

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of two appeals pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Side-Winder Contracting Ltd.
("Side-Winder")

and

Edward Simney Munro
("Munro")

- of two Determinations issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/205

DATE OF HEARING: July 3rd, 1997

DATE OF DECISION: August 4th, 1997

DECISION

APPEARANCES

Jim Errington and
Lori Errington for Side-Winder Contracting Ltd.

Edward S. Munro on his own behalf

No appearance for the Director of Employment Standards

OVERVIEW

I have before me two appeals brought pursuant to section 112 of the *Employment Standards Act* (the “Act”). Side-Winder Contracting Ltd. (“Side-Winder” or the “employer”) is appealing a Determination issued by the Director of Employment Standards (the “Director”) on March 19th, 1997 under file number 31573. For ease of reference, I shall refer to this Determination as the “Side-Winder Determination”.

Edward S. Munro (“Munro”) is appealing a Determination, also issued on March 19th, 1997 under file number 31573. I shall refer to this Determination as the “Munro Determination”.

The two Determinations relate to a complaint filed by Munro against Side-Winder and concern the following matters: overtime pay, statutory holiday pay, vacation pay, compensation for length of service, and unauthorized payroll deductions.

The Director determined that Side-Winder owed Munro the sum of \$6,371.42, inclusive of interest to March 18th, 1997. Munro succeeded, at least in part, on all of his claims except for the overtime claim. Munro appeals the Director’s dismissal of his overtime claim.

Side-Winder, by way of its appeal, says that it had just cause to terminate Munro, and thus is not liable for any compensation for length of service, and also says that it does not owe Munro any of the other monies set out in the “Side-Winder Determination”.

The two appeals were heard together at Whistler, B.C. on July 3rd, 1997. I heard evidence and submissions from Munro, on his own behalf, and from Jim and Lori Errington (Side-Winder’s only two officers, directors and shareholders), Grant Hendrickson, James Beattie and Doug Bronson, on behalf of Side-Winder. The Director of Employment Standards was not represented at the appeal hearing.

FACTS

Side-Winder is a towing/booming contractor in the logging industry. It usually has employees located at three or four separate logging camps around the province, primarily on the B.C. Coast and Vancouver Island. Side-Winder typically hires employees to work during a designated seven to eight month (or less) "logging season" although many employees have worked for the company, on a seasonal basis, for a number of years. Munro's association with Side-Winder commenced in 1994 and ended in September 1995.

Munro was initially employed by Side-Winder from August to November 1994 when he was laid off due to a "shortage of work" (according to the Record of Employment issued in November 1994). He was rehired in February 1995 and was subsequently terminated, allegedly for cause, in September 1995.

ISSUES TO BE DECIDED

As noted above, there are a number of disputed claims: overtime, statutory holiday pay, unauthorized payroll deductions, vacation pay, and compensation for length of service. I propose to deal with each of these claims in turn.

ANALYSIS AND FINDINGS

Overtime Pay

Munro claims that he worked a number of overtime hours during the period August 1994 to September 1995. Munro's evidence is that he "never worked less than 8 hours in a day". The primary evidence presented in support of the overtime claim, other than a self-prepared log, was a report prepared by Side-Winder and submitted to the Workers' Compensation Board which stated that Munro worked a 10-hour day.

The employer called three witnesses, all of whom had worked, at various times, with Munro and all testified that Munro did not work, in some cases, even 8 hours per day, let alone significant overtime hours. Further, Munro's handwritten log of his overtime hours is not consistent with an earlier record of overtime hours that he submitted to the employer. I also find it curious that Munro did not raise the issue of overtime hours, including overtime hours allegedly worked in 1994, until October 1995. This latter point is particularly telling in light of the fact that Munro was laid off in November 1994 (and a Record of Employment was issued), yet he never suggested, at that time, that his Record of Employment was inaccurate due to the failure to include overtime hours.

On balance, and for many of the same reasons that were set out in the Determination, I am not persuaded that the Director erred in refusing to award Munro any compensation for overtime hours.

Statutory Holiday Pay

In the "Side-Winder Determination" Munro was awarded statutory holiday pay for four holidays. The employer alleges that, in fact, Munro was paid for three of the four days and produced payroll

records supporting its position. At the appeal hearing, the parties agreed that the Determination was in error on this particular issue and that the Determination ought to be varied accordingly.

Unauthorized Deductions

The deductions in question include telephone charges and repayment of loans made by Side-Winder and two other parties to Munro. Section 21(1) of the *Act* provides that “an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee’s wages for any purpose” unless otherwise authorized by the *Act* or some other provincial or federal enactment. Certain written assignments may be deducted under section 22 of the *Act*, however, none of those particular permissible deductions apply here and, in any event, the employer concedes that it had no *written* authority from Munro to deduct the monies in question.

In light of the foregoing, the employer’s appeal on this aspect of the Side-Winder Determination must be dismissed. If the employer is of the view that it has a valid monetary claim against Munro, such a claim must proceed as would any other civil action. The employer, in this case, was not permitted to engage in a form of “self-help” by unilaterally attaching Munro’s wages.

Compensation for length of service

Munro was awarded two weeks’ wages as compensation for length of service. Side-Winder says that it terminated Munro for just cause and, accordingly, is not obliged to pay any compensation for length of service [see s. 63(3)(c) of the *Act*].

However, in my view, in light of section 65(1)(c) of the *Act* I need not make a decision as to whether or not Side-Winder had just cause to terminate. As was the case in 1994, Munro was hired in 1995 to work through the logging season. For the sort of boom work that Side-Winder is engaged in, the logging season typically ends when winter arrives. As stated by the employer in its Reasons for Appeal “All of our employees eventually get laid off for the winter”. This latter point is not in issue between the parties.

Munro’s employment was terminated in September 1995 but, in any event, his employment would have ended (as it did in 1994), at most, a few months later. Given that Munro was hired in February 1995, I am satisfied that he was not entitled to any compensation for length of service by reason of section 65(1)(c) of the *Act*--Munro was an employee “employed for specific work to be completed in a period of up to 12 months”.

Vacation Pay

The employer claims that Munro’s pay, based on a daily rate of \$250, included an amount reflecting 6% vacation pay. Mr. Errington testified that Munro was clearly told, at the outset of his employment, that the daily rate included vacation pay. Mr. Errington testified that rather than paying vacation pay as a lump sum when the employee is laid off each year [see section 58(3) of the *Act*], the company practice has always been to pay vacation pay on a regular basis as it accrues. Three Side-Winder employees corroborated Mr. Errington’s testimony and agreed that he had told them, at the outset of their employment, that their wages included an allowance for vacation pay.

The two Records of Employment issued to Munro in 1994 and 1995 both contain, under box 17A ("Vacation Pay"), the typed notation "P.O.E.C." which Lori Errington testified was an abbreviation for "paid on each cheque". Munro did not file any claim for outstanding vacation pay following his layoff in 1994.

Munro testified that he did not understand what "P.O.E.C." meant and that he was never specifically told by Mr. Errington that his daily rate included vacation pay. I do not find Munro's evidence to be credible on this point. First, I would have thought that if he felt he was owed vacation pay following his layoff in 1994 he would have filed some sort of claim at that time, or, at least, bring the matter to the employer's attention. Second, if he did not understand what "P.O.E.C." meant, I would have expected him to query the matter. Third, Mr. Errington's evidence to the effect that all employees, including Munro, were specifically told that their pay included vacation pay is corroborated by both the *viva voce* and documentary evidence of other employees. Fourth, I note that Munro's complaint form, filed with the Employment Standards Branch on September 25th, 1995, contains no claim for vacation pay, although there is a clearly obvious box denoted "Annual Vacation Pay" which could have been checked off by Munro (as were the boxes for overtime, holiday pay, unauthorized deductions) had he truly believed he had a valid and subsisting claim for unpaid vacation pay.

Section 58(2)(b) of the *Act* authorizes the payment of vacation pay "on the employee's scheduled pay days, if agreed by the employer and the employee". In my view, the parties had such an agreement in this case and, therefore, Munro was not entitled to an award on account of unpaid vacation pay.

Summary

On the basis of the foregoing analysis, Munro is entitled to the following:

| | |
|--|-----------------|
| Overtime: | \$NIL |
| Statutory Holiday Pay: \$250 x 1.06 (reflecting 6% vacation pay) | \$265.00 |
| Unauthorized Deductions: | \$408.26 |
| Compensation for Length of Service: | \$NIL |
| Vacation Pay (other than as noted above): | <u>\$NIL</u> |
| Total = | <u>\$673.26</u> |

ORDER

Pursuant to section 115 of the *Act*, I order that the two Determinations issued in this matter, both dated March 19th, 1997 and filed under number 31573, be varied to reflect a total amount due from Side-Winder to Munro of **\$673.26** together with a further amount on account of interest which is to be calculated by the Director in accordance with section 88 of the *Act*.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal