

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-

William Lavery
("Lavery ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 96/775

DATE OF HEARING: April 25, 1997 and February 18, 1998

DATE OF DECISION: March 13, 1998

DECISION

APPEARANCES

For the Director:	Ray Stea
For Arc Solar Products:	L. Oss Cech, Crease Harman & Company
	Roger White, Nancy White
William Lavery	On his own behalf

OVERVIEW

This is an appeal by William Lavery ("Lavery"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against Determination #004731, issued by the Director of Employment Standards ("the Director") November 27, 1996. The Director's delegate, R. Stea ("Stea") found that Lavery was an employee of Arc Solar Products ("Arc"), and that he was entitled to \$1293.43 in holiday pay and compensation for length of service. The Director's delegate found that Lavery was not entitled to overtime pay, and that there was insufficient evidence to support his claim that he was wrongfully terminated under Part 10 of the *Act*.

Following the first day of the hearing on April 25, 1997, the Director's delegate further found that Lavery was entitled to \$562.58 in commissions and vacation pay.

As of the date of the reconvened hearing on February 18, those amounts had been paid in full to Lavery.

ISSUE TO BE DECIDED

The issues on appeal are whether the Director correctly determined that Lavery was not wrongfully terminated under Part 10 of the *Act*, that Lavery was not entitled to overtime pay, and whether Lavery was entitled to commissions in excess of \$562.87.

FACTS

Lavery worked as a commissioned salesperson for Arc from May 3, 1995 to October 18, 1996. The Director's Determination that Lavery was an employee for the purposes of the *Act* was not disputed by either party.

On March 15, 1996, Lavery filed a complaint with the Employment Standards Branch contending that he had not been paid overtime wages. During the investigation of the complaint, Lavery advised Stea that he had not discussed his overtime concerns with Arc. Stea suggested that he do so.

Following his investigation, Stea concluded that Arc did not require, direct or permit Lavery to work overtime hours, and dismissed the claim.

At the time Arc terminated Lavery's employment, Lavery received compensation for length of service. Stea determined that the calculations were incorrect, and awarded Lavery an additional amount for length of service and holiday pay, which was included in the Order.

Following the preparation of the Determination, but before it was mailed, Lavery also complained that he had been terminated because he had filed a complaint with the Employment Standards Branch. After an investigation of this aspect of the complaint, Stea dismissed it on the grounds of insufficient evidence.

At the first date of the hearing of this appeal, Lavery indicated that the issues under appeal were those of unjust dismissal, compensation for overtime work and unpaid commissions. Lavery further indicated that all documents dealing with the issues of wrongful dismissal were before the Tribunal. However, he contended that not all of the information regarding the overtime pay and commissions had been reviewed by Stea.

Stea indicated that Lavery had presented him with an enormous volume of material for him to review (over 1800 pages). Stea declined to review all the material, and requested that Lavery provide him with only the specific information relating to the complaint. Lavery then prepared a summary, which was based on working notes from his diary. Stea requested that Lavery provide him with the diary and the original documents supporting the claim, which Lavery refused to do.

After the Determination was prepared, Lavery presented Stea with additional documents, which appeared to be the information originally requested (identifying specific accounts with notations) with respect to the complaint related to commission wages owing. That aspect of the complaint had not been fully investigated at the time of the hearing.

Consequently, I adjourned the hearing, and suggested that the Director's delegate complete his investigation. I Ordered that no further information be provided to the Director's delegate, as Lavery had confirmed that Stea now had all the information necessary to make a determination. I indicated that the Determination could be amended, if necessary.

Stea reviewed the additional information, and on November 6 1997, determined further amounts by way of commission wages were owing. An Order in favour of Lavery in the amount of \$562.58 was made at that time.

The hearing was reconvened on February 18, 1998.

ARGUMENT

Lavery's appeal remains that he was wrongfully terminated under Part 10 of the *Act*, and that he was not properly compensated for overtime or commission work.

Lavery further contends that Stea was biased in favour of Arc in arriving at his determination. In support of this argument, he suggests that Stea preferred Arc's records over his own. He contends that Arc failed to maintain proper records, and that, accordingly, the material he provided to the Director should be relied upon over that provided by Arc.

Lavery contends that the records he maintained show that he is entitled to overtime wages as well as commissions in the amount of \$5,539.00.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Wrongful termination

I shall first address the issue of whether the Director's delegate correctly concluded that there was insufficient evidence to support Lavery's complaint that he was terminated contrary to Part 10 of the *Act*.

Section 83(1) of the *Act* provides that an employer must not
(a) refuse to employ or refuse to continue to employ a person,

....
because a complaint or investigation may be or has been made under this *Act* or because an appeal or other action may be or has been taken or information may be or has been supplied under this *Act*.

Lavery filed his complaint with the Employment Standards Branch on March 15, 1996. Stea investigated, and during the course of the investigation, asked whether Lavery had approached Arc with respect to the issue of overtime. When he indicated he had not, Stea advised him that he should advise his employer that he had filed a complaint regarding this issue. Lavery notified Roger White, President of Arc, about the complaint when he returned from holidays on July 22, 1996. That was the first date Arc became aware of the fact that Lavery had filed a complaint. Lavery's position was terminated on October 18, 1996.

