

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 -

Pacific Precision Wood Products Ltd. -and- Robert Pritchard, a Director or Officer
of Pacific Precision Wood Products Ltd.

(“PPWP”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/469 and 2000/527

DATE OF HEARING: November 23, 2000

DATE OF DECISION: January 02, 2001

DECISION

APPEARANCES:

on behalf of Pacific Precision Wood Products Ltd.
and Robert Pritchard

Robert Pritchard

on behalf of the individual

in person

OVERVIEW

This decision considers two appeals brought appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”). One appeal has been brought by Pacific Precision Wood Products Ltd. (“PPWP”) of a Determination (the corporate Determination) which was issued on June 13, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that PPWP had contravened Part 3, 18 and Part 8, Section 63 of the *Act* in respect of the employment of Randolf Bouwman, Melvin Sawka (“Sawka”), Darlene Koehmstedt and Michel Chalifoux and ordered PPWP to cease contravening and to comply with the *Act* and to pay an amount of \$14,495.77. The other appeal has been brought by Robert (Roy) Pritchard, a Director or Officer of Pacific Precision Wood Products Ltd. (“Pritchard”), of a Determination (the director/officer Determination) issued June 14, 2000 by a delegate of the Director of Employment Standards (the “Director”). This Determination adopted the conclusion in the above Determination, that Melvin Sawka (“Sawka”) was owed \$5355.36 wages at the time his employment with PPWP was terminated, found that Pritchard was a Director or Officer of PPWP at the time when the wages were earned and should have been paid and, pursuant to Section 96 of the *Act*, found he was personally liable for the full amount of the wages owed to Sawka.

PPWP has only appealed the Determination in respect of Sawka and says the conclusion that there was wages owing to Sawka in the amount \$5355.36 is wrong. Pritchard has appealed the Determination on the same basis.

ISSUE

The issue raised by the appeals is whether PPWP and Pritchard have shown the conclusion that Sawka was owed wages in the amount of \$5355.36 was wrong.

THE FACTS

PPWP operated a wood re-manufacturing operation in Prince George, B.C.

Sawka was employed by PPWP from May 11, 1998 to December 31, 1999 as the Production Supervisor at a salary of \$50,000.00 a year. The Determination concluded Sawka’s wage rate

was \$55,200.00 a year. That conclusion appears to be based on correspondence from Pritchard to Sawka in October, 1999 indicating an increase in salary to \$55,200.00 effective October 1st, 1999. However, it is unlikely that salary increase was ever implemented and Sawka's wage rate did not change throughout his employment. However, for the purposes of this appeal, nothing turns on whether Sawka's wage rate was \$50,000.00 or was \$55,200. More relevant to these appeals is that during the initial discussion between Pritchard and Sawka setting the terms of employment, which took place in late April or early May, 1998, Sawka proposed either that his wage package include an RRSP contribution by PPWP or that the proposed salary be increased. Pritchard, noting that PPWP was trying to put together an RSP plan for salaried staff, agreed that Sawka's wage package would include a contribution by PPWP of \$3000.00 a year (\$250.00 a month) to an RSP. No RSP plan was ever established by PPWP because of ongoing financial difficulties, but I find that throughout the term of Sawka's employment there was a continuing intention on the part of PPWP to do so.

During a period commencing September 1, 1998 and ending February 28, 1999, PPWP overpaid Sawka an amount of \$1,924.08. This overpayment was ascribed to an internal change in the method of paying salaries (from monthly, with a mid-month draw, to twice a month). In any event, when the overpayment was discovered by PPWP, there was a discussion between Sawka and Pritchard. What occurred in respect of this overpayment is the nub of the appeals and, as one might expect, there is some disagreement between the parties. PPWP and Pritchard say that, following discussion between Sawka and Pritchard, it was understood and agreed that the overpayment would not be deducted, but would be applied against what PPWP owed to Sawka's RSP "account". Sawka says that Pritchard agreed he would not deduct that amount from him and there was no reference to applying the overpayment to the RSP obligation.

At the hearing Pritchard indicated that he believed his recollection of the events could be confirmed by Phyllis Dunphy, who was the controller for the company during the relevant period of time. He requested that Ms. Dunphy be allowed to provide a statement to the Tribunal. I agreed, in the circumstances, to that procedure. The reasons for doing so were, in my opinion, valid and there was no objection from Sawka. A notarized statement, dated December 5, 2000, was provided to the Tribunal by Ms. Dunphy. In the statement she says:

When I realized there had been an overpayment on a number of Mel's paycheques, I told him that we would be deducting the overpayment at the same rate which we had overpaid him. He said he wanted to talk to one of the owners, Roy Pritchard, before I did anything. He did talk to Roy and came back to me saying that I was not to deduct anything from any of his paycheques. He suggested that we apply the overpayment against his RRSP Plan payments (at this time the company was trying to set up an RRSP Plan for all salaried employees). After discussing this with Roy, I told Mel that we would apply the overpayment as he suggested. Unfortunately, the RRSP Plan did not get set up because of ongoing financial difficulties.

The above statement is consistent with the evidence given at the hearing by Pritchard. Sawka was given an opportunity to respond to this statement. In reply, he stated that he had not talked to Ms. Dunphy concerning the overpayment, "as Roy Pritchard told me he was not going to deduct it nor would I have to pay it back". This statement is somewhat different from the

evidence Sawka gave at the hearing. There was no reference in his evidence that Pritchard told him he would not have to pay it back.

The corporate Determination made the following findings of fact concerning the claim made by Sawka:

The complainant was offered RRSP's as part of wages and therefore under the definition in the Act of wages is entitled to be paid fully after employment has been terminated, pursuant to Section 18 of the Act. The total amount owing for these RRSP's is \$5000.00, in addition there is 4% annual vacation pay entitlements that should have been paid at that time, amounting to \$200.00. Interest payable . . . amounts to \$155.36.

PPWP's manufacturing operation was closed on or about May 22, 2000 and a receiver was appointed on June 28, 2000. The receiver has authorized Pritchard to bring and advance the appeal on behalf of PPWP.

ARGUMENT AND ANALYSIS

The Director concluded that PPWP made no payments to Sawka in respect of the RSP contributions which were promised to be included in his wage package in May, 1998. I accept, however, the evidence of Pritchard, supported by the statement made by Ms. Dunphy, that there was an overpayment of wages in an amount of \$1,924.08 made by PPWP to Sawka and there was an understanding, if not an agreement, that the overpayment would not be deducted but would be applied against Sawka's RSP entitlement. In his testimony, Pritchard impressed me as having a better recollection of the events surrounding the discussion of the overpayment and, in the circumstances, it is more probable that the overpayment would have been applied as Pritchard says it was, rather than "forgiven" which is, in effect, what Sawka says occurred. The evidence was, and Sawka agreed, that during the relevant period of time PPWP was in financial difficulty. The situation for the employees was "status quo"; no wages increases were being given to anyone. Pritchard said, and I have no reason to disbelieve him, that there was pressure from other owners to recover the overpayment. On the other hand, there was no evidence and no reason given, to explain why Pritchard would have, in effect, "forgiven" the overpayment. It is more probable, in the circumstances, that Pritchard would have sought and made the accommodation he says he made, which relieved Sawka of repaying the overpayment and went some way to satisfying the agreement PPWP made with Sawka to establish and contribute to an RSP plan. While I accept that the overpayment never actually found its way into an RSP plan, nevertheless Sawka received an amount of money which he understood, and probably agreed, would be applied to that obligation. In my view it would be unfair, and consequently inconsistent with the statutory objective of promoting the fair treatment of employees and employers, found in Section 2 of the *Act*, to not recognize that understanding.

The amount of wages found to be owing to Sawka in the Determinations should be reduced by an amount of \$1,924.08 (plus 4% annual vacation pay and interest on that amount).

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated June 13, 2000, in the amount of \$14,495.77, and the Determination, dated June 14, 2000, in the amount of \$5,355.36, be varied as described above and the resulting amount be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

DAVID B. STEVENSON

**David B. Stevenson
Adjudicator
Employment Standards Tribunal**