

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Model Holdings (1997) Ltd
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Mark Thompson

FILE NO.: 97/707

DATE OF DECISION: January 27, 1998

DECISION

OVERVIEW

This is an appeal brought by Model Holdings (1997) Ltd. (formerly Valet Cleaners Ltd.) (the “Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a Delegate of the Director of Employment Standards (the “Director”) on August 27, 1997. The appeal was decided on the basis of written materials submitted by the Employer and the Director. The Determination found that the Employer owed statutory holiday pay and vacation pay to a former employee, Mr. Bob Kane (“Kane”). The basis of the Employer’s appeal was that the business was closed on statutory holidays, and Kane received his commission for the work normally done on the holiday. The appeal did not address the conclusion in the Determination regarding holiday pay.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether the Employer paid Kane for statutory holidays as required by Section 45 of the *Act*.

FACTS

Most of the facts of the case were not in dispute. Kane was employed as a driver who delivered the Employer’s products to customers. Kane’s compensation was calculated as a per centage of the gross value of goods delivered. The plant was closed on statutory holidays and on Boxing Day. During the weeks in which a holiday fell, drivers essentially serviced their routes in four days, rather than five. Within the company, days in a week in which a holiday fell were known as “double days.” The Employer stated that if an employee worked more than eight hours on a double day, he or she was paid overtime. According to the payroll records for Kane, he apparently did not work more than eight hours. The Employer’s appeal seems to rest on the assumption that because employees received commissions for their full routes during the weeks when the plant was closed for a statutory holiday, the statutory requirement for holiday pay was met. It argued that other employees completed Kane’s work on the day previous to the holiday. Kane denied that other employees assisted him in completing his work during the weeks in which statutory holidays fell. The Director’s Delegate found no evidence in the Employer’s payroll records that Kane had been paid for a statutory holiday.

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The data supplied by the Employer in support of its appeal were the same as those available to the Director's Delegate when she made her determination.

ANALYSIS

Section 45 of the *Act* requires that an employee who is given a day off on a statutory holiday must be paid the same amount as if he or she had worked regular hours on the day off if the employee meets certain requirements not at issue in this case. This provision does not depend on the method by which the employee is paid, e.g. on a salary or a commission. The burden of proof in proceedings before this Tribunal is on the appellant to persuade the Tribunal on the balance of probabilities that the original Determination was incorrect. The Employer presented no new evidence or argument to meet this burden. In addition, the intent of Section 45 of the *Act* is that statutory holiday pay is based on wages earned, not on what work was done. The inclusion of statutory holiday pay in a commission wage structure does not comply with the requirements of the *Act* (see *W. M. Schulz Trucking Ltd.*, B.C.E.S.T. #D127/97). Based on the evidence presented to the Director's Delegate, the Employer's practice seems to have been to require the same volume of work from Kane and the other employees in four days rather than five in weeks in which a statutory holiday fell. This falls short of conferring a benefit on the employees as the *Act* intends.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, I order that the Determination of August 27, 1997 is confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal