

Appeals

- by -

Dundarave Wine Cellar Ltd. (“Dundarave”)

- and -

Martyn Turner (“Turner”)

- 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.: 2003A/238

DATE OF DECISION: November 12, 2003

DECISION

SUBMISSIONS

Martyn Turner	on behalf of himself
Alan Phillips	on behalf of the Director of Employment Standards

OVERVIEW

Dundarave Wine Cellar Ltd. (“Dundarave” or “the employer” in this decision) appealed a Determination issued on January 28, 2003 by a delegate of the Director of Employment Standards (the “Director”). The Determination ordered Dundarave to pay Martyn Turner \$5,123.94 in wages, interest included.

Mr. Turner (“the employee”) appealed that same Determination.

I held an oral hearing on the two appeals on April 29, 2003 and *Dundarave Wine Cellar Ltd. and Martyn Turner*, BCEST Decision No. D191/03 (“*Dundarave*”) was subsequently issued. In that decision I decided that there is not evidence to support a conclusion that Mr. Turner was a manager: He was not employed in an executive capacity and his primary employment duties were not to supervise and direct employees. Beyond that I found that the Determination contained errors and that the Determination should be referred back to the Director so that matters could be reinvestigated and the Determination recalculated.

The Director has now reported back to the Tribunal. The Determination has been amended. It is now the view of the Director that Mr. Turner is entitled to \$4,851.70, interest included.

Dundarave and Turner were given an opportunity to make written submissions on the Determination as amended. Mr. Turner took advantage of the opportunity. Dundarave did not.

Mr. Turner suggests that there might be problems with the Director’s method of calculating wages but no problem is demonstrated to me. Mr. Turner goes on to claim that he is entitled to statutory holiday pay for working Good Friday and Victoria Day in the year 2000. I, in this decision, find that Mr. Turner is not entitled to be paid for Good Friday as claimed but that he is entitled to be paid overtime for his work on the Victoria Day and a day off with pay as provided by section 46 of the *Employment Standards Act* (“the *Act*”).

ISSUES

Does Mr. Turner identify some further reason to vary the Determination or refer a matter or matters back to the Director?

SUBMISSIONS

Dundarave and Turner were given an opportunity to make written submissions on the delegate's report to the Tribunal. Mr. Turner took advantage of the opportunity. Dundarave did not.

Mr. Turner's submission was forwarded to Dundarave and the Director for a response. Dundarave did not respond. The Director had "no comment".

Mr. Turner in his submission vaguely suggests that there are problems with the Director's method of calculating wages but my reading of his submission is that he does not want the Tribunal to do anything about this because it makes almost no difference to the Determination.

Mr. Turner also claims statutory holiday pay. The Determination as amended is that he is not entitled to statutory holiday pay for Good Friday and Victoria Day in the year 2000. Mr. Turner claims that he is entitled to be paid for both of those days as out in the *Act*. He claims that the employer agrees that his employment did not begin on the 28th of March in the year 2000 but at least one week if not two weeks before that date.

FACTS AND ANALYSIS

In *Dundarave*, I found that the Determination did not calculate earnings from the date that the employment began, it did not account for work in the week of November 5, 2000 and it misstated the number of hours worked on the January 29, 2001; February 12, 2001; February 27, 2001; March 9, 2001; March 31, 2001 and June 16, 2001. I had this to say on that,

"an error in law has been shown in this case. There are grounds to vary the Determination. And as the Determination must be recalculated, it failing to account for lunch breaks as it does, I am satisfied that it is only fair that the Director should correct for all of the errors which have been identified in this decision, minor and major, those in favour of the employer as well as those in favour of the employee."

The Determination was referred back to the Director.

The Director, by letter dated August 27, 2003, has reported back to the Tribunal. It is now the view of the Director that Mr. Turner is entitled to \$4,851.70, interest included.

Mr. Turner takes issue with the Determination as amended. He vaguely suggests that there are problems with the Director's calculations. He suggests no action. And I can see no reason to take any action. As matters have been presented to me, I have not been given any reason to believe that there is a problem with the Director's calculations. Absent proof that the Director's calculations contain an error, the Tribunal will just accept her calculations.

Turning to the matter of statutory holiday pay, I note that Turner was given a day off in the case of the Good Friday which is in question and that he worked the Victoria Day which is in question.

The matter of whether Turner is or is not entitled to such statutory holiday pay is governed by the *Act* as it stood before it was amended on November 30, 2002.

The matter of whether Mr. Turner is or is not entitled to statutory holiday pay depends first on the matter of whether he was or was not employed for 30 calendar days prior to the holiday.

- 44** After 30 calendar days of employment, an employer must either
- (a) give an employee a day off with pay on each statutory holiday, or
 - (b) comply with section 46.

Good Friday in the year 2000 fell on the 21st of April. The question is, Did he start working for Dundarave on or before the 22nd of March, 2000? If so, the Good Friday holiday fell after 30 days of employment.

There is no record of Turner's work prior to March 28, 2000. At my hearing on April 29, 2003, so far as the employer and the employee were able to recall, Mr. Turner began work "on or about the middle of March" (see Facts, page 3, *Dundarave*) but neither could recall the exact day that Turner began work. For all I know it was the 23rd of March. And even if it is, as Turner claims, that the employer subsequently agreed that he started work "at least one week" before the 28th of March if not two weeks, it should not be inferred from that vague use of the term "week" that Turner started work on or before the 22nd. That would be to put too fine a point on things.

There being an absence of proof that the employee started work on or before March 22, 2000, I can see no reason to award statutory holiday pay for the Good Friday in question.

Victoria Day in the year 2000 was on the 22nd of May. Turner had been employed for 30 days by that point. That is clear.

Turner was not given the day off in the case of the Victoria Day in question. The record of hours worked shows 6.5 hours of work on that day. Section 46 of the *Act* requires that he be paid one and one-half his regular wage for all work on that day and that he also receive a day off with pay.

- 46** (1) An employee who works on a statutory holiday must be paid for that day
- (a) 1 1/2 times the employee's regular wage for the time worked up to 11 hours, and
 - (b) double the employee's regular wage for any time worked over 11 hours.
- (2) In addition, the employer must give the employee a working day off with pay according to section 45.

The Determination, even as amended, is inconsistent with the *Act*. Even as amended, the Determination must be varied so that Turner is paid as required by sections 46 (1)(a) and 46 (2) of the *Act*.

I leave it to the Director to make the calculations.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated January 28, 2003 and subsequently amended by letter dated August 27, 2003, be varied. Dunderave Wine Cellar Ltd. is ordered to pay Martyn Turner \$4,851.70 plus all wages due for reason of the fact that he worked 6.5 hours on Victoria Day in the year 2000 and was not given a day off and whatever further interest he is owed pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal