

An appeal

- by -

Balwinder Sunner
("Sunner")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/495

DATE OF HEARING: September 28, 2001

DATE OF DECISION: October 22, 2001

DECISION

APPEARANCES:

Balwinder Sunner	on his own behalf
Shafik Bhalloo, Barrister & Solicitor	for Gold Oak Custom Furniture Ltd.
Interpreter (Punjabi)	Santosh Thind

OVERVIEW

This is an appeal filed by Balwinder Sunner (“Sunner”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Sunner appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on June 8th, 2001 (the “Determination”). By way of the Determination, Sunner’s claim for unpaid wages was dismissed.

This appeal was heard at the Tribunal’s offices in Vancouver on September 28th, 2001 at which time I heard the testimony of Mr. Sunner, on his own behalf, and and Mr. Sukhdev Singh Gill (“Gill”) on behalf of the employer, Gold Oak Custom Furniture Ltd. (the “Employer”). No one appeared at the appeal hearing on behalf of the Director. Both Messrs. Sunner and Gill testified through a Punjabi interpreter.

In addition to the two witnesses’ testimony, I have also considered the various documents and submissions submitted by the parties, and by the Director’s delegate, to the Tribunal.

ISSUES ON APPEAL

As noted above, the Director’s delegate dismissed Mr. Sunner’s unpaid wage complaint filed against his former employer, Gold Oak Custom Furniture Ltd. During the course of the delegate’s investigation, it was determined that the Employer did not pay Sunner’s statutory holiday pay in full. Accordingly, the Employer paid Sunner a further \$941.46 in that regard. However, Sunner claims that this latter payment did not reflect his actual wage rate, namely, \$8 per hour. Sunner says that the delegate erred in determining that his \$8 per hour wage rate included vacation pay. He also says that he has not been properly credited for all overtime hours worked.

In sum, Sunner says that he has not been paid in full for either his regular or overtime hours, that he has not been paid any vacation pay and that his statutory holiday pay was not properly calculated inasmuch as it was not based on his actual hourly wage rate.

FINDINGS AND ANALYSIS

At the outset I should note that the evidence before me is, in many respects, unsatisfactory. In essence, Sunner and Gill each accuse the other of being untruthful. Accordingly, and since neither witnesses' evidence leaves me entirely free of doubt, I must decide this appeal based on which of their two mutually exclusive stories is the more probable.

Sunner testified that when he was hired in June 1998 to work at the Employer's comparatively small-scale furniture manufacturing plant, he was promised an hourly rate of \$8 plus vacation and statutory holiday pay. Gill, the Employer's principal, on the other hand, testified that the hourly wage offered to Sunner *included* vacation pay.

Section 58(2) permits vacation pay to be paid on the employee's scheduled pay days, rather than in a lump sum prior to the employee taking annual vacation leave, but only if the employee and employer so agree. I am not satisfied that there was such an agreement in this case. Further, the Tribunal has held in a number of decisions that an employer is not entitled to unilaterally allocate a portion of an employee's hourly wage to vacation pay--see *e.g.*, *Kirkham Silviculture Ltd.*, B.C.E.S.T. Decision No. D260/97; *Golden Sikh Cultural Society*, B.C.E.S.T. Decision No. D357/98 and the other decisions referred to therein; see also *Atlas Travel Service Ltd. v. B.C. (Director of Employment Standards)* (1994), 99 B.C.L.R. (2d) 37 (B.C.S.C.).

If there was an agreement between the parties that vacation pay would be paid on each payday, then it behooves the Employer to clearly document the same; there is no such documentation here. Second, if the parties' bargain was that Sunner would be paid \$7.69 per hour plus 4% vacation pay (for a total hourly rate of \$8), the employee's wage statement should clearly, and separately, set out both the hourly wage rate and the additional vacation pay being paid for the current pay period (see section 27). There is no satisfactory evidence before me of any such wage statements ever being issued. Sunner, for his part, says that he *never* received a wage statement together with his payroll cheque. It is clear that the Employer failed to keep adequate payroll records (the Employer concedes as much) and I do not find Gill's testimony that wage statements were regularly issued to Sunner--but that copies of these wage statements were not maintained (despite the Employer's statutory obligation in that regard: see section 28)--to be credible. Gill testified that the employees' wage statements were prepared by an independent bookkeeper (as were most, if not all, of the Employer's payroll records, such as they are), however, this person did not testify before me. Accordingly, I draw an adverse inference from this person's failure to testify.

At the appeal hearing the Employer tendered an internal ledger sheet which purports to show an hourly rate of \$7.69 but I cannot conclude from this document, standing alone, that Sunner agreed to work for \$7.69 per hour. It was noted by the delegate in the Determination (at p. 4) "the employer paid vacation pay inconsistently, paying some employees each pay period and others at the end of employment and still others, it appears, not at all". In my view, this latter observation--which the Employer does not challenge--calls into question the veracity of the

Employer's assertion that vacation pay was separately calculated and itemized each pay day and then properly paid to Sunner. It would appear that the Employer exhibited a somewhat cavalier attitude toward its statutory obligation to pay (and to properly document such payment) vacation pay to its employees.

The Employer's contention that it fully satisfied its obligation to pay Sunner 4% vacation pay is further undermined by the fact that the Employer concedes that it failed to properly pay statutory holiday pay to Sunner. As previously mentioned, during the course of the investigation the Employer issued a further payment to Sunner on account of unpaid statutory holiday pay (albeit a payment based on an hourly wage rate of \$7.69).

Sunner appended a letter to his appeal form and sought to introduce this letter into evidence at the appeal hearing. This letter, dated May 5th, 1999, is signed by Gill and states that Sunner "is working as a Painter [and] is working full time and paid \$8.00 per hour". Counsel for the Employer objected to this letter being admitted into evidence on the ground that the document was not provided to the delegate during the course of her investigation. The delegate, in her submission, concedes that she never spoke with Sunner personally during the investigation (she communicated with his sister) due to Sunner's inability to speak English. It does not appear that the letter was deliberately withheld from the delegate and it certainly cannot be said that Sunner refused to participate in the delegate's investigation. Thus, the letter is not inadmissible by reason of the *Kaiser Stables* principle.

I admitted the May 5th letter into evidence since it simply corroborated the position that Sunner had previously advanced in his complaint and during the investigation--namely, that his hourly rate was \$8 not \$7.69--and thus, in that sense, the letter did not raise an entirely new argument. Further, Mr. Gill acknowledged that the letter was a *bona fide* document although he had an exculpatory explanation regarding its contents. The Tribunal is not, of course, bound by the technical rules of evidence (see Rule 19, Tribunal Rules of Procedure), however, in my view the document is properly admissible in any event as it could be characterized as a prior inconsistent statement made by the Employer (see sections 13 and 14, *Evidence Act*).

Mr. Gill testified that although he signed the letter (which he said was prepared by, or on behalf of, Sunner so that Sunner could obtain mortgage financing for a home purchase), the reference in the letter to the \$8 per hour wage rate simply refers to Sunner's hourly rate including vacation pay. In my view, a fair-minded reading of the letter would lead one to conclude that the stated wage rate does not include vacation pay. I think it reasonable to say that most persons would conclude, when advised that someone earns a certain amount of money per hour, that the stated hourly rate is separate and apart from any additional statutory entitlements such as, say, vacation pay or statutory holiday pay. While one could interpret the letter as implying an hourly rate inclusive of vacation pay, I am nonetheless of the view that this letter is more corroborative of the position advanced by Sunner than of the position advanced by the Employer.

It may well be that the Employer's intent was that Sunner's hourly rate included vacation pay, however, I am not satisfied, on the balance of probabilities, that a formal agreement in this latter regard was reached between Sunner and Gill. Under the *Act*, an employer and an employee can agree upon a certain hourly rate (so long as it meets or exceeds the minimum wage) and, in addition, that the employee will be paid *both* the hourly rate and their accrued vacation pay on each scheduled pay day. However, an employer cannot unilaterally allocate, say 4%, of the employee's earned hourly wages to vacation pay and, in that fashion, satisfy its statutory obligation under section 58 of the *Act*.

I am not satisfied, based on the evidence before me, that the delegate erred in determining the number of overtime hours worked by Sunner. However, since I am satisfied that the delegate erred in determining Sunner's hourly wage rate, Sunner is entitled to additional compensation on account of unpaid regular wages, overtime pay, vacation pay and statutory holiday pay. In addition, Sunner is entitled to interest in accordance with the provisions of section 88 of the *Act*.

The appeal is allowed and this matter is remitted back to the Director for purposes of calculating Sunner's unpaid wage entitlement.

ORDER

Pursuant to section 115(1) of the *Act*, I order that the Determination be varied in accordance with these reasons for decision. This matter is referred back to the Director for purposes of calculating Sunner's unpaid wage and section 88 interest entitlement.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal