

An appeal

- by -

Onco Holdings Inc. operating as Cruise Holidays of Kelowna
("Cruise Holidays")

- 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: Cindy J. Lombard

FILE No.: 2001/665

DATE OF HEARING: November 30, 2001

DATE OF DECISION: January 25, 2002

DECISION

APPEARANCES:

The Appellant/Employer, Onco Holdings Inc. operating as Cruise Holidays of Kelowna (“Cruise Holidays”) was represented by its owner and President, Bruce Manning (“Manning”).

The Respondent, Trudi Scott (“Scott”), appeared together with:

Eric Scott, the Respondent’s husband

Korali McKenzie, former employee of Cruise Holidays

both of whom gave evidence on behalf of the Respondent.

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Cruise Holidays of a Determination which was issued on August 29th, 2001 (the “Determination”) by a Delegate of the Director of Employment Standards (the “Director”) finding that Scott was an employee of the employer, Cruise Holidays, and was due the following wages, annual vacation pay for the period February 9, 2001 until July 12, 2001, and interest pursuant to the *Act*.

<u>Regular Wages</u>	
658 hours x \$9.00/hour	\$5,922.00
<u>Annual Vacation Pay</u>	
4% of \$5,922.00	\$236.68
<u>Interest pursuant to Section 88 of the <i>Act</i></u>	<u>\$49.57</u>
	<u>\$6,208.37</u>

ISSUES TO BE DECIDED

1. Was Scott an employee of Cruise Holidays as defined by the *Act*?
2. If an employee, what wages and vacation pay are due to her pursuant to the *Act*?

FACTS AND ANALYSIS

1. Was Scott an employee of Cruise Holidays as defined by the *Act*?

According to Manning

Manning says that in early 2001, MacKenzie, who worked in the Kelowna office of Cruise Holidays, asked him if he would mind if Scott, who MacKenzie knew, could come into the office and “look over her shoulder” in order to learn the business.

Manning says that he was in no position to hire anyone as his business was going downhill financially. Ultimately, the business did shut down on July 12, 2001.

Manning says during the last three weeks the business was in operation, he did ask Scott to come in to the Westbank Cruise Holidays office to answer the telephones and acknowledges that he does owe her wages and vacation pay for three weeks.

Manning says that a rate of pay was never discussed and he did not keep track of her hours.

Apart from the last three-week period, Manning says that Scott’s time at Cruise Holidays was voluntary and gratuitous on her part in order to learn the business.

Manning says that he never offered Scott employment and that during the six months she was there, she never presented him with her hours or asked for a paycheck.

Manning does agree with Scott that he told her that he would arrange for her to take a cruise at some time in the future but denies that the cruise was to be in lieu of pay.

According to Scott

Scott says that in early February 2001 she heard from an acquaintance who was employed by Heritage Travel in Penticton that Manning was looking to hire someone right away. Scott therefore called Manning on February 10, 2001. In that conversation Manning told her that he needed someone on call to work once in awhile. Manning told her that she could come in to pick up the keys to the Westbank Cruise Holidays office. Scott first worked on February 12, 2001 in the Westbank office.

Scott says that she worked February 19th through the 23rd, 2001, while Manning was in Mexico. When Manning returned Scott says that she asked him whether instead of being paid a wage if she could take a cruise. Scott says that she made this offer because she was aware that the business was having financial difficulties. Scott says that Manning agreed and told her to keep track of her hours and she did so. Manning kept no records of Scott’s hours.

Scott says that an hourly rate for her time was never discussed with Manning. Scott worked at both the Kelowna and Westbank offices of Cruise Holidays with the directives as to where she was to work and on what days coming from Manning.

Korali MacKenzie was employed as an agent with Cruise Holidays at the Kelowna office from July 2000 to May 2001. Ms. MacKenzie corroborates Ms. Scott's evidence. She denies that she asked Manning if Scott could come in and look over her shoulder in order to learn the cruise business. She says that she did not know Scott prior to her working at Cruise Holidays.

Eric Scott, Scott's husband confirms that his wife told him that she was to keep track of her hours.

Where the evidence of Manning and Scott conflict. I prefer the evidence of Scott. Manning was not a credible witness as demonstrated in part by MacKenzie's evidence.

Section 1 of the *Act* sets out the definition of "employee" and "employer".

"employee" includes

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- (c) a person being trained by an employer for the employer's business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall;

"employer" includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee.

It is clear on the facts of this case that the relationship between Manning and Scott was one of employer/employee.

Manning hired Scott and directed in which office and what hours she was to work. At the very least he allowed her to perform work normally performed by an employee, e.g. answering telephones, meeting with clients, obtaining quotes, etc., and was training her in the cruise business.

2. If an employee, what wages and vacation pay are due to her pursuant to the *Act*?

Section 28 of the *Act* provides that the employer is to keep payroll records including the hours worked by the employee. Where, as in this case, the employer fails to do so it was reasonable for the Director to accept the recorded hours submitted by Scott as accurate.

The evidence of both parties is that no hourly wage was discussed. Section 16 of the *Act* provides that an employer must pay an employee at least the minimum wage as prescribed in the regulations.

The current minimum hourly wage prescribed by Section 15 of the regulations is \$8.00 per hour.

In view of the fact that no specific hourly wage was agreed to, the Determination is varied to reflect an hourly minimum wage of \$8.00 rather than \$9.00.

The calculation as to regular wages and annual vacation pay due to Scott is amended therefore as follows:

Regular wages	\$5,264.00
Annual vacation pay	<u>\$210.56</u>
Subtotal:	\$5,474.56

Plus interest pursuant to Section 88 of the *Act* to be calculated.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination with respect to Scott be varied to provide that the Appellant pay to Scott wages and vacation pay in the amount of \$5,474.56 plus interest pursuant to Section 88 of the *Act*.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal