

**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 -

Skylite Building Maintenance Ltd.  
("Skylite")

- of Determinations issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NOS.:** 1999/291

**DATE OF HEARING:** August 18, 1999

**DATE OF DECISION:** August 30, 1999

## DECISION

### APPEARANCES

Mike Singh	Manager of Skylite
Har Sarup Shukla	Complainant
Prem Kumari	Complainant
Harish Shukla	Speaking for the employees

### OVERVIEW

Skylite Building Maintenance Ltd. (“Skylite”, also, “the employer”) appeals a Determination by a delegate of the Director of Employment Standards dated April 20, 1999. The appeal is pursuant to section 112 of the *Employment Standards Act* (the “Act”).

The Determination orders the payment of vacation pay and compensation for length of service, with interest over and above that, to Har Sarup Shukla; his wife, Prem Kumari; and his son, Harish Shukla. The delegate found that Skylite gave Har Shukla notice of termination but that it allowed him to work past the day on which termination was to occur and so the notice is without effect. The employer suggested that it had just cause for the termination but the delegate found no evidence of that. No reason was given for the termination of either Prem Kumari or Harish Shukla.

Skylight, on appeal, claims that the employees have been paid all of their vacation pay. It claims that length of service compensation is not owed Har Shukla either for reason of just cause or because the employee received written notice of termination as is required by the *Act*.

### ISSUES TO BE DECIDED

At issue is the matter of whether vacation pay was or was not paid to the employees.

At issue is the matter of whether or not the employer must pay compensation for length of service to Har Shukla.

The employer objects to the Determination in that so many months passed before the Determination was issued.

### FACTS

Skylite provides janitorial services. Har Shukla began work as one of Skylite's janitors on November 4, 1992. In 1994, his wife started working for the company as well. Har Shukla's son started to work for Skylite in 1995. Those three members of the Shukla family worked together as a team cleaning ICBC facilities on a six day a week basis.

Har Shukla in all of his years of employment never once complained of not being paid his vacation pay. Neither of the other two employees complained of that while employed.

The employer failed to keep proper payroll records. There is neither a record of hours worked, nor a record of earnings showing what was paid in the way of vacation pay. The employer did issue pay stubs and those that I am shown indicate that pay consisted of salary alone. Skylite alleges that the pay stubs were issued in error but it fails to provide any evidence in support of that.

It is said that Har Shukla was twice served with written notice of termination but he was not. The second notice of termination is said to be its letter dated February 23, 1996. It is notice that the employee was being on that very day fired, not notice of termination on some future date. It is simply not the notice which is required by the *Act* for the purpose of discharging the liability to pay compensation for length of service.

It is alleged that Har Shukla was at some point violent. I am not shown that he was. I am not presented with any evidence of that at all.

Har Shukla filed a complaint pursuant to the *Employment Standards Act* on the 22<sup>nd</sup> of March, 1996 (the "Complaint"). A delegate was assigned the file and, by August of that year, the delegate had been to investigate the Complaint. At some point the decision was made to add to the Complaint in that it was clear that Prem Kumari and Harish Shukla had also been terminated. The Complaint was further complicated by a claim for wages and the fact that the employer had not kept what is required in the way of records by section 28 of the *Employment Standards Act*. Nonetheless, the delegate issued a preliminary set of conclusions on April 22, 1997, by letter of that date. In that letter, the parties are invited to respond to the delegate's letter. The file, for some unexplained reason, was then passed to another officer. It is that second officer that wrote the Determination.

## ANALYSIS

What I must decide is whether the appellant has or has not met the burden for persuading the Tribunal that the Determination ought to be varied or cancelled for reason of what is either an error in fact or in law.

Skylite does not suggest that the delegate has incorrectly applied the *Act*. It is concerned with the delegate's findings of fact. But it fails to submit clear evidence of an error by the delegate, indeed, anything that even remotely resembles what is reason to vary or cancel a Determination. This appeal is frivolous and not in good faith. The employer fails to challenge any of the delegate's conclusions in any important way. I am satisfied that it is

an appeal which may be dismissed pursuant to section 114 (1) (c) of the *Act*. That section of the *Act* is as follows :

**114** (1) *The tribunal may dismiss an appeal without a hearing of any kind if satisfied after examining the request that*

*(a) the appeal has not been requested within the time limit in section 112 (2),*

*(b) the appeal is not within the tribunal's jurisdiction, or*

*(c) the appeal is **frivolous, vexatious or trivial or is not brought in good faith.*** (my emphasis)

The employer claims to have paid vacation pay but fails to provide clear evidence of that. On the other hand, there is the fact of the employer's pay stubs. They indicate that none was paid. And they show that on the basis of the pay stubs that the employees had every reason to believe that they were being paid salary alone. Skylite claims some error but it presents no proof of any mistake to me.

The employees did not complain about a lack of vacation pay. But what of it. It does not necessarily follow that, absent any complaint, it must be that vacation pay was paid. There are many reasons why employees do not complain about their pay. To name only two: Harish Shukla and Prem Kumari, as recent immigrants to Canada, and speaking almost no English, may not have understood that they are entitled to vacation pay by law; or it may be that the employees feared for their jobs.

The lack of any record showing the payment of vacation pay is, I believe, likely to indicate that none was paid. But employers must be able to show that they have met the obligation to pay the minimum amount of vacation pay which is required by the *Act*, 4 percent of earnings in this case. Skylite is clearly unable to do that. I am satisfied that the order to pay vacation pay is fully consistent with the *Act*.

Skylite claims, in regard to the employment of Har Shukla, that its liability to pay compensation for length of service is discharged for reason of just cause and written notice of termination. I have not been shown evidence which supports a conclusion that the man was violent at all. And I have found that he was not served with a second written notice of termination but told that he was on that very day being terminated. I agree with the delegate. Har Shukla is owed compensation for length of service.

The order to pay length of service compensation to Prem Kumari and Harish Shukla is not argued by Skylite. I am satisfied that Skylite decided that it would simply terminate their employment along with that of Har Shukla. It is not shown that either were issued written notice of termination. I am given no reason to cancel the order that they be paid compensation for length of service.

The employer complains of the length of time taken by delegates to issue the Determination. Clearly, the delegates took their time in handling this case. There is no question of that.

But I am prepared to accept that it is for good reason: That it is for reason of the added complaints, the fact that the employees were claiming unpaid wages, the fact that the employer did not keep records required by the *Act*, the change in delegates, and that the latter was required. The long period of gestation will also reflect budgetary constraints and the heavy caseload of the delegates. It is not shown to me that it is purely the fault of the Director or her delegates, that there has been a fumbling of the ball in this case. But even if that were evident, I would not dismiss the Determination. It is not a criminal matter which is before me, nor any other matter where the time taken to have matters decided is of critical importance. And it is inconceivable to me, that an employee would lose the entitlements and protections of the *Act*, just because a delegate or the Director is slow in acting on a Complaint.

**ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated April 20, 1999 by confirmed.

Skylite Building Maintenance Ltd. is ordered to pay Har Sarup Shukla \$2,449.17 in compensation for length of service, vacation pay and interest, and to that I order the payment of whatever further interest has accrued pursuant to section 88 of the *Act*.

Skylite Building Maintenance Ltd. is ordered to pay Prem Kumari \$2,005.20 in compensation for length of service, vacation pay and interest, and to that I order the payment of whatever further interest has accrued pursuant to section 88 of the *Act*.

Skylite Building Maintenance Ltd. is ordered to pay Harish Shukla \$428.19 in compensation for length of service, vacation pay and interest, and to that I order the payment of whatever further interest has accrued pursuant to section 88 of the *Act*.

---

**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**