



An appeal

- by -

Luma Interior and Landscape Lighting Design Ltd.
("Luma")

- 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: M. Gwendolynne Taylor

FILE No.: 2001/416 & 2001/417

DATE OF DECISION: September 17, 2001

DECISION

OVERVIEW

This is an appeal pursuant to section 112 of the *Employment Standards Act* by Luma Interior and Landscape Lighting Design Ltd. (“Luma”), from a Determination by the Director dated May 10, 2001. The Director ordered Luma to pay Peter Malkin, former employee, \$6,262.85 for wages, a returned cheque (n.s.f.), compensation in lieu of notice, vacation pay, and interest.

The Director also found that Luma had contravened Sections 17(1), 18(1), 58(3), and 63 (1), (2) and (4) of the *Act*. The Director assessed a penalty of \$150 pursuant to section 98 of *Act* and section 29 of the *Employment Standards Regulation*, noting that this was a repeat contravention.

Bill Peters (“Peters”), owner of Luma, claimed that the Director misinterpreted and overlooked facts. He claimed that Malkin’s salary was lower than the Director determined and Malkin was not entitled to compensation for lack of notice.

ISSUE

1. Does the evidence support a finding that Malkin’s salary was \$40,000 effective March 1, 2000?
2. Did Luma have just cause to dismiss Malkin?
3. Does the evidence support the Director’s assessment of a \$150.00 penalty?

ARGUMENT

Peter Malkin was employed by Luma from October 15, 1999 to October 31, 2000. He claimed that his salary was set at \$40,000 from March 1, 2000 but that due to the employer’s financial problems, 10% of the salary each month was to be deferred to the last three months. In March 2000, he was enrolled in a medical plan, based on a reported salary of \$40,000 per annum. On November 1, 2000, he completed a claim for short term disability benefits, listing the salary as \$40,000. Peters signed this claim form.

On November 1, 2000, he took medical leave and when he went to speak with Peters later in November, Peters terminated his employment. There was disagreement over the amount of money owing. Luma issued a cheque on December 2, 2000, for \$1,000, with the Record of Employment. The cheque was returned n.s.f.

The termination letter states that Malkin’s performance had declined. Malkin disputed that he been made aware of performance concerns. He stated that Peters told him in October he

approved of his performance. Prior to taking the employment, he told Mr. Peters he had a weekly doctor's appointment that he would not be able to miss. He made up for the time by working lunch hours.

In the claim to the Branch, Malkin had included compensation for banked time. The Director found that it was an accepted practice at this employment, but this claim was insufficiently documented.

Peters submitted that the salary agreed to as of March 1, 2000 was \$36,000 per annum and he told Malkin that if his sales improved during the year, the salary might be increased. When he signed the claim form it was blank; it was not unusual for him to leave blank documents for Malkin for various reasons. He stated that he drafted documents on numerous occasions concerning Malkin's performance but that Malkin refused to sign the documents. He spoke with Malkin about his poor sales. At the end of August 2000, he told Malkin that he would give him 3 months to improve to improve his attitude. He submitted that Malkin was frequently late for work and too much time away from work.

The Director's delegate was influenced by two factors in deciding Malkin's salary:

- a) there was another case before the Branch in which a Luma employee presented a similar fact pattern respecting deferred wages
- b) the claim form, signed by the employer, stated the annual salary was \$40,000.

In his submission of July 23, 2001, Peters addressed the case of the other employee and concluded that he believed he had sufficient evidence to demand the delegate's "requisal."

DECISION

There is very little in Luma's submissions that substantively challenges the basis of the Director's determination. Concerning the salary issue, I find that the annual salary would have been documented in March when Malkin was enrolled and that it would have to match with the figure supplied in November on the claim form. I accept the Director's determination that the agreed to salary was \$40,000. I do not find it necessary to consider the case of the other employee.

From Mr. Peters' submission demanding the delegate's "requisal", I assume he means that the delegate should be removed from the case. That is not an issue for this Tribunal except to the extent that it suggests the delegate was biased and that the determination should be cancelled for that reason. Luma did not make that argument.

I have considered Luma's submission that Peters was dismissed for cause and I find it lacking in evidentiary basis. At the time the notice was given, Malkin was on a medical leave so there could not have been any immediate performance issues that gave rise to a concern. Although

Peters referred to having documented his concerns on various occasions, he provided no evidence of that. I accept Malkin's evidence over Peters' concerning the performance issue. I find that Luma has not demonstrated that the Director's determination was incorrect.

I have difficulty with the Director's determination on the calculation concerning the n.s.f. cheque. As I understand the evidence, that was to be payment toward finalizing the amounts owed to Malkin. The Director has calculated all amounts owing to Malkin for deferred wages, compensation in lieu of notice and vacation pay. The Director did not include \$225.00, noted on the Record of Employment, for the Thanksgiving statutory holiday. I see no rationale for adding the returned cheque to these items of compensation. That would result in adding \$185.78, which is already covered through the other calculations.

Accordingly, my calculation is that Luma owes Malkin:

1.	deferred salary	\$2,666.64	
2.	compensation in lieu of notice	\$1,538.46	
3.	statutory holiday pay	<u>\$ 225.00</u>	
	subtotal:		\$4,430.10
4.	vacation pay, based on 4% of \$30,742.00 gross wages plus \$4,430.10		<u>\$1,406.88</u>
	Total		<u>\$5,836.98</u>

To this will be added the section 88 interest.

Penalty

The Director determined that Luma breached the requirements to pay an employee all wages earned during a pay period (s. 17), all wages and vacation pay owing within 48 hours of the employer terminating the employment (s. 18 and 58), and compensation based on length of service, in lieu of notice (s. 63).

The only argument I can see that Luma may have raised against the penalty is the "requisal" issue. The Director's assessment was based on this being a repeat contravention. There is nothing improper in the Director having reference to other cases involving the same employer. In fact, it is required in order for the Director to meet the statutory mandates.

The Director's delegate who completed the investigation into the employment issues was J. Paul Harvey. The penalty order was issued by the Director's delegate Murray Superle. He assessed the \$150 penalty which is the subject of this appeal, for the reason that these were repeat contraventions for Luma.

I find that Luma has not made out a case that the Director's assessment of the penalty was incorrect.

ORDER

Pursuant to section 115 of the *Act*, I vary the Determination issued May 10, 2001 to \$5,836.98 plus interest pursuant to section 88.

I confirm the Determination dated May 10, 2001 which assessed a penalty of \$150.00.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal