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
(" Monarch ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE No.: 1999/544

DATE OF HEARING: February 2, 2000

DATE OF DECISION: March 23, 2000

APPEARANCES:

Peggy O'Brien for Monarch Beauty Supply Co. Ltd.

Roberta Silva

OVERVIEW

This is an appeal by Monarch Beauty Supply Co. Ltd ("Monarch" or "employer"). The employer raises issues relating to statutory holiday pay, payment for wages to attend mandatory sales meetings, and payment for wages to attend conferences. The employer's position, and the evidence tendered showed that the parties agreed to payment of statutory holiday pay as part of the commission earnings, and the amount of the statutory holiday pay was shown on the pay stubs. The evidence at the hearing indicated that the Delegate, in a very brief and unreasoned Determination, erred in holding that the employer required the employee to attend at conferences and trade shows. The evidence showed that the employee did not perform work at the conferences, and that therefore she was not entitled to be paid wages. The employer did require attendance at monthly sales meetings in Surrey. Prior decisions issued by the Tribunal have held that Monarch was required to pay wages based on an average daily rate of pay for employees to travel and attend mandatory sales meetings. This case is indistinguishable from earlier Tribunal Decisions, however, the Delegate assessed the pay on the basis of a 15 hour work day, with no reasons given in the Determination. I, therefore varied the Determination and referred this matter back to the Delegate to calculate the entitlement for sales meetings wages, based on an average wages for an 8 hour working day, for 12 sales meetings.

ISSUES TO BE DECIDED

1. Did the Delegate err in determining that Roberta Silva was entitled to statutory holiday pay?

2. Did the Delegate err in determining that Roberta Silva was entitled to be paid to attend at a convention in Collingwood and Las Vegas?

3. Did the Delegate err in determining that Roberta Silva was entitled to be paid wages to attend at Trade Shows?

4. Did the Delegate err in determining that Roberta Silva was entitled to be paid for attending monthly sales meetings in Vancouver?

FACTS

Roberta Silva ("employee") was employed by Monarch Beauty Supply Co Ltd. ("Monarch" or "employer") as a commissioned sales representative. Her sales territory included the area north of Nanaimo on Vancouver Island, out to the West Coast, and the Sunshine Coast. Monarch is a

company which is engaged in the sale of beauty supplies to salons and other commercial customers, and resellers. Monarch is in the business of selling beauty supplies to salons, educational institutions and other wholesale customers. It does not sell directly to members of the public. The company has 75 sales consultants within British Columbia and 225 employees across Canada. In this case testifying on behalf of the employer were Keiran Bower, Vice President of Operations and Chief Financial Officer, Mike Reilly, Vice President of Sales for Canada.

On October 28, 1999 the Delegate issued a Determination. The Determination is very brief and I quote in full:

> Employer's Position:
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> The employer claims that they have a Variance from the Director of Employment Standards, which allows them to pay Statutory Holiday Pay at a rate of 3.6 % per pay period. - No record of such a variance by the was found by the Employment Standards Branch and when a copy was requested from the employer they did not supply one.
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> They claim that the Sunday meetings were voluntary and that the conventions and shows were voluntary. - The employer provided no record of hours worked or any documentation which would support their position that meetings, hair shows and conventions were discretionary.
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> Complainant's Position
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> The complainant states that she never received statutory holiday pay from the employer. The employer first deducted the amount of the statutory holiday pay from the commissions earned and then added it back on to the reduced commissions and labeled it statutory holiday pay. Example: Between April 02, 1997 and April 30, 1997, the commission statement shows that the commissions earned were $3,474.39. The cheque stub for that period, shows commissions as $3,349.31 plus $125.08 statutory holiday pay which equals, $3,474.39, the amount of the commission shown as being earned on the commission report statement. No statutory holiday pay was ever paid.
>
> The complainant claims that she was required to attend Sunday meetings, hair shows and conventions and that she was never paid for the time to attend these meetings or for the travel time to attend them. - The employer claims that the meetings were voluntary.
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> Findings of facts
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> 1. Statutory holiday pay - The employer claimed to have a variance from the Director of Employment Stands, allowing for payment of 3.6 % per pay period. The employer did not produce a copy of this variance when it was requested. The

> Employment Standards Branch has no record of such a variance. In addition the employer has tried to make it appear that statutory holiday pay was paid, by first deducting the amount from the commissions earned and then adding it on as statutory holiday pay. The result being that the employee has only received the amount of the earned commission.
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> 2. Payment for meetings, conventions and hair shows - The employer produce no evidence that the meetings were voluntary and no records of hours were supplied by the company. The employer paid for the employee's airfare when attending conventions but refused to pay for the hours worked or the travel time.
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> 3. Overtime - A Demand for Employer records was issued on May 4, 1999. No record of hours was provided by the employer and subsequent conversations with representatives of the employer did not result in any further information being supplied by the employer. As a result all records of hours are those of the employee.

In its written submission and at the hearing, Monarch submitted that there were a number of disputed facts with regard to the sales meetings, hair shows and conventions. These disputed facts included the following:

a. Ms. Silva did not receive payment for the hair shows.

b. The hair show in January 1998 lasted 4 days

c. The conventions were not voluntary.

d. Ms. Silva was required to attend a convention in Toronto from July 10 to July 15, 1997.

e. Ms. Silva was required to attend a convention in Las Vegas from January 2 to 6, 1998.

There is a written sales policies and procedures paper which provides for a commission structure, based on the type of product sold, whether the sale was made directly by the representative or credited to the agent through a store sale, and whether the product was sold to "in town" or "out of town" customers. In town sales take place in the community where the sales representative resides. At all material times, Ms. Silva resided in the Comox Valley.

The sales policies and procedures paper, indicates that :

> " It should be noted that pay for Statutory Holidays is factored into the commission rates, hence while vacation pay is paid as per policy, Statutory Holiday Pay is absorbed within the commission rate".

Ms. Silva signed the Sales Representative Agreement as follows:

> I, Roberta Silva , have read the Sales Representative Agreement described above as well as the Sales Policies and Procedures and agree that these provisions and

> the Sales Policies and Procedures from part of my employment contract with Monarch Beauty Supply.

On the cheques issued by the employer the statutory holiday pay is listed as a separate item. Ms. Silva says that she questioned the team leader following the receipt of the first cheque about the statutory holiday pay, and was told that Monarch was in the wrong. The team leader recommended that she raise the issue only if she ever left. The team leader was not called by Ms. Silva to give evidence.

The employer says that it paid to the employee the sum of $1,782.22. It says that if it was required to pay the statutory holiday pay found by the Delegate, Ms. Silva would be paid twice for her statutory holidays. The employee says that if she does not receive the statutory holiday pay awarded by the Delegate she will in effect receive no payment for statutory holidays.

The Delegate found that Ms. Silva was entitled to statutory holiday pay for 12 statutory holidays, and the amount of the holiday pay was found to be $1,727.62.

The Delegate appears to have determined correctly that there was no variance under the Act in place concerning the payment of statutory holiday pay by Monarch. The employer explained that the source of the word variance as communicated to the Delegate, came about as the result of consultations that it had with the Employment Standards Branch, and the review of their method of calculation in earlier determinations. In 1992 Monarch was ordered to pay statutory holiday pay over and above its commissions. The evidence from Mr. Bower indicates that Monarch consulted with Sarah James of the Employment Standards Branch in formulating its practice with regard to the inclusion of statutory holiday pay within the commission structure. Mr. Reilly also testified that the practice was reviewed by Mr. Olmstead, a Delegate, and two other Employment Standards officers in Victoria. As a result of consultations, Monarch drafted the Sales Representative Agreement as the Sales Policies and Procedures, which it now has all employees sign as a condition of employment.

At the hearing of this matter Monarch tendered a chart (located at Tab 26 of Exhibit 1) which showed an overpayment to Ms. Silva of statutory holiday pay. The chart, which was based on pay slips and other documents, showed that Ms. Silva was paid the sum of $1,782.22 on account of statutory holiday pay.

While the Determination is bereft of reasons, the Delegate does comment on the point that Monarch alleged that a variance existed, that it could not produce the variance, and the Delegate could not find the variance. It may be that the Delegate drew an adverse inference against the employer because of this point. A variance is defined within s. 72 of the *Act*, and clearly there was no variance. There is no jurisdiction under the *Act* for the Director to issue a variance in regard to the payment of statutory holiday pay by an employer. The evidence of the employer's witnesses appears to be truthfully given, however, and I would not draw the conclusion that there was any attempt to deceive the Delegate. Monarch took the position throughout its dealings with the Delegate that the statutory holiday pay was included within the commission, and documents support that contention.

Sales Meetings:

During the course of her employment relationship, Ms. Silva was required to attend at regular sales meetings once per month in Surrey. These meetings would last 3 -4 hours. She was paid for her expenses to attend these meetings. In the "specific responsibilities section" of the Sales Representative agreement, a requirement outlined at paragraph 7 was:

> "To attend sales meetings, training and education programs as required/requested."

The evidence before me is that attendance at those meetings was required, and that the meetings were scheduled on a Saturday in the Surrey office, typically between 10:00 am to 2:00 pm. These meetings required Ms. Silva to travel from Courtenay to Surrey. This trip, even if Ms. Silva travelled by car and ferry could be accomplished in one day.

At issue is whether Monarch is required to pay wages, in addition to the commission structure, for attendance at the meetings, and if required to pay wages what amount is required to be paid.

With regard to the sales meetings it appears that the Delegate made errors, and it is unclear whether the source of the error was incorrect information given to the Delegate by Ms. Silva, which she now corrects at this hearing. She indicates that the trip for June 6/7 1998 is probably an error, this was a company golf tournament and attendance was not mandatory.

The Delegate determined that Ms. Silva was entitled to 15 hours of pay for each of the sales meetings. There was no evidence before me of the actual time required to drive from Comox to Nanaimo, take the ferry from Nanaimo to Vancouver and attend a meeting. On the face of it, 15 hours seems somewhat excessive. There is no explanation in the Determination as to why the Delegate used 15 hours as a measure for proper compensation for attending sales meetings.

Trade Shows:

Ms. Silva attended at a number of trade shows in the Vancouver area. She testified that she was not scheduled to work the floor at any time. Ms. Silva appears to have assumed that it was a requirement to attend trade shows. Ms. Silva said that no representative from the employer ever stood up and said that she had to go or else. At another point in her evidence she stated that she was told that "this is when the ABA is and you are required to go". I have considered the case of *Farayna v. Chorney, [1952] 2 D.L.R. 354 (B.C.C.A.)* and applied the test contained in that case. I am not satisfied that Ms. Silva's attendance was required by the employer at Trade Shows.

Conventions:

Ms. Silva attended two conventions, one in Collingwood, and one in Las Vegas. At issue is whether Monarch is required to pay wages for her attendance at these conventions. The evidence before me is that attendance at the conventions was voluntary. The evidence before me is that these conventions were in the nature of perks. Ms. Silva says that she gave Ms. Lyle the dates that the conferences and conventions occurred. Ms. Silva admitted that she was " not a speaker

or an organizer and didn't do anything for them" while in Las Vegas. She stated that there was a meeting on Saturday and a meeting on Sunday. Ms. Silva was asked, "you claimed 8 hours what did you do". Her response was " I don't know, I went to lunch, attended a lunch meeting, and went to a party on Saturday night". When she was asked what added up to 8 hours, she said that she did not calculate the hours. Ms. Silva also took holidays following the convention in Las Vegas. When asked whether attendance was mandatory - she said "they said it was required and no one held a knife to my throat". Ms. Silva says that she might have told Ms. Lyle that attendance was mandatory, but her evidence under oath, when pressed by counsel in cross-examination, was that she was not told by Monarch that she must attend. With regard to the Collingwood trip, Ms. Silva was invited to attend. She had no special responsibilities such as organizing, speaking. She was unclear of the dates that she actually attended.

