

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

- by -

Kenneth Edwin Rindero  
(" Rindero ")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 96/174

**DATE OF DECISION:** May 8, 1996

## DECISION

### OVERVIEW

This is an appeal by Rindero pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 000547 issued by the Director on December 20, 1995. In this appeal Rindero claims that the Director did not completely and with reasonable effort investigate his complaint and further that the Director erred in both the reasons for the determination and the amount calculated to be owing.

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128 (3) of the *Act* states:

(3) If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint under this Act.

Written submissions were received from Rindero and Northern Magneto Ltd. (“Nomag”), and information was provided by the Director. Subsequently, an oral hearing was conducted on April 25, 1996 in Prince George, British Columbia.

Persons in attendance at the hearing were:

For the Appellant	Kenneth Edwin Rindero
For Nomag	Ron Oldenburg Eva Elisabet Partel
For the Director	Al Brulotte, Industrial Relations Officer

### FACTS

Rindero was employed by Northern Magneto Ltd. (“Nomag”) as an Outside Sales Representative from January 3, 1994 to July 19, 1995.

Rindero filed a complaint with the Employment Standards Branch (“the Branch”) on October 23, 1995 alleging that termination pay, overtime pay and annual vacation pay were owing by Nomag.

The Director investigated Rindero’s complaint and determined that termination pay and some annual vacation pay was owing and, however, as Rindero was employed as a “commercial traveler”, he was specifically excluded from Part 4 of the Act, Hours of Work and Overtime, by the Employment Standards Regulations (“Regulations”) section 34 (1).

The Director subsequently issued a Determination for the amounts calculated as being owing to Rindero.

## **ISSUES TO BE DECIDED**

The issues to be decided in this appeal are:

1. Did the Director completely and with reasonable effort investigate Rindero's complaint ?
2. Did the Director err in calculating the amount of annual vacation and termination pay owed to Rindero ?
3. Did the Director err in determining that Rindero was a "commercial traveler" and therefore excluded from the hours of work and overtime requirements of the *Act* ?

## **EVIDENCE**

Rindero testified that:

- his understanding of the wage compensation agreement with Nomag was that he would receive a basic wage of \$750.00 per month plus 10% of gross profit on the sales in his territories each month
- Nomag would also pay for all travel expenses and provided a vehicle allowance
- his territories consisted of mainly the Prince George area with occasional out of town trips, most as day trips to Vanderhoof, Fort St. James etc., and, once every two weeks an overnight trip ending at Smithers where he overnights before returning to Prince George
- he was required to report to the business location in Prince George at 8:00 a.m. each morning when he was in town and to physically check in at or after the noon hour
- Nomag's business license does not list the business as a warehouse, nor does any advertising list the business as a warehouse
- the public can enter the business and make retail purchases at any time
- he also delivered material which had been ordered
- he took 8 days vacation during his period of employment and those dates were July 4, 5, 6, 7, 13, 14, 20, and 21
- he noted the July 4, 5, 6, and 7 dates on the employee's vacation calendar although he was not required to do so
- he did not enter the July 13, 14, 20, and 21 dates on the employee's vacation calendar, however, he did have permission from Roy Oldenburg, his boss, to take those days off
- Nomag never raised the issue of any overpayment of commissions and in fact he first became aware of this issue just before the Determination was issued
- Nomag never raised any issue with respect to his work performance and he was terminated without just cause
- he did not receive any annual vacation pay until after he was terminated

Ron Oldenburg testified that:

- he agrees with Rindero's understanding of the wage compensation arrangements
- Rindero was not terminated, he abandoned his job by not showing up for work on July 20 and 21
- Rindero also did not show up for work on July 13 and 14, and when questioned he stated that he had a flat tire on the 13th and some relatives showed up to visit on the 14th
- Rindero also did not report for work on May 29, 30, 31 and June 6, 1995 with no explanations
- he did not discipline Rindero for any of these absences
- it was important that Rindero show up each day at 8:00 a.m. as he did not have a telephone at his home and without this daily reporting, information vital to the business could not be communicated to him
- Rindero was not required to report to the business after noon, merely a phone call to check in for any new information was required
- the normal hours of the business was from 8:00 a.m. to 5:00 p.m. and except for some extraordinary circumstances, Rindero would not have been required to visit a client outside of those hours
- Rindero would deliver small orders at the same time as he made his regular calls on his clients, however, larger orders or rush orders would be delivered via a commercial carrier
- Rindero never discussed any concerns with respect to being underpaid

Eva Elisabet Partel testified that:

- she is the employer's accountant
- she did receive queries from Rindero with respect to her calculation of his average pay
- employee overtime must be submitted each pay period and approved in order to be paid
- never had any overtime submitted by Rindero
- with respect to the dates of the annual vacation taken by Rindero, she was only aware of July 4, 5, 6, and 7, 1995 being submitted as vacation days
- on July 21, 1995, she was instructed by Ron Oldenburg to complete and issue a Record of Employment ("ROE") for Rindero, which she did
- the ROE indicates that Rindero's last day of work was July 19, 1995 and that the reason for issuing was shown as "M" (dismissed)

Al Brulotte testified that:

- Rindero's complaint was received by the Branch on October 23, 1995
- additional information was received by the Branch on November 17, 1995
- Rindero's complaint was assigned to an Industrial Relations Officer on November 17, 1995

- he telephoned Rindero to confirm nature of complaint and advise that investigation had commenced
- he telephoned Nomag with respect to the complaint and visited Nomag's place of business to review records and calculate amounts owing on December 8, 11, 12, 13 and 14
- he determined it was appropriate to adjust Rindero's earnings to reflect only the part month worked in July 1995 and the fact that 8 days vacation were alleged to have been taken
- he concluded that Rindero was entitled to termination pay
- he concluded that Rindero was a "commercial traveler"
- the Determination was issued on December 20, 1995

## **ARGUMENTS**

Rindero argues that he was not a commercial traveler and is therefore entitled to overtime wages

Rindero further argues that the calculations performed by the Director and set forth on the Determination are incorrect as he should not have had his earnings adjusted.

Rindero finally argues that the calculations performed by the Director with respect to his termination pay and annual vacation pay was incorrect and that the Determination should be cancelled or varied.

Nomag argues that the calculations performed by the Director with respect to adjusting Rindero's earnings for July 1995 are correct.

The Director contends that Rindero is a commercial traveler therefore excluded from the overtime provisions of the *Act*.

The Director further contends that Rindero's complaint was investigated completely and with reasonable effort.

The Director finally contends that the Determination as issued on December 20, 1995 is correct and should be upheld.

## **ANALYSIS**

A central issue in deciding this appeal is the credibility of the evidence provided by all the parties. In assessing credibility, a number of factors are to be considered. These include:

- the demeanour of the witness
- opportunities for knowledge
- powers of observation

- judgment and memory
- ability to describe clearly what has been seen and heard
- the probability of the event happening in the manner suggested

With respect to issue #1, I am satisfied on the evidence presented that the Director did completely, and with every reasonable effort, properly investigate the complaint filed by Rindero.

With respect to issue #2, the matter of annual vacations and termination pay, and the subsequent calculations, I conclude that:

- Rindero was on annual vacation on July 4, 5, 6, 7
- Rindero was not on annual vacation on July 13, and 14, he simply did not report for work for other reasons
- Rindero's last day of work as confirmed by the ROE was July 19, 1995 therefore he was not on vacation on July 20 and 21
- Rindero was not paid any vacation pay until after his employment terminated
- the basic wage of \$750.00 per month is subject to recalculation as Rindero's employment was terminated part way through the month, however, there was no understanding that the basic wage would be adjusted for vacation days, and I will not insert such an understanding into this employment relationship
- commissions in this case are not subject to recalculation as they are most likely derived from employment efforts which have occurred in the past and it is not possible to reconcile specific sales to specific dates
- the Director therefore should not have adjusted the basic wage and commissions earned by Rindero for July 1995 as set forth in the reasons for the Determination
- the calculation should be;

July basic wage \$750. 00 ÷ 21(max. possible work days)	
x 13 days (July 1 - 19)	= \$ 464.28
July commissions	= \$1,976.77
Total earnings July 1995	= \$2,441.05
1994 Gross Earnings	= \$48,488.00
1995 Gross Earnings (adjusted)	= \$24,441.29
Total earnings (1994-95)	= \$72,929.29
4% vacation pay	<u>= \$ 2,917.17</u>

- Wages and vacation pay paid were:

basic wage	= \$ 750.00
commissions	= \$1,976.77
vacation pay	<u>= \$1,574.76</u>
Total	<u>= \$4,301.53</u>

- Wages and vacation pay which were owed to Rindero:

basic wage	= \$ 464.28
commissions	= \$1,976.77
vacation pay	= <u>\$2917.17</u>
Total	= <u>\$5,358.22</u>

- balance owed to Rindero:  $\$5358.22 - \$4,301.53 = \underline{\$1,056.69}$

With respect to the calculation of termination pay, I conclude that:

- vacation days are considered as “days worked” for the purpose of calculating termination pay
- the appropriate 8 week period for the calculation of termination pay is from May 24 to July 19, 1995, inclusive
- there are only 6 work days in the period May 24 - 31 therefore the normal earnings for that period are calculated as follows:  
(total monthly earnings)  $\$4,406.61 \div 23$  (working days)  $\times 6$  (days) =  $\$1,149.55$
- the total earnings for the 8 week period are therefore:

May 24 - 31	= \$1,149.55
June	= \$3,986.67
July 1 - 19	= <u>\$2,441.05</u>
Total	= <u>\$7,577.27</u>

- the termination pay owing is therefore  $\$7,577.27 \div 8 \times 2 = \$1,894.32$
- the termination pay received was  $\$1,519.25$ , therefore there is a balance of  $\$1,894.32 - \$1,519.25 = \underline{\$375.07}$  owing to Rindero

With respect to issue #3 as to whether Rindero was a “commercial traveler” , I must first review the relevant provisions of the Regulations. Section 34 (1) of the Regulations state:

#### **Exclusions from hours of work and overtime requirements**

(1) Part 4 of the *Act* does not apply to any of the following

- (l) a commercial traveler 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;

Furthermore, *Blacks Law Dictionary (6th Edition)* defines commercial traveler as:

*“a drummer; a travelling salesman who simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for such goods, which goods are*

*afterwards to be delivered by the principal to the purchasers, and payment for the goods is to be made by the purchasers to the principal on such delivery.”*

I have carefully reviewed and considered all of the facts and the evidence given by Rindero, Oldenburg, Partel and Brulotte and I am satisfied that Rindero was a commercial traveler at all times during his period of employment with Nomag and is therefore, pursuant to section 34 of the Regulations, excluded from the overtime provisions of the *Act*.

In summary therefore, I have concluded that Rindero is still owed a total of \$1,056.69 (adjusted vacation pay and commissions) + \$375.07 (adjusted termination pay) = **\$1,431.76** .

**ORDER**

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 000547 be varied to be in the amount of \$1431.76

“*Hans Suhr*” \_\_\_\_\_ May 8, 1996 \_\_\_\_\_  
**Hans Suhr** **Date**  
**Adjudicator**  
**Employment Standards Tribunal**

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