Employment Standards TRIBUNAL

An appeal

- by -

Kocher's Diving Locker Ltd.
(the “Employer” or “Kocher’s Diving”)

- 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: Ib S. Petersen

FILE No.: 2002/463

DATE OF HEARING: November 26, 2002

DATE OF DECISION: January 6, 2003

DECISION

APPEARANCES:

Mr. Greg Kocher — on behalf of the Employer

Mr. Neil Christian — on behalf of himself

OVERVIEW

This an appeal by the Employer, Kocher Diving, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director issued on August 12, 2002. The Determination concluded that Mr. Christian was owed a total of $5,789.09 by the Employer on account of overtime wages and vacation pay. While the Delegate recognized--in a lengthy and detailed Determination--that Mr. Christian worked in a responsible position, he was not a manager for the purposes of the *Act*. The Employer agreed at the hearing that this conclusion was not part of the appeal.

Mr. Christian worked for the Employer, from May 1998 to April 15, 2000. At the material time, he was the program director. The Employer operates a retail scuba and training facility. Mr. Christian was paid an annual base salary of $40,000. According to a written agreement, entered into in October 1999, the hours of work was 40 per week. The Employer says that he was also entitled to an additional $5,000 as a "contractor," an arrangement separate and distinct from the employment relationship, to obtain accreditation for Kocher Diving with the Private Post Secondary Education Commission. The hours worked on the accreditation should not be counted towards overtime.

FACTS AND ANALYSIS

The Employer appeals the Determination and, as the Appellant, has the burden to persuade me that it is wrong. In the circumstances, I am of the view that the Employer has not met that burden.

Both Mr. Kocher and Mr. Christian testified under oath or affirmation at the hearing.

The Employer argued that Mr. Christian was not entitled to the overtime awarded. The nub of the appeal is that the overtime calculation should take into account time taken off from time to time and not include time worked as a "contractor" on the accreditation. Mr. Kocher also says, in effect, that the overtime claim is inflated because Mr. Christian did not work at home between December 20, 1999 and January 5, 2000 on a training manual, nor did he have to do all the instruction on the so-called Instructor Development Course ("IDC").

I turn first to the argument that some 100 hours of work (according to Mr. Kocher) should not be counted towards the overtime entitlement because Mr. Christian worked under two separate and distinct relationships with the Employer: one as an employee, another as a "contractor"--by which presumably is meant as an independent contractor. The Employer says that the agreement between Kocher Diving and Mr. Christian dated October 12, 1999, supports this argument. I am unable to agree. First, and the Employer agrees, this was never brought up with the Delegate during the investigation. Second, while I have some trouble with this argument on a conceptual level, there is only one agreement. On a plain

reading, it provides for an annual base salary of $40,000 between September 16, 1999 and September 15, 2000, paid bi-weekly, and for an additional $5,000 for the work on the accreditation, paid in stages. On the Employer's own evidence, Mr. Christian worked on the accreditation at the Employer's office (indeed, he was not authorized to work at home), using the Employer's equipment. The agreement also provides for a maximum of 40 hours per week. I do not think it can be reasonably argued that there are two separate and distinct relationships. I reject this argument.

Mr. Kocher agrees that Mr. Christian taught most of the IDCs. He concedes that the IDCs were long programs. They ran, according to his evidence over 7 days--10 hours a day, some days 12 hours. He states that Mr. Christian had other instructors do some of the work and that he, therefore, could and did take some time off. The Employer also says that Mr. Christian took time off from time to time--an afternoon or morning here, an a day or two there--because they had an "honours system." Mr. Christian denies that he took time of as asserted. The Employer candidly acknowledges that he has no particulars or details as to the time taken off. In the circumstances, I reject the suggestion that this time should be taken into account.

The Employer asserted that Mr. Christian took time off between December 20, 1999 and January 5, 2000 and that this time should be credited. The Delegate did not agree, and Mr. Christian denies taking the time off. Mr. Christian testified that the Employer's full-time manager quit in November 1999 and that he had to take over many of those duties. This was not in dispute. It is likely that this resulted in "extra" work. Mr. Christian, concerned about "excessive" hours and "fatigue," decided to quit in December 1999 but was eventually talked out of it by Mr. Kocher. The December 20 date apparently comes from Mr. Christian's resignation letter. He agrees that he took time off from December 25 to January 1, 2000, inclusive, and did work at home during that time. As he says he worked at Kocher's Diving both before and after those dates, the Employer should be able to present evidence, for example from other employees, contradicting that claim. The employer did not do that. On the basis of the evidence before me at the hearing, I am not persuaded that Mr. Christian had the time off as stated by the Employer.

Mr. Kocher also says that I should consider the fact that Mr. Christian did not mention that he was owed overtime at the time of his resignation in April 2000. Mr. Christian says he did not consider it "prudent" at the time, preferring to rely on the Employment Standards Branch. In my view, this is irrelevant from the standpoint of the *Act*. The *Act* specifically provides for a time limit for the filing of a complaint. I gather from Mr. Kocher's evidence and submissions that Mr. Christian's failure to bring this up, in his view, reflects on the credibility of the overtime claim. In the circumstances, I am unable to agree. I found Mr. Christian to be a very credible witness and see no reason to disbelieve his testimony.

The Employer's written appeal also states that the Delegate calculated the amount owing incorrectly. This point was not pursued at the hearing.

Considering all of the circumstances, I am not persuaded that the Delegate erred. On the whole, in fact, the Delegate's analysis if fair and balanced. In short, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated August 12, 2002, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal