

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 -

Monarch Beauty Supply Company
("Monarch")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE NO.: 97/604

DATE OF DECISION: January 27, 1998

DECISION

OVERVIEW

This is an appeal by Monarch Beauty Supply ("Monarch") pursuant to s. 112 of the *Act*. The appeal is from a Determination issued by Gerry Olmstead, a delegate of the Director of Employment Standards on July 18, 1997. The Determination required Monarch to pay wages and holiday pay in the amount of \$1,375.41 to Scot Fetherston, a former employee of the company.

Monarch filed an appeal on August 7, 1997. On October 16, 1997 the parties were advised that a decision would be made based on written submissions. A submission was received from Monarch on October 27, 1997. On October 23, 1997, another Determination was made by Mr. Olmstead requiring Monarch to pay wages and holiday to a second employee in similar circumstances. The second Determination was also appealed by Monarch on November 3, 1997. Decisions on both appeals are made today based on written submissions.

FACTS

Mr. Fetherston was hired by Monarch as a commission salesperson on February 12, 1996. He continued to be an employee at the time he filed a complaint with the Director, but subsequently ceased to be an employee. For the first 3 months of his employment, Mr. Fetherston was paid a guaranteed \$2,000.00 per month; he was thereafter paid totally on commission, which ranged from 2% to 14% of net invoice value. The terms and conditions of his employment were governed by Monarch's "Sales Policies and Procedures", an 8-page document attached to the Determination as Exhibit #1.

Some provisions of Monarch's sales policies and procedures state that statutory holiday pay is factored into the commission rates, and "gross pay" is defined as including statutory holiday pay. Specifically, Monarch states that 3.7% of the commission rate is to be statutory holiday pay. In his investigation, Mr. Olmstead discovered some problems in determining whether Monarch's payroll records reflected the correct statutory holiday pay owing to Mr. Fetherston. Mr. Olmstead found discrepancies in how commissions were calculated for the months of May and June, 1996, and was unable to confirm that 3.7% of commissions amounted to the correct statutory holiday pay. Mr. Olmstead calculated, however, that pay for the 9 statutory holidays falling within Mr. Fetherston's term of employment would amount to \$984.67. Monarch's records indicated that only \$898.73 had been paid to Mr. Fetherston in statutory holiday pay, a difference of \$85.94. Monarch's written submissions do not address this aspect of the Determination and so it is not necessary to deal further with this issue.

Mr. Fetherston was directed to attend monthly sales meetings, which required him to travel from his residence in Victoria to the meetings, typically held in the Lower Mainland. The meetings took place on weekends and appear to have involved at least a 10-hour day for Mr. Fetherston, including travel time. Monarch reimbursed him the cost of travel to these sales meetings. Mr. Fetherston complains that he should have been paid wages for attending the meetings. Monarch submits that he should be exempt from the hours of work and overtime provisions of the *Act*, as he is a "commercial traveller" as set out in section 34(1)(l) of the *Employment Standards Regulation* ("the *Regulation*"). Mr. Olmstead concluded, however, that as Mr. Fetherston was required to attend these sales meetings and could not possibly earn any sales commission while attending them, he was performing "work" as defined in the *Act*. Further, the Determination held that this work was not exempted from the wages and overtime provisions because at the relevant times Mr.

Fetherston was not a commercial traveller selling goods *while travelling*. Monarch was therefore required to pay wages to Mr. Fetherston at the average daily rate of \$109.41 for the 11 sales meetings he was required to attend, which including vacation pay amounts to \$1,251.65.

ISSUE TO BE DECIDED

This appeal requires me to decide whether Monarch must pay wages to Mr. Fetherston for his attendance at monthly sales meetings.

ANALYSIS

Section 34(1)(l) of the *Regulation* reads as follows:

34. (1) Part 4 of the Act does not apply to any of the following:

- ...
(l) a commercial traveller who, while travelling, buys or sells goods that
 - (i) are selected from samples, catalogues, price lists or other forms of advertising material, and
 - (ii) are to be delivered from a factory or warehouse;

Monarch submits that the ordinary meaning of this provision is that it is a definition of "commercial traveller" and exempts only those workers who *while travelling* buys or sells goods that are selected from samples, etc. It is further submitted, however, that it would be absurd to interpret the clause "while travelling" as limiting the exemption from Part 4 of the *Act* only to the time spent by the worker in travelling. Monarch submits that the legislature could not have intended Part 4 to apply to commercial travellers when they are performing non-travelling services such as preparing for sales, doing administrative tasks, or in the case at hand, attending monthly sales meetings. If the legislature had intended to exempt commercial travellers from Part 4 for only limited times according to the type of work being performed, then, it is submitted, the legislature could have used clear language such as that used to exempt bus drivers, truck drivers, miners and first aid attendants from the overtime provisions during certain time frames (referring to the exemptions set out in section 44 of the *Regulation*). The absence of specific time frames in the commercial traveller exemption, it is argued, leads to the conclusion that commercial travellers are completely exempt from Part 4.

Monarch's submission emphasizes the point that the limited exemption of bus drivers illustrates that the legislature did not intend commercial travellers to be exempted for only limited times. Section 44 of the *Regulation* reads in part:

44. Sections 40 and 41 of the Act do not apply to any of the following:
- (a) a bus operator
 - (i) while waiting during the course of a charter trip or excursion,
 - (ii) for lay-over time, or
 - (iii) for any time that the bus operator is not operating a bus, if the cause is completely beyond the employer's control; ...

I am not satisfied that section 34(1)(l) of the *Regulation*, dealing with commercial travellers, is so lacking in specificity when compared with section 44(a) or any of the other time-limited exemptions set out in section 44. Section 34(1)(l), in my view, is clear that commercial travellers are exempted from Part 4 when they buy or sell goods *while travelling*. There is no absurdity to exempting commercial travellers only while they are travelling, just as there is no absurdity to exempting bus operators while waiting during a charter trip. If the legislature intended to exempt "commercial travellers" from Part 4 for all purposes, it would not have been necessary to specify that the exemption applies when such travellers are buying or selling goods *while travelling*.

Setting aside the issue of travel for a moment, the ordinary meaning of section 34(1)(l) is that a commercial traveller is exempt when he or she "buys or sells goods." The monthly sales meetings in question do not involve the buying or selling of goods *per se*. The meetings also appear to be quite separate from the daily administrative tasks and sales preparation activities mentioned in Monarch's submission. While I agree it is impractical to try to specify which minutes of a salesperson's day are not devoted to sales or travel, it is quite easy to identify the time salespersons must spend at mandatory monthly sales meetings. For Mr. Fetherston, attendance at these meetings involved spending a minimum of 10 hours on a weekend. I note that Monarch reimbursed Mr. Fetherston for his travel costs in attending the meetings.

It must be remembered that most of the terms and conditions of Mr. Fetherston's employment are governed by Monarch's comprehensive policy for commission salespersons. While performing sales services (which would likely involve travel), salespersons are paid a commission. Attendance at monthly sales meetings is mandatory for all Monarch salespersons, yet while performing this work, salespersons are not able to earn a commission as they are not engaged in selling while attending these meetings. This fact alone should put to rest the suggestion that Mr. Fetherston was "selling goods while travelling" whenever he attended a sales meeting: it is safe to assume that no goods are sold to customers at such meetings. I therefore find that section 34(1)(l) of the *Regulation* does not exempt Mr. Fetherston's attendance at monthly sales meetings from Part 4 of the *Act*, because when attending these meetings, he is neither travelling nor engaged in the selling of goods.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by Mr. Olmstead is correct and the appeal should be dismissed. Pursuant to section 115 of the *Act*, I order that the Determination dated July 18, 1997 is confirmed, with interest payable under section 88 of the *Act*.

Ian Lawson
Adjudicator
Employment Standards Tribunal