Employment Standards TRIBUNAL

An appeal

- by -

Monarch Beauty Supply Co. Ltd.
("Monarch" or the "Employer")

- 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: Ib S. Petersen

FILE No.: 2001/686

DATE OF HEARING: January 11, 2002

DATE OF DECISION: March 12, 2002

DECISION

APPEARANCES:

Ms. Peggy O'Brien	on behalf of Monarch
Ms. Deborah Delyzer	on behalf of herself
Ms. Julia Fraser	on behalf of herself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director issued on September 6, 2001. The Determination concluded that Ms. Delyzer and Ms. Fraser were owed $23,950.50 by the Employer on account of statutory holiday pay, attendance at sales meetings, travel to and from sales meetings (and training), vacation pay and interest. The bulk of the award was on account of sales meetings and statutory holiday pay.

BACKGROUND FACTS

Monarch operates a beauty supply company with its head office in Surrey, British Columbia. Ms. Delyzer worked as a sales representative for the Employer from August 10, 1998 to June 30, 2000. She was paid on a commission basis. Ms. Fraser also worked as a sales representative for the Employer from November 1, 1998 to June 30, 2000. She was also paid on a commission basis. Ms. Delyzer's sales territory was in Kamloops, Ms. Fraser's in Abbotsford and, later, in Kelowna.

The Employer paid the Employees for attendance at sales meetings and statutory holidays as a percentage of the commission earnings. The Delegate described the Employer's method as follows:

> "The method used is first to calculate total commissions earned in the pay period, then to deduct a percentage of the gross and show it separately for both statutory holiday pay and payment for attendance at monthly sales meetings. The percentage deducted from the gross appears to be 3.6 for each."

The Employer's position, as set out in the Determination, was that the Employees were aware of this method, that it was completely transparent and that it complied with the *Act*.

The Delegate found that the Employees were, indeed, aware of the method utilized by the Employer. They did not, however, agree that the method complied with the *Act*.

The Delegate concluded that Ms. Delyzer and Ms. Fraser were entitled to statutory holiday pay:

> "Section 45(b) of the Act provides that an employee who has worked irregular hours on at least 15 of the 30 days prior to the statutory holiday is entitled to an average days pay. To calculate an average day's pay, one must divide the total wages earned (excluding overtime) in the 30 day period by the number of days worked. A review of the method in which Monarch has used to pay statutory holiday pay to Delyzer and Fraser indicates that Monarch's method does not comply with the Act and Regulations. The Act does not give an employer the ability to vary the payment of statutory holiday pay to be included in commission wages. Nor does the Act allow employers and employees to waive any part of the Act or Regulations. Consequently, both Delyzer's and Fraser's acknowledgement of how Monarch would pay statutory holiday pay is of no effect. This is consistent with Employment Standards Tribunal decision #D064/01."

The Delegate concluded that while Ms. Delyzer and Ms. Fraser were "commercial travellers" within the meaning of the *Act* and *Regulation*, they were unable to perform the their duties as such while travelling to and from and attending sales meetings:

> "Monarch's method of calculating and paying for travel and attendance at monthly sales meetings does not comply with the Act. First, travel and attendance at the meetings is not time in which they were performing their normal duties. Consequently, payment for attendance and travel should not be part of Delyzer's and Fraser's commission earnings. Second, the fact that both employees were required to travel from the Okanagan to attend the monthly sales meetings resulted in hours in excess of 8 in a day. In some case, the employees were required to travel to Surrey (where most of the meetings were held) the day prior to the meeting, the travel back to Kamloops or Kelowna after the meeting was over."

The Delegate noted that Section 40(1)(a) of the *Act* requires an employer to pay overtime wages for hours worked, *inter alia*, in excess of 8 in a day. The Delegate calculated MS. Delyzer's and Ms. Fraser's entitlement:

> "...I have first calculated an "average day's pay" from the commissions earned, then determined an hourly rate of pay based on 8 hours. In the event that travel to and from the meetings resulted in the employee working in excess of 8 hours in a day, the applicable overtime rate has been applied."

ISSUES

The Employer takes issue with the Determination. The Employer questions the factual findings as well as the legal basis for the Determination. In particular, the Employer says that the

Determination is inconsistent with previous decisions of the Tribunal based on the "same or similar facts." There is no issue that Ms. Delyzer and Ms. Fraser were "commercial travellers" within the meaning of the *Act* and *Regulation*.

ANALYSIS

The Employer appeals the determination and, as the Appellant, has the burden to persuade me on the balance of probabilities that the Determination is wrong. For the reasons that follow, I am persuaded that the Delegate erred and, consequently, cancel the Determination.

A hearing was held to decide the appeal. The hearing was held on January 11, 2002. I heard testimony from Mr. Michael Riley, the vice-president and general manager of Monarch, Robin Myers, its human resource manager, and the two complainants, Ms. Delyzer and Ms. Fraser. The evidentiary portion of the hearing lasted all day, and in order to allow the parties to fully argue their respective cases, I requested written submissions from the parties. The final submission was filed on January 29, 2002. Despite the fact that there are conflicting factual allegations, including the length of the sales meetings and the travel time, I am of the view that the material facts are not in dispute. The issue, in my view, is largely over the characterization of the facts and whether the *Act* prohibits the Employer from paying the two Employees as it did.

Mr. Riley explained that the commission sales representatives were employed pursuant to an agreement based on gross commissions. Sales representatives were paid different percentages for different products on gross commissions. As well, the agreement stipulated that "gross moneys included" attendance at sales meetings and statutory holiday pay. Ms. Myers explained that following a complaint to the Employment Standards Branch in 1992, Monarch included statutory holidays on the pay stubs for sales representatives. Another change occurred in the spring of 1999, to expressly include payment for attendance at sales meetings. A memorandum dated September 18, 1998 gave sales representatives a little over six months notice of the change. There was dispute over whether Ms. Delyzer and Ms. Fraser received this memorandum. As I understood Mr. Riley's evidence, the agreement was included in a manual provided to each of the sales representatives. He and Ms. Myers agreed that Monarch did not have a copy of the agreement signed by Ms. Delyzer and Ms. Fraser.

Mr. Riley testified that there were about ten sales meetings per year. The number of meetings was not in dispute. According to the Employer, Monarch, these meetings generally started at about 10:00 or 10:30 a.m. and lasted until about 1:00 or 2:00 p.m. On occasion, the meetings might run a little longer. Mr. Riley's testimony was supported by the agendas for these meetings which were placed into evidence. As I understood their evidence, both Ms. Delyzer and Ms. Fraser were of the view that meetings went beyond those hours and started earlier and finished later. In my view, their records of the time spent travelling and at the meetings were no more than estimates. In any event, the differences over travel time and the length of the meetings is not material to my decision.

The gross commissions include--or factor in--statutory holidays and attendance at sales meetings. Monarch does not agree that any amounts are "deducted" as is the Delegate's view. The percentage factored in on account of 10 statutory holidays is 3.6%. Similarly, because there are approximately 10 sales meetings, the Employer has factored in 3.6% on that account. Ms. Myers explained that, for example, on a product where the gross commission rate was 12%, mathematically was equal to a net commission of 11.15% with the 3.6% for statutory holidays and 3.6% for sales meetings factored in.

Ms. Myers also took me through "earnings statements" given to sales representatives, including Ms. Delyzer and Ms. Fraser, twice a month. Mid-month, Monarch pays all actual commissions earned and adjusts for statutory holidays and sales meetings. These payments are clearly identified on the earnings statements. At the end of the month, Monarch pays 50% of the net. The sales representatives were also supplied with monthly commission reports that itemized their sales, *i.e.*, either generated by them personally allocated to their territory. The sales representatives are credited for sales within their territory, except for a few "house accounts", mostly large chains not serviced by them.

Ms. Delyzer testified that she was never given a copy of the agreement. She denied that the agreement had been explained to her. In fact, she denied receiving much of the material the Employer claimed to be in the manual for sales representatives. She explained that she was not aware of the Employer's system until close to the end of her employment. She said she was "too busy."

Ms. Fraser also denied being aware of the Employer's method of including statutory holidays and sales meetings in gross commissions until January 2000. She explained that she subsequently brought the "discrepancy" to the attention of Mr. Riley and Ms. Myers and essentially got the message "not to rock the boat."

The B.C. Court of Appeal noted in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at 357:

> ".... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions."

Those comments are apposite.

While there it is clear that there is no signed agreement indicating consent, and they deny receiving a copy of the agreement and other material from the Employer, I, nevertheless, find it difficult to accept the evidence of Ms. Delyzer and Ms. Fraser that they were not all along aware of the Employer's method of compensating them, *i.e.*, that statutory holidays and sales meetings were included in gross commissions. In my view, the earnings statements, and the attached and itemized commission reports, clearly identified the payments on account of statutory holidays and sales meetings. This system was transparent.

Monarch argues:

> "By using the rate of 3.6% instead of the calculation supported by the Employment Standards Officer, Monarch has in fact overpaid each of the Respondents for the statutory holidays that were taken during the term of her employment...
>
> The system used by Monarch, which involves calculating statutory holiday pay at the rate of 3.6% of the gross commissions and paying that amount on every mid-month pay cheque, is a system that is totally transparent. The employee is shown on her pay stub each and every month the amount of commissions and the amount of statutory holiday pay paid to her. There is no question that if Monarch had reduced the global commission rate and paid statutory holiday pay in addition to the reduced commission rate, the requirements of the *Act* would have been met...."

Monarch argues with respect to the sales meetings:

> "Monarch's method of providing pay for the average day's pay is exactly the same as its method for providing an average day's pay for the statutory holidays. An average day's pay, based on 10 days per year is 3.6%. Given that there were generally 10 sales meetings a year, Monarch advised the employees that, as required by the employment standards decision, it was instituting payment for sales meetings based on an average day's pay for attendance at those sales meetings....
>
> The employees were not provided with a raise as a result of the requirement to provide payment for the sales meetings. Rather they were kept whole but a portion of their gross commission was thereafter allocated to the sales meetings. In effect, there was a reduction in the net commission paid to the employees...."

I agree with the Employer. In my view, the principles set out in Adjudicator Paul Love's decision in *Monarch Beauty Supply*, BCEST #D062/00, are determinative with respect to the issues before me. In that decision, the Adjudicator noted, at pages 8-10:

> *"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 relies on* National Signcorp Investments Ltd. BCEST #D163/98. *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."*

What this essentially boils down to is that the commissioned sales representatives were entitled to an average day's pay for the statutory holidays and sales meetings, including travel, and, in my view, the Employer's system or method provided for that.

It follows that I disagree with the Delegate's method of requiring the Employer to pay for travel time, except as provided above. There is no dispute that Ms. Delyzer and Ms. Fraser were commercial travellers within the meaning of the *Act* and *Regulations*. Part 4 of the *Act* (hours of work and overtime) does not apply to commercial travellers (Section 34(1)(l)). The definition of "commercial traveller" is set out in the *Regulation*:

> 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
>
> (a) are selected from samples, catalogues, price lists or other forms of advertising material, and
>
> (b) are to be delivered from a factory or warehouse;

In my view, it is artificial, as seems to be the premise underlying the Delegate's decision to award overtime for travel time and sales meetings, to isolate travel time and sales meetings from the position of commercial traveller. The Delegate stated: " travel and attendance at the meetings is not time in which they were performing their normal duties." At these meetings the sales representatives were provided with information about products and new lines. While that is true in the sense that they, obviously, could not be on the road selling, the sales meetings were an integral part of the duties of the sales representatives. In short, I am of the view that the Delegate erred in this respect.

Even if I am wrong with respect to the above, and the Employer's method is inconsistent with the *Act*, I would, nevertheless, still, in the circumstances, allow the Employer to be credited for amounts paid on account of statutory holidays and sales meetings. There is no good reason why the Employees should be paid twice for those.

In short, I do not accept the delegate's conclusions. I am of the view that the Employer has discharged the burden on the appeal and I uphold the appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated September 6, 2001, be cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal