

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-

Laguna Woodcraft (CANADA) Ltd.
(the “Appellant”)

-of a Determination issued by-

The Director of Employment Standards
(the “Director”)

ADJUDICATOR:	E. Casey McCabe
FILE NO.:	96/743
DATE OF HEARING:	April 11 & 28, 1997
DATE OF DECISION:	September 5, 1997

DECISION

APPEARANCES

Mr. Al Keylock	for Laguna Woodcraft
Mr. H.S. Rana	for Laguna Woodcraft
Mr. H.S. Dhanoa	for P.S. Saprai
Mr. P.S. Saprai	for himself

OVERVIEW

This is an appeal by Laguna Woodcraft (CANADA) Ltd. (“Laguna”) of a Determination dated December 5, 1996 in the amount of \$8755.84 made in favour of the Respondent, Mr. Saprai, and an appeal of a Determination dated November 8, 1996 in the amount of \$500.00 pursuant to Sections 28 and 46 of the *Employment Standards Regulation* and Section 98 of the *Employment Standards Act* (the “Act”) for failure to supply payroll records when demanded.

ISSUES TO BE DECIDED

Is the complainant owed wages for overtime pay pursuant to Section 40 of the *Act*?

Is the complainant owed wages for statutory holiday pay pursuant to Section 44 of the *Act*?

Is the complainant owed wages for vacation pay pursuant to Section 58 of the *Act*?

Is the complainant owed wages for March 23, 25, 26 and 27, 1996 pursuant to Section 18 of the *Act*?

Is the complainant owed wages as compensation for length of service pursuant to Section 63 of the *Act*?

Is the complainant entitled to a wage rate of \$10.00 per hour rather than the \$8.00 per hour which was paid?

Should the employer be relieved of its obligation to pay the \$500.00 fine pursuant to Section 48 of the *Act*?

FACTS

Mr. Harkashan Singh Rana testified for the employer. Mr. Rana is the president of the company and has been associated with the company for 15 years. The company produces various wood products. The employee complement has ranged from thirty-five to one hundred and ten and was approximately ninety-five employees at the time of the hearing. The respondent, Mr. Palwinder Singh Saprai, worked primarily in the shipping department as a laborer/truck driver. Mr. Saprai's duties included work in the plant and delivery of finished product.

Mr. Rana testified that the employer's payroll is done by computer using the Acc Pac program. The employer has used this method of accounting for approximately the last ten years. Employees are paid bi-weekly according to times entered on individual time cards. A punch clock is used to record time. Each employee is responsible for totaling his/her hours and submitting the card to the foreman for checking and his signature. The hours on the time card as a result of this procedure are the hours used for payroll purposes. Mr. Rana testified that when he hands over the pay cheques he brings the time cards with him and the cheques are checked against the time cards. Once an employee is satisfied with his pay a tear is made in the side of the time card and given back to the worker.

Mr. Rana testified that the employees do not receive pay stubs with their pay cheques. He testified that the employer stopped giving pay stubs because it became too chaotic as the employees would compare pay cheques and hours worked. The last pay stubs given out were for the pay period of July 10, 1993. Mr. Rana agreed that for the period of time relevant to the claim by Mr. Saprai that Mr. Saprai was not receiving pay stubs showing his gross pay, vacation pay, and statutory deductions. The employer also testified that the required 4% vacation pay is included in the gross pay on each cheque. The employees are allowed 15 minutes at the end of the work day on each pay day to total their time cards and check their pay against the time cards that have already been processed. Mr. Rana further testified that the computer records are only kept for one year. That is, the computer program holds in its memory the payroll records for the past twelve months and drops the oldest month each time the payroll is completed for the most recent or newest month.

ANALYSIS

Firstly I will deal with the Appeal of Determination dated November 8, 1996 requiring the employer to pay a \$500.00 penalty for failing to respond to the demand for documents made by the Director's Delegate. The file information indicates that Mr. Rana was contacted by the Director's Delegate on October 8, 1996 and informed of the nature of the complaint filed by Mr. Saprai. Mr. Rana disputed the claim and advised the investigating officer he would send copies of payroll records indicating that Mr. Saprai had been paid in full. By October 18, 1996 no records had been received at the Employment Standards Branch and a formal Demand For Payroll Records was sent to the employer by certified mail. The demand required that copies of the relevant payroll records be delivered to the Surrey office of the Employment Standards Branch by not later than 11:00 a.m. on November 4, 1996.

The employer failed to comply with this demand and a penalty of \$500.00 was imposed pursuant to Section 28 of the Regulations on November 8, 1996.

In early January, 1997 Mr. Rana contacted the Director's Delegate and informed him that he would be forwarding the relevant information. Mr. Rana also retained Mr. Keylock who forwarded submissions including payroll records on January 31, 1997 and March 20, 1997. The submissions contained computerized payroll records showing gross pay, U.I. (E.I.), C.P.P. and income tax deductions but not net pay. Further, cancelled cheques for February 29, 1996; March 15, 1996; March 22, 1996 and April 16, 1996 were forwarded. The payroll records submitted commenced with the pay period of July 1, 1995 through to the pay period of April 5, 1996. The relevant period of Mr. Saprui's claim is the two years prior to March 27, 1996. The fact that the employer could only provide limited payroll records going back to July of 1995 is consistent with the testimony that the records are not maintained.

I am not able to sustain the employer's appeal of the \$500.00 penalty issued in the Determination of November 8, 1996. Section 28 of the *Act* requires an employer to keep records for each employee of certain specified information. Section 28(2) of the *Act* reads:

Payroll records must:

- (a) be in English,
- (b) be kept at the employer's principle place of business in British Columbia,
- and
- (c) be retained by the employer for 7 years after the employment terminates.

I find that the employer has violated Section 28 of the *Act* and I further find that the employer has violated Section 46 of the *Act* by failing to produce the required records under Section 85(1)(g) which reads:

- 85(1)(g) require a person to produce, or to deliver to a place specified by the Director, any records for inspection under paragraph (c).

Secondly, the records that the employer seeks to produce are being produced for the purposes of the appeal and after the Determination assessing the penalty was issued. The Tribunal has set a policy regarding the introduction of new evidence at the appeal stage which limits an appellant's ability to introduce evidence that was available but not produced during the investigative stage. In view of the facts before me in this appeal I find it appropriate to apply that policy. (*Kaiser Stables Ltd.* BC EST #D058/97)

Thirdly, the records sought to be introduced by the employer are incomplete in the sense that the records do not include any particularization of the hours worked each day, the rate of pay, the overtime hours or the net pay. That is significant because Mr. Rana, in his testimony, acknowledged that the employer only paid overtime on hours in excess of 80 in any pay period. That is, an employee may work more than 8 hours in a day but unless the total hours worked for the pay period exceeded 80 the employee would receive no overtime premium for the hours worked.

I turn now to the merits of the appeal. The employer alleges that it had paid Mr. Saprai all monies that Mr. Saprai was owed at his termination. Specifically, the employer states that no overtime pay is payable, that all statutory holidays were paid, that the 4% vacation pay was added into the gross on each cheque, that Mr. Saprai was paid his wages for the last four days of his employment, that Mr. Saprai quit his employment, that no compensation for length of service is payable and that at no point was Mr. Saprai's wage rate \$10.00 as opposed to the \$8.00 per hour that was paid.

Termination

I will deal with the events surrounding Mr. Saprai's termination. At approximately coffee break on the morning of March 27, 1996 Mr. Bassi, a foreman, approached Mr. Saprai about some broken glass and a damaged drawer. He asked Mr. Saprai to stop work and to discuss the damage. Mr. Saprai took exception to the manner in which he was approached by Mr. Bassi and told Mr. Bassi that he would continue to work. Mr. Bassi took exception to this attitude and alleged that Mr. Saprai had caused the damage. The discussion escalated to the point where it became a scuffle. Employees had to intervene to restrain Mr. Saprai who had picked up a hammer and Mr. Bassi who was holding a tea cup in his hand.

There is a conflict in the evidence regarding the confrontation between Mr. Saprai and Mr. Bassi particularly concerning the hammer. One Mr. Kenghura testified on behalf of Mr. Saprai and a Mr. Parmar testified on behalf of the employer. I prefer the evidence of the employer on this matter and find that Mr. Saprai did pick up the hammer. However, I am not prepared to find that he attempted to strike Mr. Bassi. I am satisfied that this is the point where the other employees intervened. Mr. Rana had heard the commotion from his office and came down to the shop floor.

Mr. Rana asked Mr. Saprai into his office. A lengthy discussion ensued in which Mr. Rana asked Mr. Saprai to apologize to Mr. Bassi. Mr. Saprai would not do so. Mr. Rana testified that Mr. Saprai offered to apologize to Mr. Rana but not to Mr. Bassi. Mr. Saprai denies offering an apology to Mr. Rana. Regardless, Mr. Rana sent Mr. Saprai home telling him that he would have until the weekend to apologize to Mr. Bassi. Bear in mind that this discussion occurred on Wednesday morning. I find that sending Mr. Saprai home for the remainder of that day plus Thursday and Friday was a disciplinary suspension. Furthermore, Mr. Rana made it clear to Mr. Saprai that he could return to work on Monday morning if he apologized to Mr. Bassi.

Mr. Saprαι claims that he is entitled to compensation for length of service because his termination was due to the fact that Mr. Bassi would not let him return to work on Monday morning. I do not accept that position. Mr. Saprαι made no effort to return to work on Monday morning, but rather, in his evidence, stated that he thought there was no point in returning because, since he hadn't apologized, Mr. Bassi wouldn't allow him to punch his card. I view the issue as whether Mr. Saprαι quit his employment. Mr. Rana had made it clear to Mr. Saprαι that he could return to work on Monday morning if he apologized to Mr. Bassi. Mr. Saprαι is a proud man. Mr. Saprαι feels that he did not owe Mr. Bassi an apology. Mr. Saprαι had no intention of apologizing to Mr. Bassi. Furthermore, Mr. Saprαι did not report to work the following Monday. I find that the subjective and objective elements of a quit are established. Mr. Saprαι is not entitled to compensation for length of service pursuant to Section 63 of the *Act*.

Wages for March 23, 25, 26 and 27, 1996

A second issue flowing from the termination is whether Mr. Saprαι was paid for the 23 hours he worked between March 23 and March 27, 1996. I find that he was paid for those days. I base this finding on the cancelled cheque that was submitted in evidence. I do not consider this cancelled cheque as part of the payroll records which Board policy would preclude me from considering. Rather I view the cancelled cheque as evidence of payment. Failure to consider this evidence would result in a miscarriage of justice. I therefore exercise my discretion and consider the cancelled payroll cheque as proof that Mr. Saprαι was paid for the aforementioned dates. The employer did not breach Section 18 of the *Act*.

Statutory holiday pay, vacation pay and overtime

I turn now to the claims for statutory holiday pay, vacation pay and overtime. As stated earlier the employer did not retain the hourly time cards marked by the employees and checked by the foreman. The employer states that those cards were used to provide the data for the computer program. However, the payroll records that were generated do not contain a break down of hours and days worked. The records simply show gross pay for the bi-weekly pay period with statutory deductions. Mr. Saprαι testified that he used the same time cards to mark his personal calendars. Those calendars were tendered as evidence both at the investigation stage and at the hearing. The calendars show the days worked, the hours worked and up to March, 1995 the time worked by Mr. Saprαι. Setting aside the Tribunal's policy as enunciated in *Kaiser Stables Ltd.*, supra, the employer's payroll records simply lack the necessary detail to support its position. Mr. Saprαι's calendars become the best evidence and that is the evidence that the Director's Delegate used to make his Determination. I am not prepared to disturb the Determination except for the following points:

1. Mr. Saprai has marked and apparently asked that the days of December 25 and 26, 1995 and January 1, 1996 be regarded as overtime days. I do not accept that contention. Rather, I accept the employer's evidence that the factory was closed on those days and view those days as part of the statutory holiday claim.
2. Mr. Rana testified that overtime was paid for hours worked in excess of 80 in any bi-weekly period. Mr. Saprai admitted that on April 24, 1994 he worked only 8 ½ hours, on March 15, 1995 he worked only 7 hours and that January 21, 1996 should show 11 and ½ hours worked. The Determination should be adjusted accordingly.
3. The employer asserts that it has paid vacation pay on each cheque. Mr. Saprai has no time entries in his calendar for January, 1994 although he was employed during this period because he states he was on vacation. The relevant period of the claim, that is March 1994 through March 1996, does not show any periods of vacation. I reluctantly find that the employer has not made out that vacation pay is included on every cheque and therefore the claim for vacation pay stands.
4. I have found for Mr. Saprai on the above three headings. It is difficult to accept the employer's position when it is the employer who has breached the *Act* by failing to keep required payroll records. I appreciate that the employer uses a standard accounting program but do not understand why the employer would return time cards without retaining copies nor providing itemized pay stubs with each bi-weekly cheque.

Wage Rate

Mr. Saprai claims a wage rate of \$10.00 per hour. This claim is based upon a letter written June 28, 1994 on the employer's letterhead which was signed by Mr. Rana. It was addressed to "To whom it may concern" (sic). The letter stated:

"Mr. Pulwinder Saprai has been working in this plant since September 1991. His wages are \$10.50 per hour. It is a steady job.

Thank you.

Yours Truly"

The letter was written for the purpose of identifying Mr. Saprai as a regular employee in order to assist him in an application for a mortgage. The wage rate was misrepresented. Mr. Saprai did not earn \$10.50 per hour at that time or during the relevant time of his wage claims. His wage rate was \$8.00 per hour without objection until the filing of the complaint. I confirm the finding of the Director's

delegate that the applicable wage rate for calculations under the Determination dated December 5, 1996 and this appeal is \$8.00 per hour.

For the above reasons I remit the Determination back to the Director's Delegate for re-calculation. In summary the re-calculation is to include an amount for unpaid overtime, statutory holiday pay and vacation pay. Calculations will not include an amount for compensation for length of service nor for pay for the period of March 23 to 27, 1996. Calculations shall be at a wage rate of \$8.00 per hour. Finally, I confirm the Director's Determination of November 8, 1996 for the \$500.00 penalty.

ORDER

I vary the Determination of the Director dated December 5, 1996 as noted above.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal