

An appeal

- by -

Kelley Thompson
("Thompson")

- 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: Carol L. Roberts

FILE No.: 2001/749

DATE OF DECISION: January 9, 2002

DECISION

This is a decision based on written submissions by Kelley Thompson for himself and Terry Hughes for the Director of Employment Standards.

OVERVIEW

This is an appeal by Kelley Thompson, pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued October 1, 2001. The Director's delegate concluded that the Hudson's Bay Company ("HBC") had paid Mr. Thompson correctly for statutory holidays, and determined that the Act had not been contravened. The delegate ceased investigation, and closed the file.

ISSUE TO BE DECIDED

The issue on appeal is whether the delegate erred in interpreting the legislation. Mr. Thompson contends that HBC is in violation of the Act in failing to give him a day off in lieu of working on a statutory holiday, and that it owed him overtime pay for "forced work of an extra day during the week of the statutory holiday".

FACTS

Mr. Thompson worked for HBC from March 1997 to October 14, 1999 as a commission salesman.

On October 18, 1999, he filed a complaint with the Employment Standards Branch claiming overtime pay for statutory holidays.

HBC advised the delegate that it attempted to give employees who worked on statutory holidays lieu days in the week that the holiday fell. It calculated an average day pay for each statutory holiday, and this was automatically paid in the pay period of each holiday. If the employee was not given a lieu day in that pay period, the employee is encouraged to take a lieu day at another time. However, given that the statutory holiday pay had been paid during the week of the holiday, HBC would not pay employees again for days taken in lieu at a later time.

With respect to commission employees working statutory holidays, HBC advised the delegate that employees receive either the greater of their draw or the commission they actually earn on a statutory holiday, plus 1/2 times the average hourly equivalent rate, which resulted in the payment of 1 1/2 times payment for the statutory holiday.

The delegate acknowledged the difficulty of determining statutory holiday pay for commission salespeople since sections 44 and 45 of the Act applied to employees only.

The delegate found that HBC determined a yearly average hourly ("non-productive") rate for each commission salesman, which is an average hourly rate of commission wages earned the previous year. This rate is used to pay the employee for normal statutory holiday time. Mr. Thompson was paid using this rate for statutory holidays he did not work.

The delegate concluded that this method of payment was reasonable, and met the intent of the Act in those instances where an employee did not work on a statutory holiday.

Where a commission employee worked on a statutory holiday, the delegate concluded that HBC's policy of providing the employee with a lieu day either during that week, or at another time, satisfied the requirements of section 46. Although Mr. Thompson contended that, because he was not always scheduled a lieu day with pay he should be paid another day at overtime pay, the delegate found no provision of the Act that supported his contention.

ARGUMENT

Mr. Thompson argues that HBC did not ensure that employees were given lieu days off for working statutory holidays as required by section 46. He contends that, while the delegate acknowledged that HBC should ensure that it should be given days off in lieu, the delegate erred in failing to find that, if he was not, that he should be paid overtime for the lieu days worked.

HBC provided no new evidence or submissions on appeal. It contended that the delegate correctly determined the facts and applied the law, and argued that Mr. Thompson's appeal should be dismissed.

The Director argued that Mr. Thompson's main concern was the timing of the payment of the lieu day. Since HBC paid for the lieu day during the pay period of the statutory holiday, if the lieu day was taken at another time, it would not be paid for. The delegate submitted that the Act did not provide for additional overtime, and additional days pay.

ANALYSIS

It is helpful to set out here the relevant sections of the Act and Regulations.

Section 44 of the Act provides that after 30 calendar days of employment, an employer must either:

- (a) give an employee a day off with pay on each statutory holiday, or
- (b) comply with section 46.

Section 46 provides that an employee who works on a statutory holiday must be paid for that day

- (1) (a) 1 1/2 times the employee's regular wage for the time worked up to 11 hours, and
(b) double the employee's regular wage for any time worked over 11 hours.
- (2) In addition, the employer must give the employee a working day off with pay according to section 45.
- (3) The employee may choose to have the pay for the day off credited to the employee's time bank, if one has been established.
- (4) the employer must schedule the day off with pay
 - (a) before the employee's annual vacation.
 - (b) before the date the employment terminates, or
 - (c) if the pay for the day off is credited to the employee's time bank within 6 months after the date of the statutory holiday, whichever is earliest.

Section 45 provides that an employee who is given a day off on a statutory holiday or instead of a statutory holiday must be paid the following amount for the day off:

- (a) if the employee has a regular schedule of hours and the employee has worked or earned wages for at least 15 of the last 30 days before the statutory holiday, the same amount as if the employee had worked regular hours on the day off
- (b) in any other case, an amount calculated in accordance with the regulations.

Mr. Thompson's main contention is that HBC did not schedule days in lieu for those statutory holidays that he worked. He submits that he was not given the option of taking a lieu day, and thus, was not paid overtime for the days he was "forced" to work.

The evidence shows that Mr. Thompson worked 3 statutory holidays in 1997, 4 statutory holidays in 1998, and 1 in 1999. HBC paid him statutory pay for each of these days as well as an additional day of pay in the week that the statutory holiday fell.

The delegate correctly notes that sections 44, 45 and 46 apply to employees, not commission salespeople. Nevertheless, similar principles must apply to commissioned salespeople as they are employees.

If I understand Mr. Thompson's appeal correctly, he contends that HBC complied with s. 46(1), but not s. 46(4). HBC says Mr. Thompson was told, both by his supervisor and the Human Resources Manager, that a day off in lieu of working on a statutory holiday could be scheduled at any time, but that it would be unpaid as he had already been paid for it during the week of the statutory holiday. Mr. Thompson denies being told this. HBC also contended that Mr. Thompson

was offered another day off on several occasions. Mr. Thompson denied this, but presented no evidence in support of his argument.

The evidence is that Mr. Thompson received overtime wages as well as an additional days pay during the pay period of the statutory holiday. If he had taken a day off at some other time, it would have been without pay.

Mr. Thompson alleges that HBC did not schedule a day off for each statutory holiday he worked. If in fact HBC did not properly schedule a day off, it is in breach of s. 46 in that respect. However, as the delegate notes, the Act does not provide a remedy in this instance. Mr. Thompson is no longer employed at HBC and can not now be given 8 days off without pay.

Consequently, I am unable to conclude that the delegate erred, and dismiss the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated October 1, 2001 be confirmed.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal