

Two appeals

- by -

Lansdowne Barber Shops Ltd.

- 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: Lorne D. Collingwood

FILE No.: 2001/518 & 2001/519

DATE OF DECISION: December 13, 2001

DECISION

APPEARANCES:

Marten W. Verbeek	The employer's accountant
Shahin Hosseini	On his own behalf

OVERVIEW

Lansdowne Barber Shops Ltd. (referred to as “Lansdowne”, “the employer” and also “the Appellant”) has appealed, pursuant to section 112 of the Employment Standards Act (“the Act”), two Determinations issued on June 25, 2001 by a delegate of the Director of Employment Standards (the “Director”). In one Determination (the “Corporate Determination”), Lansdowne is ordered to pay Shahin Hosseini \$1,458.30 in wages, interest included. In the second Determination (the “Penalty Determination”), Lansdowne is fined \$500 for a failure to produce records required by section 28(a) of the Employment Standards Regulation (the “Regulation”).

The Corporate Determination is that the employer failed to pay at least the minimum wage in a number of pay periods. On appeal, it is said that the determination's calculations contain several errors. The Appellant also argues that the Director must look at what was paid over time and that it is wrong to require payment of the minimum wage in just those periods where earnings fell below the minimum wage. In this decision, I find that the employer may not pay less than the minimum wage for all hours worked in each and every pay period but, also, that the Corporate Determination does contain factual errors and that they are significant. That said, however, I find I should not just attend to those errors but refer matters back to the Director. That is so that information which is of vital importance to the matter of quantum can be examined.

The Penalty Determination is cancelled. The Director presented the employer with an offer to cancel the decision if the appeal was withdrawn. At the appeal hearing, the Appellant said that it would withdraw the appeal if the determination were cancelled. Only the Tribunal is in a position to cancel the Penalty Determination once there is an appeal and I have cancelled the decision as it is the clear wish of both parties that it be cancelled.

An oral hearing was held in this case.

ISSUES TO BE DECIDED

The facts of this case are at issue.

At issue is the matter is whether the Act does or does not require the employer to pay the minimum wage for all hours worked in a pay period.

At issue is the matter of whether the employer may or may not deduct an amount which is alleged to have been paid in error.

What I must ultimately decide is whether the Appellant has or has not shown that the Determination ought to be varied or cancelled, or a matter referred back to the Director, for reason of an error or errors in fact or law.

FACTS

The employee's complaint is that he was paid less than the minimum wage.

Mr. Hosseini worked as a barber and for that he was paid \$8.50 an hour prior to January 1, 1999 and commissions from that point on. His commissions were 50 percent of sales.

In the Corporate Determination, Mr. Hosseini is awarded \$1,381.64 in wages and vacation pay plus interest. In calculating whether minimum wages were owed, the delegate relied on the employer's payroll records but he assumed that pay was twice monthly. In fact, Hosseini's pay was biweekly, a point now accepted by the delegate. The delegate has recalculated the determination and decided that it is not \$1,381.64 that the employee is owed but only \$808.40 (plus interest).

The delegate's calculations reflect the notion that Hosseini was paid only \$517.30 in the pay period ending February 6, 1999. In fact, the employee was paid \$572.30. The difference is \$55.

The Appellant claims that the Corporate Determination should take into account an error made in calculating pay. According to the employer, the employee was paid \$149.00 more than he should have been paid in the pay period ending July 10, 1999 and that amount was deducted from his next pay cheque (July 24, 1999). That is to say that the employee was, in effect, paid more than the minimum wage in the pay period ending July 24, 1999. I find, however, that there is not evidence to establish an overpayment of \$149. All that I am shown is a cash register summary for June 28, 1999 on which the employee's identification number ("4") is circled and "5" is written in the margin. That is not proof that there was an overpayment. The employer does not have a record of hours worked. Payroll records are produced but they do not show an overpayment, nor a \$149 deduction for the July 24 pay period. I find, moreover, that the employer is just too confused on this point to be believed. On filing the appeal, the overpayment was \$69.63 and in the year 2000. Only later does the employer claim that the overpayment is \$149 and in 1999.

The Appellant claims that the employee was inadvertently paid 8 percent vacation pay in that 4 percent vacation pay was calculated on the amount of his sales rather than the amount of his commissions (50 percent of sales). The point is irrelevant. The delegate's minimum wage calculations take into account the total amount which was paid in each pay period.

The delegate's calculations are as if the employee worked two weeks in the pay period ending November 13, 1999 and another two weeks in the pay period ending August 19, 2000. The

employer's payroll records indicate, however, that the employee took a week off in both of those pay periods. As matters are presented to me, I am given no reason to doubt the employer's records. I am therefore prepared to accept that the employee did in fact take a week off in those two pay periods and that he is therefore entitled to be paid for only one week. It follows that, for the pay period ending November 13, 1999, it is not \$263.89 in minimum wages that the employee is owed but \$0 [$\$535.4 \div 2 = \267.70 . $\$267.70 - 271.51$ is a negative number and so the amount owed is \$0]. And it is not \$309.52 that Hosseini is owed for the period ending August 19, 2000 but \$41.82 [$\$267.70 - 225.88 = \41.82].

ARGUMENT AND ANALYSIS

The Tribunal has in the past held that an employer must pay at least the minimum wage for all hours worked in the pay period (*Wen-Di Interiors Ltd.*, BCEST No. D481/99). I agree with that. Sections 16 and 17 (1) of the *Act* must be read together.

16 An employer must pay an employee at least the minimum wage as prescribed in the regulations.

17 (1) At least semimonthly and within 8 days after the end of the pay period, an employer **must pay** to an employee **all wages earned** by the employee **in a pay period**.

(my emphasis)

The employer may not, by law, pay less than the minimum wage. It is the minimum wage that is earned if the minimum wage for all hours worked in a pay period exceeds the amount of commissions earned in the pay period.

The employer fails to show that moneys were deducted from the employee's paycheque for reason of an earlier overpayment. It is, in any event, unclear to me how the alleged deduction is allowed.

21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages **for any purpose**.

(my emphasis)

Given what are found to be the facts of this case, it appears that it may only be \$221.81 that Mr. Hosseini is owed [$\$808.40 - 55 - 263.89 - 309.52 + 41.82 = \221.81]. But as matters are presented to me, I am led to believe that he may in fact be owed more than that.

The employee has all along claimed that he worked 6 days for a period of six months and I am shown, contrary to what one would believe from the Corporate Determination, that there is a way to determine this issue with certainty. The employer's cash register record of sales is by day and by barber. As such, it is a record of days worked.

From the Corporate Determination, it appears that the delegate did not examine the cash register record as there is no mention of the record and he relies on the testimony of witnesses. I do not know whether the record was withheld from him or whether it was just overlooked by him but, whatever the reason, I consider it of vital importance that this record be examined. The matter of whether the employee did or did not work 6 days a week for a period of about six months can then be determined with certainty and, therefore, the matter of the amount owed. Clearly, if the cash register records confirm that the employee did in fact work 6 days a week for a period, it follows that it is not \$221.81 plus interest that he is owed but more than that.

The matter of days worked and the matter of the amount earned by Hosseini is referred back to the Director so that a delegate may conduct a review of the employer's cash register records and consider that evidence of days worked.

The Penalty Determination

The Director has a discretionary power to penalise an employer that fails to keep records.

- 79** (3) If satisfied that a person has contravened a requirement of this Act or the regulations, the director **may** do one or more of the following:
- (a) require the person to comply with the requirement;
 - (b) require the person to remedy or cease doing an act;
 - (c) **impose a penalty** on the person under section 98.
- 98** (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director **may impose a penalty** on the person in accordance with the prescribed schedule of penalties.
- (2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorises, permits or acquiesces in the contravention is also liable to the penalty.
- (3) A person on whom a penalty is imposed under this section must pay the penalty whether or not the person
- (a) has been convicted of an offence under this Act or the regulations,
or
 - (b) is also liable to pay a fine for an offence under section 125.
- (my emphasis)

It is use of the word “may” that signals that the power to levy penalties is discretionary.

In this case, the prescribed \$500 penalty was imposed because of the employer's failure to keep and produce records and the employer's failure to provide some reasonable explanation for the

failure to keep records. However, the Director, though a delegate, has decided that this case warrants an offer to cancel the Penalty Determination if only the employer will withdraw the appeal. Now that the employer has said that it is prepared to do so, I am myself going to cancel the Penalty Determination as it is the clear wish of the Director and the Appellant that the decision be cancelled.

ORDER

I order, pursuant to section 115 of the Act, that the Corporate Determination dated June 25, 2001 be referred back to the Director for further investigation.

I order, pursuant to section 115 of the Act, that the Penalty Determination dated June 25, 2001 be cancelled.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal