

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 -

Mehar Forest Products Ltd.

("Mehar")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/549

DATE OF HEARING: December 1, 2000

DATE OF DECISION: January 02, 2001

DECISION

APPEARANCES:

Bichtar S. Mahal, Chartered Accountant
& Avtar Sidhu, President/Director

for Mehar Forest Products Ltd.

Dharampal Singh Gill

on his own behalf

No appearance

for the Director of Employment Standards

OVERVIEW

This is an appeal by Mehar Forest Products Ltd. (“Mehar”), filed pursuant to section 112 of the *Employment Standards Act* (the “Act”), of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 18th, 2000 under file number ER#062-601 (the “Determination”).

The Director’s delegate determined that Mehar owed Dharampal Singh Gill (“Gill”), its former employee, the sum of \$3,719.45 on account of unpaid wages including overtime pay (the largest component of Gill’s award), statutory holiday pay, one week’s wages as compensation for length of service and concomitant vacation pay and interest.

Mehar’s appeal was heard at the Tribunal’s offices in Vancouver on December 1st, 2000 together with an appeal of the same Determination filed by Gill--see EST File No. 2000/539. My reasons for decision in the Gill appeal are being issued concurrently with these reasons under B.C.E.S.T. Decision No. D544/00.

Mehar’s president, Avtar Sidhu, and its accountant, Mr. Bichtar Mahal, appeared and made submissions on Mehar’s behalf. Mr. Gill, who testified via a Punjabi interpreter, appeared as the sole witness on his own behalf. The Director was not represented at the appeal hearing.

ISSUES ON APPEAL

Mehar says that the Determination is incorrect in two respects. First, Mehar says that Gill was not entitled to any compensation for length of service because he either voluntarily quit his employment or was lawfully discharged [see section 63(3)(c) of the *Act*]. Second, Mehar says that “the hourly rate paid to Mr. Gill included 4% holiday [sic, vacation] pay thus the rates used to calculate overtime are not correct [and] the amount for vacation pay should be nil”.

I shall deal with each of these issues in turn.

FINDINGS AND ANALYSIS

Compensation for length of service

Compensation for length of service is not payable by an employer if the employee voluntarily quits his or her employment. As noted in the Determination (at page 4), the delegate found that on or about October 5th, 1999 Mehar laid off Gill and at that time had no intention of recalling him to work. In fact, Gill never was recalled. The employer issued a record of employment which indicated (Code "A" on the form) that Gill's employment was terminated due to a "shortage of work".

Before me, Mehar took the alternative positions that Gill either quit or was, in effect, lawfully terminated for insubordination. Mehar's position was that Gill was sent home for refusing to work on a "staining machine". According to Mr. Sidhu, Gill was suspended for 3 days following which he was supposed to telephone Mr. Sidhu about returning to work but Gill never did call back. Mr. Sidhu admits that neither he, nor anyone else at Mehar, ever telephoned Mr. Gill to advise him of his "return to work" date. The foregoing, in my view, falls well short of evidence of a voluntary quit. Further, I might add, since Mehar in some fashion alluded that it had just cause for termination, this evidence does not support Mehar's view that it had just cause for terminating Gill because, on the employer's own evidence, Gill was not terminated for failing to use the staining machine but, rather, was issued a 3-day suspension with respect to that alleged misconduct.

Mr. Gill, on the other hand, told quite a different story; a story I find to be credible--especially in light of the fact that Mehar has now advanced four entirely different stories (Gill was laid off due to a shortage of work; Gill quit; Gill failed to report back to work after a 3-day suspension; Gill was terminated for insubordination). According to Mr. Gill, he was sent home because he expressed a reluctance to work on the staining machine (although he started working on that machine and continued to work for some 20 minutes before he was sent home). Gill was told that he was not to come back to work for 3 days but shortly thereafter, in a telephone conversation with a supervisor, was told that there was no longer any work for him to do. As noted above, a record of employment was issued to him that indicated Gill's employment ended due to a shortage of work.

In my view, and in the absence of proper written notice of termination, Gill was entitled to be paid compensation for length of service.

Vacation Pay

There is simply no evidence before me that Gill received *any* vacation pay as required by section 58(1) of the *Act*. I might add, in any event, that the Determination only awarded 4% vacation pay on the *unpaid* (primarily overtime) wages that were awarded to Gill by way of the Determination. The delegate did not make a "backpay" award, though perhaps he should have, on account of unpaid vacation pay with respect to those wages that were paid by Mehar to Gill. The only payroll record before me (a copy of a payroll cheque and accompanying wage statement) does not support Mehar's contention that Gill's hourly rate included 4% vacation pay; indeed, it shows just the opposite.

ORDER

Mehar's appeal is dismissed.

In accordance with the findings and directions set out in B.C.E.S.T. Decision No. D544/00 (my reasons for decision in the "Gill" appeal), the matter of Gill's entitlement to unpaid wages--including overtime, statutory holiday pay, vacation pay and compensation for length of service--is referred back to the Director for purposes of recalculation.

KENNETH WM. THORNICROFT

**Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal**