DECISION OF ADJUDICATOR
IN THE MATTER OF AN ADJUDICATION
PURSUANT TO SECTION 2-75 and 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT

LRB File #229-16
Wage Assessment #8276

COMPLAINANT:	Anthony Charanduk Represented by Randy Armitage Employment Standards Officer
RESPONDENT:	Cramer Livestock Nutrition & Health Solutions, Inc. Represented by Doug Cramer Director
DATE OF HEARING:	December 6, 2016 10:00 a.m.
PLACE OF HEARING:	1870 Albert Street 3rd Floor Boardroom

1. INTRODUCTION

The parties were introduced. Mr. Cramer was accompanied by Marvin Kunitz.

The parties were advised that my hearings are reasonably informal, that I appreciate respectful behaviour and that I don't tolerate the parties interrupting one another. I also advised that my responsibility is to provide a written decision within 60 days of the hearing.

II. PRELIMINARY OBJECTIONS

Mr. Armitage tabled a copy of the Corporate registration for Cramer Livestock. The document shows Doug Cramer to be the sole Director. The document was marked EE1. Mr. Cramer agreed this was the situation during the relative time period.

Mr. Cramer also agreed that Mr. Charanduk was with the Company from September 1, 2010 to October 6, 2015.

III. THE DISPUTE

There are two disputes before me. The first being whether Mr. Charanduk was an employee or an owner.

If determined to be an employee, the second dispute is the amount of the wage assessment regarding vacation pay.

IV. FACTS

i. EVIDENCE OF EMPLOYER

Mr. Cramer was sworn and he then provided the following evidence:

He tabled a document, marked ER1, which is a copy of The Employment Standards Inspection Report. He contends that since the file was opened on January 11, 2016, the wage assessment period should be two years to January 11, 2014, rather than two years October 6, 2013 to October 6, 2015 which are the two years back from Mr. Charanduk's last day of employment. He references Section 2-89 2(b) of the Act as his reference. Further, Section 2-89(2)(b) allows recovery of wages that become payable within, only, the last 12 months of employment.

He then referred to EE1 second page where The Registry references Mr. Charanduk as a shareholder of Cramer Livestock. This is evidence that Mr. Charanduk was an owner.

Next he tabled a Share Purchase Agreement (ER3), an email from Mr. Charanduk (ER4) that contains an admission he is an owner, and a record of dividend payment (ER5) from Cramer Livestock to Mr. Charanduk. All of these are evidence Mr. Charanduk was not an employee, but rather an owner.

He proceeded by tabling a large document that contained calendar months from August 2014 to September 2015 to record Mr. Charanduk's activities. The months showed handpicked days that he recorded visa expenses which not only showed what Mr. Charanduk had purchased but where the purchases were made. Using this information he was able to tell whether Mr. Charanduk was working or not (i.e. visiting family in Tisdale). He believes this document shows Mr. Charanduk took far more vacation days than he had earned.

Note: This document was marked ER11.

Note: Mr. Armitage advised that he has never seen ER11.

He testified that in the industry, days around Christmas are always claimed as vacation as are religious holidays that clients like Hutterites observe.

Tabling a page from Mr. Charanduk's rebuttal to a letter sent to Mr. Armitage in April of 2016 by Cramer Livestock (marked EE3 later in the hearing), he believes no overtime is to be paid to a salaried employee.

On the document marked ER8, he testifies that Mr. Charanduk marked Mondays as "Office Days" but really never worked Mondays.

He concluded his examination in chief but concluding that Mr. Charanduk exceeded any vacation entitlement he earned and is owed nothing.

Cross Examination

In response to questions from Mr. Armitage, Mr. Cramer provided the following evidence:

- Mr. Charanduk was a shareholder from November 4, 2013 onward.

- Mr. Charanduk was a sales person, as well as a manager. He was paid his salary twice a month. He was expected to work Monday to Friday as much as was needed to get the job done.

- Mr. Charanduk called Mondays an office day but the work could be completed in two hours maximum.

- The Company's Office is located in Swift Current and Mr. Charanduk's residence is in Regina. Paper work can be completed anywhere, home, hotel, etc.

- Mr. Charanduk received a pay-stub along with every salary payment.

- When Mr. Charanduk became a shareholder the Company no longer recorded his vacation entitlement or usage. That became Mr. Charanduk's responsibility.

Re-direct

Legal advice to Mr. Cramer is that Mr. Charanduk was not an employee and therefore responsible to track his own vacation.

ii. EVIDENCE OF EMPLOYEE

Mr. Armitage called Mr. Charanduk and he was sworn. In response to questions from Mr. Armitage, Mr. Charanduk provided the following evidence:

- He began working for Cramer Livestock on September 1, 2010. His main duties were sales, manage employees and look after the store when Mr. Cramer was away.

- His duties did not change after he became a shareholder.

- His salary for the last two years was $100,000/year and he was paid twice a month.

Note: Mr. Armitage tabled two documents that were marked EE3 and EE4. EE3 contained a letter dated April 2016 with attachments from Cramer Livestock to Mr. Armitage. The attachments were:

1) a list of days along with a calendar reference of 57 days Cramer considered were paid vacation days taken by Mr. Charanduk during 2014 and 2015.

2) a document showing a list of Mr. Charanduk's pay cheques from September 2014 to September 2015.

3) photo copies of all the pay-stubs for 2014 up to September 2015.

EE4 contained Mr. Charanduk's rebuttal to Cramer's letter of April 2016 as well as Mr. Charanduk's expense reports that coincide with his rebuttal.

- He referred to EE3 and EE4 to show that for the wage assessment period he took 7 days vacation and therefore is owed for 23 of the 30 earned in the two year period.

- Referring to EE4 and his notation for Mondays being an "office day" is considered by the industry as normal.

- For the two years in question he did not submit timesheets as Mr. Cramer and himself agreed he was to keep his own records and he did that.

- When he left the employment in October of 2015, he received no vacation pay-out.

- Mr. Cramer approved all his expenses and if Mr. Cramer felt he had taken vacation days then Mr. Cramer should have recorded that at the time.

- Mr. Cramer never, in the last two years, spoke to him about his vacation entitlement or that he should have recorded vacation taken instead of a work day.

Cross Examination

Mr. Cramer advised that Mr. Charanduk's duties did change after becoming a shareholder. Mr. Charanduk was given signing authority, a company credit card and a company vehicle. Further, the Company observed four days of Hutterite religious beliefs as non-work days that should have been charged to vacation.

Mr. Cramer also advised that Mr. Charanduk's expenses were just paid, never questioned, but it became obvious he was using company money to travel on personal business and those days should have been claimed as vacation. These are documented in ER11.

Re-direct

None

Final Argument

Mr. Cramer argues that the wage assessment should go back only one year if Mr. Charanduk is an employee and not an owner. He feels Mr. Charanduk received pay for non-work days far and away above the 15 vacation days he earned each year.

Mr. Armitage argued that Section 2-89 2(b) of The Act is interpreted, for annual vacation, to be the last 12 months of employment plus an extra year because calculations are from the year previous. He tabled a Queen's Bench Decision to support this claim.

Mr. Armitage further argued that Mr. Charanduk was an employee as per Section 2-1 (f) of The Act as he received wages. Section 2-36 allows bonuses and dividends to be not considered wages. Further Mr. Cramer was the only Director of the Company and therefore was the employer. As such he was responsible to keep all records including Mr. Charanduk's vacation entitlement.
Mr. Armitage tabled a written argument as well as he concluded that the wage assessment should be up held.
I thanked the parties for their co-operative approach and closed the hearing.

V. ANALYSIS

Cramer Livestock has appealed Wage Assessment #229-16 on the following grounds:

1. Mr. Charanduk was an owner and not an employee and therefore is not covered by The Saskatchewan Employment Act.

2. Mr. Charanduk took more unrecorded vacation days than he earned and therefore is owed nothing.

3. Section 2-89 (1)(b) of The Act allows unpaid vacation entitlement to only the previous 12 months not 24 months.

4. Mr. Charanduk took off four Hutterite religious holidays each year but did not claim vacation days for them from his Cramer Livestock entitlement.

Mr. Cramer makes some compelling points in both the April 2016 document (EE3) and in the document tabled at the hearing (EE11). Being on his own, Mr. Charanduk would be in an ideal position to claim to be working when he was actually attending to personal endeavors. If the argument that Mr. Charanduk was an owner succeeded then it wouldn't matter what he was doing as it pertained to vacation entitlement.

Mr. Armitage points out that there was only one Director in the Company and therefore all others working for Cramer Livestock had to be employees, including Mr. Charanduk. As the Employer, Mr. Cramer under Section 2-38 (1) of The Act was responsible for keeping records including vacation entitlement and usage.

Further Mr. Armitage advised that the proper interpretation for Section 2-89 (2)(b) of The Act is two years because vacation is payable in the year after it is earned. He provided a Queen's Bench Decision (EE7) between Rocking Hills Cattle Co. Ltd. and the Director of Labour Standards from 2011. In that Decision, Rocking Hills sought an order to set aside an adjudicator's decision that allowed a wage assessment for unpaid annual vacation to be calculated for the previous two years rather than 12 months. Queen's Bench Decision was to dismiss the appeal and uphold the adjudicator's decision.

Note: This case is attached.

The fourth issue appealed by Cramer Livestock is the contention that Mr. Charanduk should have claimed vacation for the four annual Hutterite religious holidays. In my review of all documents submitted I cannot ascertain the dates of these holidays.

VI. DECISION

Section 2-1 (f) of The Act describes an employee as "a person receiving or entitled to wages". Section 2-1 (g) describes an employer as "any person who employees one or more employees....(ii) is responsible directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees;".
My conclusion is that Mr. Charanduk, even though a minor shareholder, was an employee throughout his employment at Cramer Livestock.

As an employee, Mr. Charanduk was entitled to a vacation as per Section 2-24 (1)(a) of The Act and as per Section 2-24 (2), entitled to vacation pay on unused vacation.

Sections 2-37 (1) and (2) and 2-38 (1) of The Act direct employers to not only provide statements of earning which contain the amount of vacation paid but also to keep records that show the dates on which vacation is taken and the amount paid to the employee for that vacation.

Mr. Cramer testified that he considered Mr. Charanduk an owner and therefore record keeping became Mr. Charanduk's responsibility.

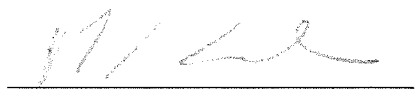
Since no employer records were kept throughout the relevant time period, and no concrete dates supplied regarding Hutterite holidays, I am left to consider two reconstruction attempts (ER11 and EE 3) by the employer and Mr. Charanduk's records.

Again there is no concrete evidence that Mr. Charanduk padded his vacation entitlement by failing to count Hutterite religious holidays. I cannot check the records provided not knowing the actual dates.

On the balance of probabilities I have little choice but to accept Mr. Charanduk's rendition.

Therefore my decision is that the wage assessment for $8,846.72 (23) days of unused vacation is payable and the appeal is denied.

Dated at Regina, in the Province of Saskatchewan, this 14th of December, 2016.



Ralph Ermel
Adjudicator

Attachment: Queen's Bench Citation: 2011 SKQB 453

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at www.saskatchewan.ca.

Right to appeal adjudicator's decision to board

4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

Appeal to Court of Appeal

4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.

(2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.

(3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

4-10 The director of employment standards has the right:

(a) to appear and make representations on:

(i) any appeal or hearing heard by an adjudicator; and

(ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and

(b) to appeal any decision of an adjudicator or the board.

EE7

Pour 36

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2011 SKQB 453**

Date: **2011 12 06**
Docket: Q. B. No. 790 of 2011
Judicial Centre: Saskatoon

BETWEEN:

ROCKING HILLS CATTLE CO. LTD.
and MARK RUPCICH (Director)

APPELLANTS

- and -

DIRECTOR OF LABOUR STANDARDS
(on behalf of Nancy Holdner)

RESPONDENT

Counsel:

Scott Giroux — for the appellants
Shannon Carson — for the Director of Labour Standards

JUDGMENT
December 6, 2011

GUNN J.

---

[1] Rocking Hills Cattle Co. Ltd. ("RH Cattle") and Mark Rupcich seek an order allowing the appeal from and/or setting aside the decision of the adjudicator Leslie Sullivan; an order revoking and/or quashing and/or declaring a nullity the wage assessment issued by the Director of the Labour Standards Branch dated November 18, 2010, and solicitor and client costs of the application.

[2] The Director of Labour Standards opposes the applications.

[3] There is an order granting a stay of the enforcement of the decision of the adjudicator, Leslie Sullivan, dated May 20, 2011, until such time as this matter is decided and an order staying the enforcement of the certificate which may be filed pursuant to s. 68.1 of *The Labour Standards Act*, R.S.S. 1978, c. L-1 (the "*Act*") in this matter until such time as this matter is decided.

[4] The appellants raise the following grounds in their notice of motion:

a. As Nancy Holdner was at all material times an employee employed primarily in farming, and/or ranching within the meaning of s. 4(3) of the *Act*, the adjudicator erred in law by holding that the exemption provided in s. 4(3) does not apply to Nancy Holdner.;

b. In the alternative, should the exemption provided in s. 4(3) of the *Act* not apply to Nancy Holdner, the adjudicator erred in law in her calculations.

THE FACTS

[5] The facts found by the adjudicator do not appear to be in dispute. They appear commencing at page 4 of her decision:

> ...
>
> RH Cattle is a ranch of over 100 quarter sections (16,000 acres) of land near Kenaston, Saskatchewan. During the time when Nancy Holdner was employed by RH Cattle, the main purpose of the business was to raise cattle and sell them. While RH Cattle is a significant operation, it is an average

> size when viewed provincially. The land is about 70% pasture. The remaining land is used to grow hay and grain to feed the cattle. Calves were born and raised at RH Cattle. Calves were also purchased from neighbors. At its peak, RH Cattle had about 1000 mother cows and over 4000 calves. In 2010, RH Cattle had 1100 cow-calf pairs and 1,000 feeder cattle. When ready for sale, cows were shipped to markets in Alberta, Saskatchewan and Nebraska, USA.
>
> During the summer months RH Cattle would employ between 10 and 13 workers. These employees would perform only those duties which pertained to the raising of cattle such as checking the animal pens, feeding the cattle, harvesting and assisting at calving and vaccination time.
>
> Nancy Holdner was the company bookkeeper and office manager. She worked for RH Cattle in this capacity from January 13, 2006 until October 28, 2009. Her duties included bookkeeping which consisted of reconciling bank and credit card statements, entering the bills into their account system, paying those bills, preparing the invoices when cattle were sold and machinery parts were sold via the inventory, keeping track of inventory, preparing the payroll and creating monthly profit and loss statements. Her duties also included answering the phone, filing and preparing the paperwork required to transport cattle to the United States. On rare occasions Ms. Holdner would lend an extra hand at calving. Ms. Holdner was not paid over time, annual holiday pay or public holiday pay. Ms. Holdner did not get any paid vacation. It should be noted that Ms. Holdner worked full time, year round.
>
> ...

[6] The adjudicator goes on to discuss at some length some other business activities of RH Cattle. However, for the purposes of this analysis, the adjudicator concluded that RH Cattle was a business primarily engaged in the area of ranching and farming. Neither party takes any issue with that finding.

DECISIONS BELOW

[7] The Director of the Labour Standards Branch made a determination November 18, 2010 pursuant to s. 60 of the *Act* that RH Cattle and Mark Rupcich failed to pay wages to Nancy Holdner in the sum of $6,280.80.

[8] This wage assessment was appealed by RH Cattle and Mr. Rupcich. A hearing was held before Leslie Sullivan, adjudicator, whose written decision was rendered on May 20, 2011. The adjudicator dismissed the appeal and upheld the wage assessment.

[9] In doing so, the adjudicator said at p. 9 of her decision:

> ...
>
> In deciding whether s. 4(3) applies to the employee, Nancy Holdner, I must look at the duties she performed and whether or not they were primarily "farm type" and "ranch type" activities. ...
>
> Ms. Holdner's duties were not at all like those of the other workers RH Cattle hired. Ms. Holdner was a bookkeeper and office manager. She worked exclusively and steadily in this capacity full time, year round. As well, in no way could her work be viewed as having the seasonal component of most farm or ranch type work.
>
> Therefore I find that Ms. Holdner was not an employee employed primarily in farming, ranching or market gardening. The provisions of the [sic] s. 4(3) of the Act do not apply and she is entitled to be paid overtime, annual holiday pay and public holiday pay.
>
> ...

[10] RH Cattle and Mr. Rupcich, by notice of motion, appeal the decision of the adjudicator.

[11] The appeal is pursuant to s. 62.3 of the *Act* which provides in part the following:

> 62.3(1) An employer, a corporate director, an employee named in a wage assessment or a decision of the director pursuant to subsection 62.4(2.1) or the director on behalf of employees may, by notice of motion, appeal a decision of the adjudicator on a question of law or of jurisdiction to a judge of the Court of Queen's Bench within 21 days after the date of the decision.
>
> ...
>
> (4) The record of an appeal consists of:
>
> (a) the wage assessment or a decision of the director pursuant to subsection 62.4(2.1);
>
> (b) the notice of appeal served on the registrar of appeals;
>
> (c) the written decision of the adjudicator;
>
> (d) the notice of motion commencing the appeal to the Court of Queen's Bench; and
>
> (e) in an appeal to the Court of Appeal, the decision of the Court of Queen's Bench ...

[12] The appellants assert that Nancy Holdner was, at all material times, an employee employed primarily in farming, and/or ranching within the meaning of s. 4(3) of the *Act*. The appellants further assert that the adjudicator erred in law by holding that the exemption provided in s. 4(3) does not apply to Nancy Holdner.

[13] In the alternative, the appellants submit that the adjudicator erred in law in her calculation of the quantum of annual holiday pay owed to Ms. Holdner by failing to properly apply s.68.4 of the *Act* in her calculations.

STANDARD OF REVIEW

[14] The appropriate standard of review of a decision of an adjudicator on appeals pursuant to s. 62.3(1) of the *Act* is correctness. This was recently confirmed by the Court of Appeal in *DJB Transportation Ltd. v. Bolen*, 2010 SKCA 50., 350 Sask. R. 217. *DJB* was an appeal from a Queen's Bench order overturning the decision of an adjudicator appointed pursuant to the *Act*. Lane, J.A. said the following at para 34:

> [34] The appeal should be dismissed. For the reasons to follow, the Chambers judge was correct in determining the Adjudicator was required to correctly interpret and apply the governing legislation and his failure to do so amounts to an error of law. For the following reasons the standard of review is correctness.

[15] The parties here agree that the standard of review is correctness.

THE LEGISLATION

[16] Sections 4(3) and (3.1) of the *Act* provide as follows:

> 4 (3) Subject to subsection (3.1), this Act does not apply to an employee employed primarily in farming, ranching or market gardening.
>
> (3.1) For the purposes of subsection (3), the following are deemed not to be within the meaning of farming, ranching or market gardening:
>
> (a) the operation of egg hatcheries, greenhouses and nurseries;
>
> (b) bush clearing operations;
>
> (c) commercial hog operations.

DISCUSSION/ANALYSIS

[17] The central issue is whether Nancy Holdner was an employee employed primarily in farming, ranching or market gardening within the meaning of the *Act*.

[18] In *Anderson v. Bear Hills Pork Producers Ltd.* 2000 SKQB 505, 198 Sask. R. 229, Scheibel, J. said at para. 17 that "...[t]he Legislature, in s. 4(3), clearly did not want the Act to apply to 'an employee employed primarily in farming, ranching or market gardening....'"

[19] Here, the adjudicator made findings of fact that Ms. Holdner was a bookkeeper and office manager for RH Cattle, a ranching operation, and because she was not an employee primarily employed in ranching, the exemption did not apply. The Director submits that the actual work performed by the employee must be examined to see if the exemption applied, not just the nature of the employer's operation.

[20] The Director relies on the analysis in *Bear Hills, supra,* where Justice Scheibel used a four part test for the analysis of s 4(3) of the *Act* commencing at para. 21 of his decision. The test can be summarized as follows:

(1) Employee performs farm/ranch type activities;

(2) Employee employed by a farming operation;

(3) Work done exclusively for the farmer or farming operation;

(4) Workers not engaged in processing of a product.

[21] At para. 21, Justice Scheibel said the following in relation to "farm type activities":

> [21] A review of the affidavits filed demonstrates that the employees of the respondent were performing "farm type activities". These activities include providing water and feed to the pigs, weighing them, providing appropriate medication, cleaning barns, assisting in the birth process, as well as other activities all related to the traditional occupation of farming.

[22] Even though the legislation has changed since the *Bear Hills, supra,* judgment, the Director submits that the changes do not impact the analysis.

[23] RH Cattle and Mr. Rupcich submit that in examining the evidence in relation to this four part test, Justice Scheibel relied on "The Department of Labour Standards Branch, Information Bulletin LSA-7". This bulletin was referred to in paras. 19 and 20 of his decision. RH Cattle and Mr. Rupcich frame their objections to the use of the Information Bulletin in their brief of law in the following way at paras. 59 and 60:

> [59] ... However, and with the greatest respect, it is far from clear that in so accepting the Hog Barn Bulletin as an accurate statement of the law, and before proceeding to apply it as such, that Mr. Justice Scheibel engaged in an assessment of the accuracy of the legal statements claimed in the said Bulletin. To the extent that the said Bulletin contains inaccurate statements of the law, as it has been outlined above, it is respectfully submitted that *Bear Hills Pork* should not be followed.
>
> [60] If in fact this was the intention of Scheibel J. to adopt the Hog Barn Bulletin as a new minimum hurdle to leapt [sic] by an employer seeking to rely on the exemption provided by 4(3), it is respectfully

> submitted that in any event, he did not have farms and ranches, as distinct from intensive hog barns, in his contemplation at the time. Certainly, if it were otherwise, one would have expected Scheibel J. to refer to the prior case law as it interpreted the section, such as *Elcan* [*Elcan Forage Inc. v. Weiler*, (1992) 102 Sask. R. 197 (Q.B.)] and *Thibeault [Saskatoon Horses and the Handicapped Inc. v. Thibeault* (1994), 126 Sask. R. 250 (Q.B.)] [citations added], and to explain why he was departing from those interpretations. If Scheibel, J. simply neglected to mention the previous case law, and it indeed was Sheibel's [sic] intention to change the law, such that an employee employed primarily in ranching had to be doing primarily "farm-type tasks, for the reasons that will follow regarding statutory interpretation, it is respectfully submitted that the case was wrongly decided and should not be followed.

[24] The *Elcan* case (supra) referenced dealt with whether a commercial alfalfa processing operation was exempt under s. 4(3) where the employee in question was a welder and mechanic. Justice Wright concluded that the employer was purely a commercial processing operation, so the exemption did not apply. The analysis did not center on the status of the employee.

[25] In *Thibeault, supra*, Justice McLellan concluded that the exemption did not apply because the primary purpose of the operation was running therapeutic services for the handicapped, not farming or ranching. Again, the analysis did not center on the status of the employee.

[26] I am satisfied that *Bear Hills, supra*, was correctly decided and that Justice Scheibel correctly applied the *Act*.

[27] The adjudicator did make reference to the *Bear Hills, supra,* decision in her decision. She also made reference to the filing of an Information Bulletin before her,

despite the objection of RH Cattle and Mr. Rupcich. She clearly recognized that information bulletins were not sources of law but that they had some relevance in relation to the interpretation of the *Bear Hills* decision given the similarity of language.

[28] I am satisfied that the adjudicator correctly interpreted the legislation and the appeal from this aspect of her decision is dismissed.

[29] RH Cattle and Mr. Rupcich also raise, as a ground of appeal, the calculations of the adjudicator. The portion of the assessor's decision dealing with this issue, at p. 9, is as follows:

> ...
>
> With respect to the secondary issue, the Appellant challenges the wage assessment. The figure proposed by RH Cattle as the total amount of wages to be taken into consideration in determining Annual Holiday Pay is $54,493. 28. RH Cattle is suggesting that the sum of $3086.45 (3/52 of these wages) is therefore the appropriate amount of Annual Holiday Pay. A review of the payroll transactions for Nancy Holdner (Exhibit EE 2) shows that the sum of $54,493.28 was the net pay of Ms. Holdner during the relevant time period. Annual Holiday Pay is based on gross pay. The gross pay actually paid to Ms. Holdner during the relevant time period was $70,141.00. However, she is also owed some overtime and Public Holiday Pay. These amounts must be factored in to achieve the correct figure for outstanding Annual Holiday Pay.
>
> | | |
> |---|---|
> | Gross pay received | $70,141.00 |
> | Overtime (to be paid) | 665.00 |
> | Public Holiday Pay (to be paid) | 1,447.33 |
> | Total Gross Pay | $72,253.33 |
>
> Therefore the annual Holiday Pay owing to Ms. Holdner is 3/52 of $72,253.33 or $4168.47. The calculation of the Wage Assessment by the Labour Standards Officer is correct.

[30] RH Cattle and Mr. Rupcich take no issue with the calculation of the overtime to be paid or the public holiday pay to be paid. However, they submit that the calculation of the annual holiday pay is in error and should be reduced to $3,086.45.

[31] The appellants submit that the relevant provisions of the *Act* are the following:

> 29.4 In this Part, "year of employment" means a period of 52 consecutive weeks in which an employee's employment is not broken by a period greater than 26 consecutive weeks.
>
> 30(1) Every employee to whom this Act applies is entitled:
>
> (a) subject to clause (b), to an annual holiday of three weeks after each year of employment with any one employer;
>
> (b) to an annual holiday of four weeks after the completion of ten years of employment with one employer and after the completion of each subsequent year of employment with that employer.
>
> ...
>
> 33(1) An employee is entitled to receive annual holiday pay in the following amounts:
>
> (a) if the employee is entitled to an annual holiday pursuant to clause 30(1)(a), three fifty-seconds of the employee's total wages for the year of employment immediately preceding the entitlement to the annual holiday;
>
> (b) if the employee is entitled to an annual holiday pursuant to clause 30(1)(b), four fifty-seconds of the employee's total wages for the year of employment immediately preceding the entitlement to the annual holiday.
>
> (1.1) With respect to an employee who is entitled to an annual holiday pursuant to section 30 but who does not take that annual holiday, the employer shall pay to the employee the employee's annual holiday pay not

later than 11 months after the day on which the employee becomes entitled to the annual holiday.

...

35(1) If the employment of an employee terminates, the employer of the employee shall, within fourteen days after the effective date of termination, pay to the employee the annual holiday pay to which he or she is entitled pursuant to this Act.

(2) If the employment of an employee terminates, the employee is entitled to annual holiday pay calculated in accordance with section 33 with respect to all total wages earned by the employee with respect to which the employee has not previously been paid annual holiday pay.

(3) Subsection (2) applies whether or not an employee has completed a year of employment.

...

68.4(1) A claim pursuant to this Act with respect to unpaid wages must be made to the director or a duly authorized representative of the minister within one year after the last day on which payment of wages was to be made to an employee and an employer failed to make payment.

(2) Recovery of wages pursuant to this Act is limited:

(a) to wages that became payable in the year immediately preceding the day on which the claim was made to the director or duly authorized representative of the minister; or

(b) where the employment with the employer has ceased, to wages that became payable within the last year of employment with that employer.

...

82 All money payable by an employer to any employee under this Act shall be deemed to be wages earned by the employee and is subject to all deductions that the employer is required to make from wages under any law in force in the province.

[32] The appellants submit that Ms. Holdner became entitled to Annual Holiday Pay ("AHP") pursuant to ss. 30(1) of the *Act* on or about January 13 of every year, calculated as 3/52 of her total wages for the previous year. With respect to an employee who is entitled to AHP but who does not take that annual holiday, the employer shall pay

to the employee the AHP not later than 11 months after the day on which the employee becomes entitled to the annual holiday. This would be December 13 in any year in which Ms. Holdner did not take her annual holiday.

[33] The appellants submit that pursuant to s. 82 of the *Act*, AHP is deemed to be wages earned. They further submit that pursuant to s. 68.4(2), Ms. Holdner is limited to wages that became payable in the last year of her employment, namely October 28, 2008 through October 28, 2009.

[34] The calculations relied on by RH Cattle and Mark Rupcich are contained in the brief submitted to the adjudicator marked as Exhibit ER 7 at paras. 11-14 inclusive:

> 11) Once Ms. Holdner's employment ceased (not a termination in the usual sense of the word) on October 28, 2009, Annual Holiday Pay ("AHP"), pursuant to section 35(1) became due on or about November 11, 2009. It is accepted that AHP for the period between January 13 and October 28, 2009 was also payable during the last year of employment, namely on the 28th of October.
>
> 12) On December 13, 2008, Ms. Holdner's AHP for January 13, 2007 – January 13, 2008 would have become due. However, the AHP for that period became payable on January 13, 2008, which is outside Ms. Holdner's last year of employment.
>
> 13) From the document entitled "Rocking Hills Cattle Company Ltd., Payroll Transactions by Payee January 2008 through October 2009", the total wages for the period January 11, 2008 – October 28, 2009 for Ms. Holdner is stated as $54,493.28 - $994.87, for a total of $53,498.41. It should be noted that this figure gives Ms. Holdner the benefit of wages for two additional days, Jan. 11 and 12, 2008.
>
> 14) Taking 3/52 of the wages for these two periods, January 11 2008 through January 13, 2009, and January 14, 2009 – October 28, 2009, provides a total AHP which became payable during the last

> year of employment in the amount of $3,086.45 (i.e. $53,498.41 x 3/52 – $3,086.45).

[35] The Director submits that the decision of the adjudicator in respect to the AHP is correct and the appeal should be dismissed.

[36] The Director submits that Ms. Holdner was entitled to holiday pay for 2008 and 2009. Ms. Holdner earned annual holidays between January 13, 2008 and January 13, 2009. In accordance with s. 33, her holiday pay was to be paid out within 11 months after January 13, 2009. Therefore, this was payable and owing during the one year period prior to the last day worked, which was October 29, 2009. In addition, Ms. Holdner earned annual holidays between January 13, 2009 and the last day of employment on October 29, 2009, which would also be payable in the one year period prior to her last day of work.

[37] The Director summarizes its submission at para. 43 of its brief in the following way:

> 43. Based on the records provided by the employer, Ms. Holdner[s'] gross wages for the period January 13, 2008 until January 13, 2009 was $37,195.00 and for the period January 2009 to October 28, 2009 was $32,946.00 for a total of $70,141.00 x 3/52 = $4.046.60.

[38] I am satisfied that the adjudicator correctly interpreted the provisions of the *Act* in relation to the AHP and the appeal on this issue is dismissed.

[39] There will be no order as to costs on the appeal to the successful party as the Director is not seeking costs.

J.

E. J. GUNN