 1999 and October 16, 2000 holidays. Yet even in the case of these three holidays, it is unclear that the employee was paid statutory holiday pay. That is because Kozak was paid for only 7 hours in the case of the April 21, 2000 statutory holiday and 6 hours in the case of the August 7, 2000 holiday. It is unlikely that those two entries mark the payment of statutory holiday pay. The likely explanation for the entries is that they refer to hours worked. And that brings into question days marked with an 8 and ST (where there was once an 8). One can only guess in the case of those holidays whether the employer paid statutory holiday pay or paid for 8 hours of actual work. It was common for the employees to work an 8 hour day.

The Calculations

The employer draws an error to my attention. The delegate has Macklin working 45.5 hours of overtime in the pay period ending August 25, 2001. He did not in fact work any overtime in that pay period. Macklin had 45.5 hours of overtime in his ‘overtime bank’ and he was at that point paid \$591.78 for those hours of overtime plus another \$529.75 in regular wages.

Macklin is entitled to be paid for the 45.5 hours of overtime. But, as the delegate goes about the calculations, he is paid twice. Macklin is awarded overtime wages as overtime is worked in June, July and the pay period ending August 11, 2001 (a total of 48.5 hours). Yet she then awards overtime wages for a second time in the case of 45.5 hours of that overtime (calculations for the August 25, 2001 pay period). The amount of the error is \$295.75 plus vacation pay and interest.

The employer, in Lenihan’s case, claims that the delegate is wrong on the amount of wages paid. The Determination is that Lenihan earned \$14,918.25 for his work in 2001 (not disputed by the employer on appeal) and that he was paid \$12,525.00 (see wage calculation summary). I have examined the employer’s payroll records, that is, the set of hand-written records which were turned over to the delegate, and I find that Lenihan in those records is paid \$12,525.

The employer, on appeal, seeks to introduce a second set of records, computer records which are said to show that Lenihan was paid \$13,757 in wages. They show payments of \$33 in May, \$48 in June and \$1,136 in August which the hand-written records do not. Beyond that, the computer record has Lenihan being paid \$975 on July 4, 2001 (and there is a corresponding cheque stub) whereas the hand-written record has him earning a total of \$960 in gross wages in that period. [$\$12,525 + 33 = 48 + 1,136 + 975 - 960 = \$13,757$]. It is clear that this is information which could have been submitted to the delegate but was not.

The employer claims that the delegate has added apples and oranges in calculating the amount earned by Kozak. There does appear to be something wrong with the delegate's calculations. The delegate calculates an "amount earned" by adding the employee's 2001 earnings and the amount earned for 5 weeks of work in the year 2000. (See detailed calculations.) In calculating the amount owed, the delegate then subtracts \$14,253.49, what is said to be the amount paid. It is not anywhere shown what this last figure represents, not in the Determination, nor by way of an appeal submission. As matters are presented to me, I am led to believe that the delegate may have failed, in calculating the amount paid, to consider the amount that has been paid for the work performed in 2000 (the 5 weeks). I say that because Kozak's T4 for the year 2001 is for \$14,629.84.

The employer alleges that, in Kozak's case, statutory holiday pay is double counted. It is not. The second page of her detailed calculations covers holidays falling in 1999, 2000 and the January 1, 2001 holiday. Beyond that statutory holiday pay is awarded for Good Friday in 2001 and Canada Day in 2001. There is no double-counting.

ANALYSIS

The Appellant falls well short of showing that it should not be made to pay statutory holiday pay as set out in the Determination. Its records are such that there is no way to determine whether the employer has paid statutory holiday pay in the case of some statutory holidays. In a great many instances it is clear from the employer's own records that statutory holiday pay was not paid. And in two further instances I have found that the employer probably failed to pay statutory holiday pay.

The delegate has accepted that a certain amount of statutory holiday pay was paid to the employees but she orders the payment of statutory holiday pay where it is unclear that the employer has paid statutory holiday pay as the *Act* requires. I can see no reason to disturb her decision.

The employer has shown me that the Determination contains at least one error which is in need of attention. There may be two. But the delegate cannot be faulted for concluding that Lenihan was paid \$12,525 for his work. It is the employer that provided the delegate with payroll records which show the payment of that amount.

The employer is now seeking to introduce new evidence in Lenihan's case. I will not accept this new information.

Through decisions of the Tribunal, notably *Tri-West Tractor Ltd.* (BCEST No. D268/96), the Tribunal has set forth a principle which is that an employer will not normally be allowed to raise issues or present evidence which could have been raised or presented at the investigative stage.

"... This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process. ..."

Decisions like *Tri-West* preserve the fairness and integrity of the *Act's* decision-making process. They greatly reduce the chance of anyone being blindsided on appeal. And if it were not for such decisions, the role of the Director would be seriously impaired and the appeal process would become unmanageable and eventually fall into disrepute.

The Tribunal has not set an absolute bar to the production of new evidence on appeal. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer. But there are not any in this case. It is, as I see it, for reason of sloppy record keeping and a failure of the employer to apply itself to the task at hand, not simple oversight, that the employer did not act to produce its computer records at the investigative stage. I do not believe, moreover, that there is any reason to prefer the computer records over those submitted to the delegate. It is unclear to me, moreover, that accepting the new evidence would lead to a more appropriate remedy. It may well be that Lenihan is owed additional statutory holiday pay or wages. There is really no way to know in this case, the employer failing to keep proper records.

The above considered, I find that the following:

Backus

The appeal is that Mr. Backus was paid all of the statutory holiday pay to which he is entitled and that he is therefore owed something less than the \$523.09 that he is awarded in the Determination. The employer has failed to show me that Backus is owed a lesser amount of statutory holiday pay. The Determination is confirmed in respect to Backus and I am ordering the addition of whatever further interest may have accrued pursuant to section 88 of the *Act*.

Macklin

The employer has failed to show me that Mr. Macklin is owed a lesser amount of statutory holiday pay. I am shown an error in calculating overtime wages. I am satisfied that the Determination should be amended so as to correct for that error. It is not \$1,679.37 plus vacation pay and interest that Macklin is owed but \$1,383.62 [\$1,679.37 minus 295.75]. To that must be added 4 percent vacation pay (\$55.34) and interest. Macklin is entitled to \$1,438.96 plus interest pursuant to section 88 of the *Act*.

Lenihan

Mr. Lenihan is awarded \$2,424.23 in the Determination. The Determination is based on evidence which was submitted to the delegate by the employer.

The employer has on appeal sought to have the Tribunal consider new evidence but I have decided that I should not accept that evidence for a number of reasons, the fact that it could have, indeed, should have been submitted at the investigative stage included. The Determination in respect to Lenihan is therefore confirmed and I am ordering the addition of whatever further interest may have accrued pursuant to section 88 of the *Act*.

Kozak

In the Determination, Mr. Kozak is awarded \$5,782.21 plus interest. The appeal, in part, is that the employee was paid all of the statutory holiday pay to which he is entitled. The employer has failed to

show me that Kozak is owed a lesser amount of statutory holiday pay. That part of the Determination is confirmed.

The Appellant has led me to believe that the delegate's calculations may be in error. The matter of the calculations is referred back to the Director for an explanation of the calculations and, should it be found that the calculations are in error, recalculation of the decision.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination be confirmed in respect to the decision to award Mr. Backus \$523.09 and to that amount I add whatever further interest has accrued pursuant to section 88 of the *Act*.

I order, pursuant to section 115 of the *Act*, that the Determination be varied in respect to the decision to award moneys to Mr. Macklin. It is not \$1,679.37 plus vacation pay and interest that he is owed but \$1,438.96 plus interest pursuant to section 88 of the *Act*.

I order, pursuant to section 115 of the *Act*, that the Determination be confirmed in respect to the decision to award Mr. Lenihan \$2,424.23 and to that amount I add whatever further interest has accrued pursuant to section 88 of the *Act*.

I order, pursuant to section 115 of the *Act*, that the Determination in respect to the decision to award Mr. Kozak \$5,782.21 plus interest be referred back to the Director so that the decision can be explained and, if necessary, recalculated.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal