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 -

Mark Lapka operating as Aldergrove Equipment

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Alison H. Narod

FILE NO.: 2000/095

DATE OF HEARING: June 26,2000

DATE OF DECISION: November 6, 2000

DECISION

This is an appeal by Mark Lapka, operating as Aldergrove Equipment Services (the "Employer"), of a determination made by a delegate of the Director on January 25, 2000. In that determination, the Employer was found to be in contravention of Sections 18(1), 40, 45 and 58(1) of the *Employment Standards Act* because it had not paid regular wages to its former employee, the Complainant Harold Smith, for his last day of work (July 2, 1999), or minimum daily pay, overtime wages, statutory holiday pay and vacation pay in compliance with the aforementioned sections of the *Act*. Accordingly, the delegate ordered the Employer to pay $691.75 to Harold Smith.

The Employer takes issue with whether or not minimum daily pay was owed for the following days: May 5 and June 4, 5, 15 and 25, 1999. Additionally, the Employer disputes whether or not the Complainant was entitled to statutory holiday pay for July 1, 1999 or any pay for June 30 and July 2, 1999. Finally, the Employer takes issue with whether or not the Complainant was entitled to be paid at overtime rates for work performed on Saturdays.

With respect to minimum daily pay, the Employer contended that the Complainant was expected to work eight hours a day from Monday to Friday. Whenever the Complainant worked less than eight hours, it was at the Complainant's request. In particular, the Employer contended that on at least two occasions the Complainant asked to leave early because his wife was sick. On one of these occasions, the Complainant said that he had to look after his grandchildren due to her illness. The Employer's wife, who was also the Employer's office Manager, supported the Employer's contention that on several occasions the Complainant worked less than eight hours because he either arrived late or left early. She said he was never sent home due to lack of work. The Employer was unable to identify which days Mr. Smith left early at his own request.

The Complainant maintained to the delegate that he never left early of his own accord.

At the hearing of this matter, the Complainant maintained that he never left work early except at the Employer's direction because of lack of work. He supplied a letter from a co-worker, John Baranyi, stating that Mr. Smith was not late for work and that he often did not work full days because there were no parts available. The Complainant's wife said that the Complainant left early on one occasion, June 15, 1999, because she was ill. Other than that, she knew of no occasion when he left work for reasons relating to her or to children.

The Employer responded that Mr. Baranyi ceased working full-time in 1998 and afterwards worked only part-time on an on-call basis. The Employer also contests the admissibility of Mr. Baranyi's letter, saying that it is not written in his handwriting. Mr. Baranyi was not called as a witness.

The Appellant Employer has the burden of proving its case. I place little weight on Mr. Baranyi's letter in view of the fact that he only worked part-time at the relevant time and would not have had an opportunity to observe what happened on those days when he was not present. In view of the fact that the Employer is unable to identify which days the Complainant left early at his own request and in view of Mrs. Smith's evidence, I uphold the delegate's determinations with respect to minimum daily pay on all days except June 15, 1999. However,

the delegate's determination respecting June 15, 1999 should be adjusted to reflect my finding, based on Mrs. Smith's evidence and the Employer's records, that the Complainant left early on June 15, 1999 at his own request and therefore worked only 3.5 hours that day. This will reduce the total minimum daily pay owed to him by one-half hour.

With respect to the issue of the Complainant's overtime, the Employer says that overtime work on Saturdays was voluntary. Consequently, it asserts that any work performed on Saturdays ought not to paid for at overtime rates. In my view, the *Act* does not exclude voluntary work from overtime in circumstances such as those presented here. The Employer permitted employees to work on Saturdays and did not instruct them not to do so. It merely stipulated that if they did so, they would not be paid at overtime rates. However, where the *Act* requires overtime to be paid for work in excess of eight hours in a day and forty hours in a week (excluding those hours worked in excess of eight hours in a day), such work must be paid for at overtime rates. Accordingly, this aspect of the appeal is dismissed.

With respect to whether or not the Complainant is entitled to statutory holiday pay for July 1, 1999 or pay for June 30 and July 2, 1999, the Employer argues that he was not entitled to pay for those days because he quit on Wednesday, June 30, 1999 and did not work at all on or after that day. The Employer said that when the Complainant quit, he asked for, and the Complainant provided him with, a letter confirming that he quit. The Complainant's last day of work was June 29, 1999. The Employer said its operation was closed on Thursday, July 1, 1999. It was open on Friday, July 2, 1999 and closed again on Saturday July 3, 1999, because it was a holiday weekend. The Employer's wife gave evidence in support of her husband's evidence. It should be noted that the Employer's records did not show any hours worked for June 30 or July 2, 1999.

The Complainant told the delegate that he quit on July 2, 1999. He worked an eight hour day that day. He then returned on Sunday, July 4, 1999 to pick up his tools as he was starting a new position on July 5, 1999. He did not claim that he either gave notice or worked on Saturday, July 3, 1999. The letter from Mr. Baranyi said that he helped Mr. Smith remove his tools on Sunday, July 4, 1999. I note that the delegate ordered that Mr. Smith be paid for eight hours allegedly worked on Friday, July 2, 1999 but made no order for pay for any hours allegedly worked on Saturday, July 3, 1999.

At the hearing of this matter, the Complainant contended that he worked on June 30, 1999. On July 1, 1999 he went to Squamish and found he had a job at Interfor. He told this to Mr. Lapka on Friday, July 2, 1999 and worked 8 hours that day. He then came in on Saturday, July 3, 1999 and worked four hours that day. On Sunday, July 4, 1999 he came to work and picked up his tools. He said he gave both verbal and written notice to Mr. Lapka on Saturday, July 3, 1999 confirming that he was quitting. Moreover, he filled out timesheets in respect to the time he worked on July 2 and 3, 1999, and submitted them in a basket normally used for that purpose.

After the hearing, I offered the parties an opportunity to make further submissions respecting the Employer's desire to appeal a penalty Determination dated November 17, 1999 (referred to in more detail below). In response to this, the Complainant supplied a further letter in which, among other things, he contended that he worked eight hours on each of July 2 and 3, 1999.

The evidence raises an issue of credibility. From the information on file and the evidence at the hearing, the Employer's version has been consistent. The Complainant's has not. There are some unresolved questions about the Complainant's evidence. In particular, he does not explain the inconsistencies between what he told the delegate, what he told the tribunal at the hearing and what he wrote in his post-hearing letter. For instance, he told the delegate and he gave evidence at the hearing of this matter that he never left work early of his own accord. His wife's evidence contradicted this. He gave three different versions of the hours he worked on July 3, 1999: one to the delegate, one at the hearing and one in his post-hearing letter.

In view of these circumstances, I accept the Employer's evidence over the Complainant's.

Accordingly, I order that the delegate's Determination be adjusted to delete the requirement that the Employer pay statutory holiday pay for July 1, 1999 and eight hours pay for each of June 29 and July 2, 1999. However, in accepting the Employer's version that the Complainant attended at work on June 30, then quit and was sent home without having performed any work, I order that the Complainant is entitled to four hours minimum daily pay for that day under Section 34 of the *Act.*

The Employer also seeks to appeal a Determination dated November 17, 1999 in which a delegate of the director decided that it had contravened section 46 of the *Employment Standards Regulations* by failing to produce proper payroll records pursuant to a demand for production of documents dated October 27, 1999 and imposed a penalty of $500.00 pursuant to section 28(b) of the same Regulations.

The Determination was not formally appealed within the time limited for appeals under the *Act*, which ended on December 10, 1999. Information concerning the time limit for appeals was clearly stated on the Determination dated November 17, 1999.

It became clear at the hearing of this matter that the Employer anticipated having its arguments heard in respect of its wish to appeal the November 17, 1999 Determination. A review of the materials provided to me indicates the earliest time at which the Employer communicated its discontent with the November 17, 1999 Determination was in a letter dated February 21, 2000 from the Employer's accountant commencing the appeal of the January 25, 2000 Determination.

The Tribunal's criteria for determining whether or not to extend the time limits have been set out in a number of cases, for example, *Rasmussen* BC EST #D341/99, where it was said that in order to obtain an extension of the time limits, an appellant is required to prove that:

1. there is a reasonable and credible explanation for the failure to file within the time periods;

2. there has been a genuine and ongoing bona fide intention to appeal the Determination;

3. the Respondent and the director have been made aware of that intention;

4. the Respondent will not be prejudiced by the granting of an extension;

5. there is a strong prima facie case in favour of the Appellant.

In the instant case, no explanation has been given for the Appellant's failure to commence an appeal within the time limits. Indeed, there is no suggestion that the Employer informed the Director of its intention to appeal the Determination prior to the February 21, 2000 letter. The evidence is that the Employer received the Determination which was sent by registered mail and received by the Employer's mother, Holly Lapka, on or about December 1, 1999.

Additionally, I am not persuaded that there is a strong prima facie case in favour of the Appellant.

There is no dispute that notification of the complaint was sent to the Employer. Indeed, Mr. Lapka said that he talked to the delegate over the phone and told her he would provide her with the records she sought. The Employer served notice of termination of the rental of its premises on October 1, 1999 and ceased operating on October 15, 1999. The Employer disagreed with the delegate's contention that several attempts had been made to contact him by phone. He stated that the phone was disconnected at the end of October. He denies that the Employer had voice mail and says that any voice mail messages left for him must have been left at the wrong telephone number.

The Employer also says that the delegate spoke to his accountant who told her that the business was closed and she should send mail to him. Despite this, she continued sending mail to the Employer's last address. The Employer does not provide any date when the alleged conversation between the delegate and the accountant occurred. The most that can be gleaned from this evidence is that the conversation took place after October 15, 1999.

The documentation provided by the delegate indicates that the October 27, 1999 demand was sent by certified mail to the Employer's last known address. It was returned to the delegate on November 24, 1999 marked "unclaimed". A second demand and the impugned Determination, each dated November 17, 1999, were sent by registered mail to the Employer's last known address and, as noted above, were received on or about December 1, 1999 by Holly Lapka. The Employer acknowledges having received these documents.

Section 122 of the *Act* addresses how a determination or a demand is deemed to have been served. It states:

> *s.122 (1) A determination or demand that is required to be served on a person under this Act is deemed to have been served:*
>
> *(a) served on the person, or*
>
> *(b) sent by registered mail to the person's last known address.*
>
> *(2) If service is by registered mail, the determination or demand is deemed to be served eight days after the determination is deposited in a Canada Post Office.*

The difficulty I have on the facts on this case is that the Employer knew of the complaint before the demand was issued. It had been asked for, and agreed to provide copies of, documents requested by the delegate. It did not do so. It did not claim the demand dated October 27, 1999

which was sent to its last known business address. However, it did receive the second demand sent to the same address.

It was up to the Employer, once it acquired knowledge that a complaint had been made under the *Act* to arrange its business affairs so that it could continue to receive legal process in relation to the complaint in a timely manner. In the instant case, it failed to make such arrangements. Here, communications were made with the Employer at its last known address before and after the October 27, 1999 demand was sent.

On these facts, I am not persuaded that there is a strong prima facie case in favour of the Appellant. Moreover, in the absence of any reasonable and credible explanation for the failure to request for an appeal within the time limits and the absence of evidence that the Employer stated its intention to the director to appeal the Determination of November 17, 1999 in a timely way, I am not persuaded that an extension of the time to appeal ought to be granted.

ORDER

I order that the Determination dated January 25, 2000 be varied in accordance with the findings and directions set out in these Reasons. Those findings are that the Complainant is not entitled to minimum daily pay for June 15, 1999. He is entitled to minimum daily pay for June 30, 1999. He is not entitled to statutory pay for July 1, 1999. He is not entitled to any pay for July 2, 1999. I refer the matter back to the Director on the sole issue of these recalculations.

I decline to order an extension of the time to appeal the Determination dated November 17, 1999.

Alison H. Narod
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Adjudicator
Employment Standards Tribunal