Collingwood:

This event was hosted by Redken, a beauty products manufacturer. In a letter to Premier Salon owners in March of 1997, the event was described as bringing advanced educational opportunities, and an opportunity to see product launches, it also mentioned theme night events. The event took place between 12:00 noon on Saturday July 12th to 4:00 p.m. on Tuesday July 15th. There were entertainment events including a Hawaiian theme dance, a Hollywood Movie Star dance.

There was evidence from Mike Reilly, a Vice President of Monarch concerning this trip. The employer did not keep records of who attended this event. The employer had a program to encourage sales. The more an employee sold the greater the amount of the Collingwood trip was paid by the employer. If the maximum was sold, the company paid airfares, transfers, and hotel. The employer made a "big deal" of the Collingwood trip as a method of congratulating employees for their hard work at making sales.

Mr. Reilly testified that the employer did not require the employees to attend this trip. It was a big party, with some sales training included. The company hoped that the consultants would attend, have a "blast" and be encouraged to make further sales.

Las Vegas

In the case of the Las Vegas convention, a customer paid for the attendance and expenses of all Monarch's employees who wished to attend. The purpose of the convention, in part, was to acquaint the Monarch employees with the new product lines, with the hope that Monarch employees would sell these items. There does not appear to have been any actual business transacted at the Las Vegas convention. Monarch did hold a sales award luncheon. There is a difference in the evidence between the parties as to whether a sales meeting was also held.

ANALYSIS

In an appeal under the Act, the appellant, in this case the employer, bears the burden of establishing an error such that I should cancel or vary the Determination.

The employer provided a written submission that accompanied its appeal, and also, at my request provided a written submission on the applicability of the case of Atlas Travel to the statutory holiday pay issue.

The employer advances a number of grounds of appeal in this matter:

Lack of Reasonable Opportunity to Respond to Allegations:

The employer submitted that Monarch was not afforded a reasonable opportunity to respond to Ms. Silva's allegations. The employer says that the Delegate did not advise Monarch of the details of Ms. Silva's complaint and afford it the opportunity to respond to those details. The Delegate who conducts an investigation has a duty under s. 77 of the *Act* to disclose the nature of the case investigated. The Delegate was not present at the hearing. The Delegate filed a written submission dated January 13, 2000 which outlines the particulars of the contact between the Delegate and the employer. Contact included telephone calls to the employer which were not returned by the employer on September 7, 10, 21. The Delegate says that she sent a letter to the employer outlining the wages owing on September 21, 1999, and did not receive a response from the employer. The Delegate issued the Determination on October 28, 1999. I am satisfied that the Delegate complied with the duty set out in s. 77 of the *Act*. This grounds of appeal fails.

Failure to Supply Adequate Reasons in the Determination:

The employer asserts that there was a failure of the Delegate in the Determination to supply adequate reasons. It was submitted that it is not sufficient to simply outline the evidence and argument and state the conclusion. Grounds must be set out: *Re Northwestern Utilities Ltd. et al and the City of Edmonton (1978) 89 D.L.R. 161 (S.C.C.)*. I agree that the Determination is lacking in reasons. The purpose for giving reasons is to ensure that the parties and any reviewing Tribunal can ascertain the reasons why the decision was made, and the evidence on which the decision-maker relied. Adequate reasons, are in my view, fundamental to administrative accountability and fairness, in the exercise of a statutory power of decision. In my view this is an error in the part of the Delegate. As a matter of remedy, I have considered the possibility of sending this matter back for reconsideration with a duty to provide reasons. I have also considered the possibility of cancelling the Determination. I think it is preferable, given that there is evidence before me, to identify the errors and remit this matter to the Delegate for the calculation of the wages. Ms. Silva has some entitlement to wages, but has a significantly lesser entitlement than that awarded by the Delegate.

Statutory Holiday Pay:

The employer submits that the amount of the statutory holiday pay has been calculated and paid on each cheque. The employer submits that the contract of employment confirms that the amount of statutory holiday pay would be paid to her as a percentage of commissioned earnings each month, and the employee was provided with a pay stub that set out the amount. The employer further submits that the approach of this Delegate is inconsistent with the approach taken by the Delegate in *Monarch Beauty Supply Company Ltd. BCEST #D 97/604, and 97/798.*

The employer relies on *National Signcorp Investments Ltd. BCEST #D 163/98.* While this is a decision which deals primarily with the vacation pay, it also deals in principle with a commissioned employee where the parties agreed at the outset of the relationship, and the documentation reflected that a portion of the commissioned earnings was paid to the employee as vacation pay. This case distinguished the decison of *Atlas Travel Service Ltd v. British Columbia* (Director of Employment Standards) (1994), 99 B.C.L.R. (2d) 37 on the basis that this case dealt with a fact pattern where vacation pay was purported to be included as part of the commissioned earnings, but it was not set out separately on a pay stub.

I find persuasive the reasoning of Adjudicator Thornicroft in *National Signcorp* when he writes:

> In my view, the system the employer has put into place with respect to the payment of vacation pay is in full compliance with the Act. This system is completely transparent; it was agreed (in writing) between the employer and the employee at the outset of the employment relationship; and it separately identifies "regular" commission earnings and vacation pay on each payday wage statement. The Director's delegate concedes that if the employer had, from the outset, simply reduced the global commissioned rate by an amount equivalent to vacation pay and then added that latter amount to each employee's pay on each payday, the requirements of the Act would have been satisfied. For my part, I cannot fathom why the same result cannot be lawfully accomplished by simply paying a global commission rate and then allocating a portion of that commission to vacation pay so long as that system is clearly explained to the employee at the outset of the employment relationship and the vacation pay portion is clearly identified and accounted for on the employee's wage statement.

I therefore find that the Delegate erred in determining that the sum of $ 1,727.62 was due and owing to Ms. Silva on account of holiday pay.

Sales Meetings:

The employer argues that Ms. Silva should not be paid to attend sales meetings. The employer argues that Ms. Silva is a "commercial traveller" under the Regulations, and as such is exempt from Part 4 of the Act. This argument was considered by the Tribunal in *Monarch Beauty Supply Company*, BC EST #D042/98, *and Monarch Beauty Supply Company*, BC EST #D041/98. These cases were reconsidered by the Tribunal in *Monarch Beauty Supply Company*, BC EST #D251/98. I appreciate that an administrative tribunal is not bound by precedent:

> A tribunal is not bound to follow its own previous decisions on similar issues. Its decisions may reflect changing circumstances in the field in which it governs. The principle of *stare decisis* does not apply to tribunals. A tribunal may consider previous decisions on point to assist it in deciding the appropriate order to make in the case at hand. If circumstances are similar, it may find an earlier decision persuasive. However, it should not treat the earlier decision as binding upon it, and should be open to argument as to why that case ought not to be followed.

Blake, Administrative Law in Canada, (Butterworths: Toronto, 2d)

There should, however, be some consistency in the Tribunal's decisions, otherwise there is little guidance on the interpretation of the *Act*. The only facts that distinguish Ms. Silva's case from the earlier cases are that Ms. Silva was required to travel a longer distance and spend more time travelling than the employees in the earlier decision were. If the reasoning in those decisions is correct, Ms. Silva has a more compelling case for compensation. Given the recentness since the earlier decisions (1998) it cannot be said that there are any changed circumstances.

Amount of Compensation for Travel:

In this case the Delegate determined that the wages for attending sales meetings was $4,896.56. The employer urges that if I decide that Ms. Silva is entitled to be paid for the sales meetings, I should follow the approach set out in *Monarch Beauty Supply Company*, BC EST #D251/98 and the Determination dated October 23, 1997, on which it was based. That Determination was the subject of an appeal to the Tribunal, and the Tribunal did not overturn this approach. My reading of the decisions leads me to believe that this point was not argued before the Tribunal. There is no comment in the Decisions on the method of calculation. In the Determination of October 23, 1997, the Delegate found that the employee was to be compensated for attending the sales meetings, in the absence of records kept by either party, on the basis of pay for an average day. In that decision the delegate found that the average pay was $115.32 per day, and that the employee was entitled to the pay for an average day while attending meetings.

I find this to be an attractive approach, in the absence of any records kept by the parties. Ms. Silva testified that travel from Courtenay to the Nanaimo ferry took 1 1/4 hours. The sales meetings seem to have taken 4 hours but included a one half-hour lunch. She testified that 15 hours was required for travel. I have some difficulty accepting this. As can be seen from the Determination quoted above, there is no explanation in the Determination is to why the Delegate settled on a 15-hour day.

The premise which underlines earlier Determinations concerning Monarch's employees, is that the employee was unable to use the sales meeting/travel day, in order to make sales, and therefore should be compensated for that lost opportunity. Ms. Silva is a commissioned sales person, she is not an hourly rate employee. A better measure of the loss to her of the day, is to obtain some data for her average daily commissions, and use that is a proxy to measure the loss.

As part of the relief in this matter, I intend to cancel the Determination in so far as it deals with compensation for travel time for sales meetings, and refer this issue back to the Delegate for recalculation. One of the meetings, (June 6/7) for which the Delegate awarded compensation, was the company golf tournament, which was a voluntary meeting, for which Ms. Silva should not receive wages. Ms. Silva is entitled to payment of wages for 11 meeting days, based on an average daily rate of pay.

Conventions and Trade Shows:

The issue of whether attendance by an employee at a tradeshow or conference is "work" has not yet been dealt with by the Tribunal. I note that this is a case where one might have expected counsel from the Director of Employment Standards, as the case addresses a novel issue, which may have interest to persons other than the parties to this dispute. At this hearing Monarch indicated that there are a number of conventions each year which "top performers" attend. For example, there are conventions this year in Las Vegas and Cancun. If employees who attend trade shows and conventions are entitled to be paid for their attendance, this may be a point that takes the employment community by surprise. At first blush, attendance at these events may be a reward for work well done, in the nature of a perk or a holiday, rather than something that is considered to be work. If a commissioned sales person, or hourly paid employee attends such a convention or show, without compensation for the attendance it may reduce the employee's earnings for the period of attendance. The question is whether the attendance at a trade show, conference or convention is "work". If it is "work" then an employee must be paid "wages".

The Act defines "work" as "labour or services an employee performs for an employer whether in the employee's residence or elsewhere". The definition of work is wide enough to cover labour or services provided at a convention, trade show or conference.

The Act also excludes from the definition of wages "money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency". In my view, the fact that the employer pays or reimburses the employee for the costs of attending a convention, trade show or conference, may not necessarily mean that the employee is performing work, because the payment may be discretionary and not related to the hours of work, production or efficiency of the employee.

Collingwood Trip:

In my view, based on the evidence before me, attendance at the Collingwood conference was not mandatory. It was in the nature of a perk - a party for employees, with some business training. The employer used the conference as a method to motivate employees to sell more products prior to the show so that they could obtain a "free trip". The employer hoped that the employees would enjoy the conference and be motivated to sell more of the employer's products. Participation in the event cannot, however, be said to be work. Ms. Silva did not sell product, give speeches or make presentations, she did not work in a trade booth at the convention. While Ms. Silva attended the conference, it cannot be characterized as work, and therefore she is not entitled to be paid to attend at or travel to this convention.

Las Vegas Trip:

The Las Vegas trip was hosted by Graham Webb International, a supplier to Monarch. The entire sales force of Monarch was flown down to Los Vegas, in connection with the launching of a new product line by Graham Webb. There was a sales awards lunch banquet held by Monarch. Monarch may have held a sales meeting at the conference. There was a "power conference" where the participants were shown new product lines. Mr. Reilly described the amount of money

spent by Graham Webb International as "obscene". There was no requirement for anybody to attend this trip. Some Monarch employees did not attend.

The Delegate indicated that the employer had no documents showing that the trip was not mandatory. One would expect that there would not be documents in existence unless attendance was in fact mandatory. The reasons why the Delegate found in favour of Ms. Silva are unclear. It may be that the Delegate drew an adverse inference against the employer because of the lack of documents. Monarch supplied the Delegate with a memo addressed to the Delegate dated March 24, 1999 which explained that:

> With regards to the Los Vegas and Toronto seminars plus the Rusk Event show (January'98) all three are not compulsory for the employee to attend and are regarded as company perks if they choose to attend.

I note that Delegates do often draw adverse inferences against an employer when an employer fails to keep records that are required to be kept by the *Act*. This, however, is not one of those situations and no inference should have been drawn by the Delegate because of a lack of documents supplied by the employer. This is not a question which can necessarily be resolved by documents.

Trade Shows & Hair Shows:

I think that there is a distinction between the Las Vegas and Collingwood trip from trade shows or hair shows within British Columbia. In this industry, the trade shows such as Allied Beauty Association ("ABA") are held in Vancouver with industry wide participants. Hair shows are put on by specific groups. Ms. Silva attended in Vancouver for Irvine Rusk show in January of 1998 and the ABA show in September of 1998. At the trade shows typically there is a "cash area" where cash and carry sales are made and a 6% commission is paid to sales consultants who work. If Ms. Silva attended the trade shows and sold product she was performing work. The evidence before me is that if she attended at those shows she received a commission from the sale based on the commission structure of the employer. When she travelled to such a show, in my view she would be a commercial traveller within the meaning of the *Act*, and therefore would be exempted from Part 4 of the *Act*.

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

> 34. (1) Part 4 of the Act does not apply to 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 materials, and
> (ii) are to be delivered from a factory or warehouse.

The evidence before me was that attendance was voluntary and not mandatory. There is no evidence that Ms. Silva performed work or services at the trade shows. In my view the Determination is bereft of reasons why the Delegate found an entitlement to wages. The

Delegate awarded the sum of $889.28 for wages for Ms. Silva's attendance at trade or hair shows in September of 1997, and January of 1998. No reasons were provided as to why the Delegate considered this to be work. There is no indication that the Delegate analyzed the attendance of Ms. Silva to determine if work was performed on behalf of the employer. I cancel the Determination in respect of wages awarded for attending at Trade shows.

In summary, I have found that Ms. Silva:

(a) was not entitled to wages for attending conventions or trade shows. This amounts to a deduction of $2,982.64 from the Determination.

(b) was paid statutory holiday pay within her commissioned earnings, and this amounts to a deduction of $1,727.62 from the Determination

(c) I have found that the Delegate erred in the manner of calculating the compensation for travel time which should be calculated at the average daily pay for attending 11 meetings in Vancouver. I refer the issue of calculation of the entitlement for compensation for attending meetings back to the Delegate.

Given the large discrepancy between the Determination, and what I have ordered, I vary the Determination by cancelling the amount found to be due and owing by the Delegate, and refer the issue to the Delegate for a calculation of compensation for attending meetings in Vancouver based on an average daily pay for an 8 hour working day, for 12 meetings.

ORDER

Pursuant to section 115 of the *Act*, I vary the Determination of the Delegate made October 28, 1999, by cancelling the amount of the Determination and refer this matter to the Delegate for the calculation of wages on the basis of 11 days at an average daily rate of pay.

Paul E. Love
Adjudicator
Employment Standards Tribunal