

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 -

Cottonwood Golf Inc.
("Cottonwood")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Michelle Alman

FILE No.: 2000/516

DATE OF DECISION: October 18, 2000

DECISION

OVERVIEW

This decision addresses an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Cottonwood Golf Inc. (“Cottonwood”) from a Determination issued June 30, 2000 by a delegate of the Director of Employment Standards (“the Director”). In the Determination, the Director’s delegate concluded that Cottonwood owed its former employee, Tom Schneider (“Schneider”), overtime wages, statutory holiday pay, and vacation pay. Cottonwood’s principal, Ted Kaese (“Kaese”), and Cottonwood’s Superintendent, Brett Lamontagne (“Lamontagne”), made extensive submissions to the effect that Schneider, as an Assistant Superintendent, was a manager at Cottonwood and therefore not entitled to overtime or statutory holiday pay, pursuant to s. 34(1)(f) of the *Employment Standards Regulation* (“the Regulation”).

Cottonwood specifically alleges in its appeal that the Director’s delegate concluded Schneider was not a manager based on errors of fact, witness bias, and bias by the Director’s delegate in favour of Schneider. Cottonwood also alleges that the wrong end date for Schneider’s employment in 1999 was used in the wage calculations, and that there were mathematical errors in the Determination’s calculations of Schneider’s hourly wage and the total amount found owing. Finally, Cottonwood appeals from the Determination due to an error in the first name used for Kaese in the Determination’s “cc” line, and because it alleges that the failure to give any address for Schneider in the Determination amounts to legally insufficient identification of a party.

The parties made written submissions in the appeal. Cottonwood did not reply to the submissions of Schneider or the Director’s delegate.

ISSUES

The issues to be decided are whether Schneider was a manager, and if not, whether the Director’s delegate erred in her calculation of the amount of overtime wages and statutory holiday pay owing by Cottonwood to Schneider.

THE FACTS AND ANALYSIS

Cottonwood is a golf course located in Cassidy, B.C., near Nanaimo. Kaese is the owner, and Lamontagne the Superintendent. There are currently 24 employees. In April, 1998 Cottonwood had only nine holes, but was in the process of expanding to 18.

Schneider, then newly graduated from a Turfgrass Management course at Fairview College, was hired by Cottonwood on or about April 14, 1998 to work as an Assistant Superintendent at a yearly wage of \$24,000. Schneider allegedly had sought a higher salary of \$2,600 per month when discussing his salary requirements with Lamontagne, but Lamontagne told Schneider that Kaese would not agree to that. Lamontagne says that he discussed Schneider’s salary with Kaese and offered Schneider only \$24,000 per year with no promise of any raise. Schneider says he was told by Lamontagne that his salary would start low, but would increase “to a competitive

salary in one year.” There was no increase in Schneider’s salary between April, 1998 and November 25, 1999, the date when Schneider’s work at Cottonwood ended.

Lamontagne gave Schneider a written notice of “winter layoff” on September 29, 1999. The notice stated that Schneider’s last day of work would be November 9, 1999, and that he would take his vacation between November 10 and November 25, 1999, the last day of his employment with Cottonwood. The notice also stated that job descriptions would be given in 2000 to all returning employees, who would be required to meet all tasks in the job descriptions in order to receive their “title.” The notice also said that new wage and benefit agreements would have to be negotiated in 2000. Schneider complained to the Employment Standards Branch on November 4, 1999.

The Record of Employment (“ROE”) Cottonwood provided to Schneider on November 29, 1999 indicates that Schneider’s occupation was “(Greenskeeper),” written large and in the noted parentheses in the first half of the space. Crowded into the second half of the allotted occupation designation space in smaller handwriting, Cottonwood states that Schneider was an “Assistant Maintenance Super.”. Schneider’s first day of work is originally noted as being “April 30, 1998,” which date is crossed through and has written above it, “May 14, 1999.” The enddate given for Schneider last day of pay and final pay period is November 25, 1999. Cottonwood originally stated that Schneider’s total insurable earnings were “\$38, 769.36,” but that figure is crossed through and the amount of “\$12,923.12” is written beside it. Schneider’s total insurable hours are originally recorded as “3360,” which figure is then crossed out and replaced by “1080,” which is in turn crossed out and replaced by the figure, “2160.” The ROE was signed by Karin D. Kaese. The Director’s delegate noted in her submissions that Ms. Kaese is Cottonwood’s accountant.

Schneider states in his Employment Standards Branch complaint that on being hired he was told that his overtime hours would be “banked” and the time would be taken off during the winter. Instead, Schneider says in the winter of 1998 he was only allowed to take two weeks of vacation, mandatorily assigned. Schneider further states that when he approached Lamontagne about how Cottonwood would prefer to track his overtime hours, he was told that he was “management” and did not “bank” hours. Schneider recites in his complaint that the great majority of his duties (94%) consisted of maintenance duties for the golf course, including operating irrigation controllers, applying pesticides and fertilizers as required, cutting grass, cleaning up garbage, etc.. Only a total of 5% of Schneider’s time was spent organizing maintenance crew members in Lamontagne’s absence, and 1% training new employees. Furthermore, Schneider says he was required to attend at work daily for additional time before the start of the other employees, and was also required to attend to wait for frost to clear from the greens so he could open the course, for neither of which was he compensated. Neither sort of unpaid work was included in the overtime calculation, either.

Kaese and Lamontagne on Cottonwood’s part say that Schneider was hired as an Assistant Superintendent or a manager trainee, with no promise either of a raise or of permanent employment. They allege that Schneider’s primary duties consisted in supervising the maintenance crews, with authority to discipline and evaluate crew members; regularly and frequently scheduling employees by calling them in to work or sending them home early; directing the work of other employees according to the “laid out...sequence of jobs” from Lamontagne; and training new employees. Kaese alleges Schneider “was included in budgeting

but only at a trainee level...,” while Lamontagne claims that Schneider asked only once to be included in budget meetings, but was unable to attend any because the meetings were held only on an impromptu basis. Lamontagne recites also in his submissions that Schneider’s primary duties included “indicating employee problems and solving them if able,” and “indicating potential problems on the golf course before they became a problem.” Kaese states in his appeal submissions, though, that Schneider failed to exercise the authority he had to direct and discipline employees, and that Schneider also “tended to” check with Kaese or Lamontagne as to whether employees could be sent home due to weather conditions or completion of a project.

Lamontagne confirms that Schneider was expected to report to work at least ten minutes before the maintenance employees. Lamontagne also alleges that because Cottonwood paid for an Assistant Superintendent’s membership for Schneider for 1999 in the Golf Course Superintendents’ Association of America, Schneider should have spent time reviewing the organization’s website in order to study his responsibilities. Lamontagne, too, complains that Schneider did not exercise sufficient authority regarding discipline and direction of other Cottonwood employees, and states that due to Schneider’s lack of experience, he kept in touch with Schneider by radio as well as meeting before the other employees arrived in order to set up the day’s schedule. Lamontagne also confirms that another employee besides Schneider did some training, for which he reprimanded the non-supervisory employee.

Two former and one current Cottonwood employees interviewed by the Director’s delegate indicated different perceptions of Schneider as an authority figure. One former employee stated that Schneider seemed to him more of a co-worker than in any way a superior. The other former employee described Schneider as passing on directions from Lamontagne occasionally or when Lamontagne was away, but predominantly tasks were allocated by Lamontagne’s use of a “white board” on the door to his office. The second former employee felt Schneider was an equal co-worker, and said he was never aware of Schneider making any decisions. In contrast, the current employee stated that she considered Schneider her “superior,” and that she was trained on some equipment by Schneider and had duties delegated to her by Schneider.

The Director’s delegate stated that she interviewed the current employee in Lamontagne’s presence; Lamontagne denied being present while the current employee gave her evidence. Both Lamontagne and Kaese complain that the Director’s delegate seemed biased in favour of Schneider and cited a comment she made to the effect that Lamontagne “had too much power.” They also complain that they did not feel Cottonwood had been given a fair chance to offer explanations or evidence. As evidence of witness bias against Cottonwood on the parts of the former employees, Cottonwood alleged one of the employees played sports with Schneider. Cottonwood supplied some unidentified notes concerning discipline delivered to the other of the two employees, who had acknowledged that Schneider did give directions on occasion.

Copies of job descriptions for an “Assistant Superintendent” and for a “Maintenance Superintendent” and “Assistant Maintenance Superintendent” were included with the appeal documents. Schneider denied ever having seen either of them prior to receipt of his copy of Cottonwood’s appeal. Cottonwood also attached to the appeal copies of payroll “Employee Summaries” for Schneider for 1998 and 1999, which Kaese alleges were provided to the Director’s delegate in reply to a Demand for Employer Records dated May 27, 2000. The Director’s delegate, in her submissions, denied having previously seen the additional records before the issuance of the Determination and receipt of the appeal. She alleged she received

from Cottonwood's accountant payroll records for Schneider only covering the period between April, 1998 and August, 1999.

Schneider also asserts the additional records were not part of the information provided by Cottonwood prior to the issuance of the June 30, 2000 Determination. Schneider concedes, however, the correctness of the additional records' total amount of wages he received from Cottonwood between April, 1998 and November, 1999. He also pointed out to the Director's delegate some errors in the original overtime hours used in the June 30, 2000 Determination's calculations, and conceded that the original Determination used the date of the layoff notice as the enddate of his employment. The Director's delegate accordingly recalculated the amount owing to Schneider in overtime wages, statutory holiday pay, vacation pay and interest, using the correct enddate of November 9, 1999 for Schneider's last day of work. The adjusted figure for the Determination's principal amount is now \$7,126.36 plus \$298.77 in interest to August 10, 2000, for a total of \$7,425.13 as of August 10, 2000. The Director's delegate in her submissions also adequately explained that the hourly wage figure used for her calculation of the monies owing to Schneider varied according to the number of hours in a month that Schneider worked.

Cottonwood contends any correction of the Determination should take into account the vacation pay delivered to Schneider and his being paid for sick days. No records of Schneider's absences were provided other than handwritten notations apparently made by Kaese or Lamontagne beside the Employee Detail payroll records for Schneider attached to the appeal.

Section 1 of the Regulation defines a "manager:"

"manager" means

- (a) *person whose primary employment duties consist of supervising and directing other employees, or*
- (b) *a person employed in an executive capacity;*

Section 34(1) of the *Regulation* states in relevant part:

Part 4 of the Act does not apply to any of the following:

...

a manager;

Part 4 of the *Act* addresses hours of work and overtime.

Section 36 of the Regulation states:

Exclusion from statutory holiday pay requirements

Part 5 of the Act does not apply to a manager.

Part 5 of the *Act* deals with pay and other working conditions relating to statutory holidays.

The Tribunal's decision in *429485 B.C. Ltd. (c.o.b. Amelia Street Bistro)*, BC EST #D479/97 (Reconsideration of BC EST #D170/97), is the definitive case on determining whether or not an employee is a manager. The case addresses primarily the issue of how to judge whether an employee with some supervisory responsibilities is a manager. The panel of adjudicators said:

The task of determining if a person is a manager must address the definition of manager in the Regulation.

...

Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a "manager."

The panel also said that a manager:

Typically...has a power of independent action, autonomy and discretion;...the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business.

There are a number of evidentiary conflicts that I must resolve in deciding the issues in this matter. In deciding which versions of the facts are to be preferred, I rely not on the style of the written assertions of the interested witnesses presenting their accounts, but on my assessment of which versions were most likely to have occurred in all of the circumstances. I must determine which story was most probable in each of the then-existing circumstances, and "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).

First, there are conflicting accounts of Schneider's duties and the level of his supervisory authority. The job descriptions attached to the appeal I accept as not having been shown to Schneider during his employment at Cottonwood, and therefore find they are irrelevant. As for the issue of witness bias against Cottonwood, the discipline notes apparently made by Lamontagne which also were attached to the appeal concern the former employee who acknowledged some occasional exercises of authority by Schneider. This counters, in my assessment, a notion of bias against Cottonwood sufficient to make it likely the witness lied. I also find the allegation of the other witness's playing sports together with Schneider too weak a motivation for lying to make it probable that witnesses gave false evidence. Given, too, the large number of inconsistent statements in Kaese's and Lamontagne's renditions of Schneider's actual authority, and their substantial agreement that Schneider failed to exercise whatever authority he did have, I prefer Schneider's and the former employees' accounts of Schneider's duties and

authority. I find, therefore, that Schneider did not direct, discipline, train other employees or schedule them as a primary duty of his employment as an Assistant Superintendent at Cottonwood. There is, in my view, no indication that Schneider had any significant involvement in Cottonwood's budget processes. I further accept that Schneider's main duties consisted of acting as a greenskeeper, which is supported by the much-modified ROE sent to him by Cottonwood. I find in all the circumstances that Schneider was not a manager while employed at Cottonwood.

The issue of mathematical and Schneider's employment end date errors in the Determination calculation has been adequately addressed by the Director's delegate's correction of the amount of the Determination. The Director's delegate also has adequately addressed the method and reason for the hourly wage rate used in her calculations. I find, therefore, that there is no merit to the appeal's disagreement with the hourly wage rate used in the Determination's calculations. In light of the fairness of the Director's delegate in accepting Cottonwood's new records and correcting the calculation of the amount owing to Schneider, I cannot accept that it is likely that she would have ignored previously disclosed records or acted in the biased manner alleged by Kaese and Lamontagne. I find, therefore, that there was no improper bias on the Director's delegate's part, and that the corrected Determination figures have sound basis in fact and law.

The additional issues of the mistake in the Determination as to Kaese's first name in the "cc" line, and the failure to disclose Schneider's address, raised in Cottonwood's appeal have no merit. The corporate Determination was properly addressed to Kaese, and only the "cc" sent to him as a director had his first name in error. The mistake is, therefore, of no legal significance. Similarly, there is no legal requirement in the *Act* or in the Tribunal's rules that a complainant's address must be provided to an appellant. Section 75 of the *Act* in fact requires the Director to keep a complainant's identifying information undisclosed unless disclosure is required for a proceeding under the *Act* or in the public interest.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination issued June 30, 2000 is varied to reflect that Cottonwood owes Schneider the amount of \$7,126.36 as overtime wages, statutory holiday pay, and vacation pay owing on those amounts, plus additional interest to be calculated further to section 88 of the *Act*. In all other respects Cottonwood's appeal is dismissed.

Michelle Alman

Michelle Alman

Adjudicator

Employment Standards Tribunal