After hearing the evidence of the parties on this issue, I am unable to find, on the evidence presented, that there is a connection between Arc's knowledge of Lavery's complaint and his termination three months later. White's evidence is that Lavery's attitude toward the job and his sales had declined for some months. He also testified that he had warned Lavery about his job performance on October 9, following an incident over the preparation of a job quote. On October 18, 1997, White indicated that the relationship "was not working out" and brought the employment to an end. Lavery was paid compensation for length of service at that time.

On the evidence, I am unable to find that Arc's actions in October were taken as a retaliatory measure against Lavery for filing a complaint several months earlier. There is sufficient evidence as to other issues between the parties which could have led to the dismissal. I find no basis on which to conclude that the Director's determination was in error, and deny the appeal on these grounds. (See: *Performance Development Ltd.* BC EST #D 446/97).

At the hearing, I indicated that Lavery had been paid all he was entitled to under Section 63 of the *Act*. Lavery alleged that he was entitled to damages for loss of reputation, and one year's wages for the wrongful termination. He relied upon the case of *Jack Wallace v. United Grain Growers*. (SCC October 1997) in support of his argument. *United Grain Growers* involved an action for compensation under common law, specifically a claim in contract and in tort, for damages for wrongful dismissal and mental distress. That case may be distinguished from the case under appeal, as it deals with common law rights, not statutory rights. The *Employment Standards Act* sets out a framework which establishes minimum acceptable limits for employment relationships, and prescribes the jurisdiction of the Director and this Tribunal. That jurisdiction does not

encompass claims for loss of reputation or common law actions for wrongful dismissal. However, this does not preclude Lavery from pursuing any common law claims in another forum.

Lavery also argued that his notice of termination was not in writing. I find that nothing turns on this point on appeal, as Lavery did not return to work, does not wish to return to work, and accepted his compensation for length of service, which was reviewed by Stea.

Overtime

I shall next address the issue of whether Lavery is entitled to overtime pay.

Lavery argued that as an employee, Arc exercised control over him, and directed his hours of work.

Lavery also contended that because Arc failed to keep proper records to establish that overtime was or was not payable in contravention of the *Act*, his documentary evidence ought to be preferred over that of Arc's.

Section 28 of the *Employment Standards Act* provides that for each employee, the Employer must keep records of a number of matters, including

...

- (b) the date the employment began
- (c) the employee's wage rate, whether paid hourly, on a salary basis or on some other basis
- (d) the hours the employee worked on each day,
- (e) the benefits paid to the employee
- (f) the employees gross and net wages for each pay period, and
- (g) each deduction made from the employee's wages and the reason for it.

Arc failed to keep records as required. However, no contravention was found by the Director. As noted in *C.S.Q. Foods Ltd. BC EST #D118/87*, an investigating officer has discretion under the *Act* to impose a penalty where payroll records do not comply with the standard set in the *Act*. There is no evidence or submissions on whether the Director's delegate properly exercised his discretion in not issuing a penalty determination. Nevertheless, I note that Arc assumed that Lavery was a commissioned salesperson rather than an employee. I infer that Arc did not keep records based on this assumption, and not because it was unaware of its responsibilities under the *Act*. There is also no evidence to show Arc wilfully disregarded the *Act*, or that the failure to keep records in respect of this employee was an attempt to avoid an obligation arising under the *Act* [see generally *Performance Development Ltd. BC EST #D117/97*].

Section 35(a) of the *Act* provides that an employer must pay overtime wages in accordance with section 40 if the employer requires or, directly or indirectly, allows an employee to work over 8 hours a day or 40 hours a week.

The Director determined that Lavery was not required to work overtime. During his investigation, Lavery advised Stea that he had "a lot of leeway as an on the road salesperson" and he determined where and when he went on calls. Stea found that Lavery had significant flexibility in scheduling and controlling his hours of work, and concluded that Arc did not require him to work overtime.

Lavery's evidence is that his normal working hours were from 7am to 4pm, but that he was often required to work after that time. He also contended that he did not schedule his own work. Arc's evidence was that Lavery was only required to fill customer orders. How and when he did so was

up to him. White denied that Lavery was ever directed in how and when to work, as he considered him to be a commissioned salesman.

Lavery's evidence on the issue of whether or not he asked Arc for overtime wages was contradictory. When he filed his complaint, he indicated to Stea that he had not discussed his overtime concerns with Arc. At that time, Stea suggested that he do so. At the appeal hearing, Lavery testified that he asked for overtime wages every month. He also testified that he would advise White when he went to do a job in the evening, but did not raise an issue of overtime during those conversations. White's evidence was that Lavery never raised concerns about the overtime hours he was working, nor did he ever ask for overtime wages .

On the evidence presented, I am unable to find that the Determination is incorrect. I accept that Lavery was not directed or required to work overtime, and that he had a great deal of discretion in how he carried out his job. I am also unable to conclude that Arc directly or indirectly allowed Lavery to work overtime.

Lavery testified that Arc would set up his appointments, but that how he carried out those appointments was primarily within his discretion. I accept that Lavery may have felt pressure from customers to attend evening meetings, but that Arc never required him to do so. In other words, any demands to work 'overtime' came from the customer, not Arc.

If Lavery did demand overtime wages on a weekly basis, as he testified at the appeal hearing, I find it unusual that he would wait 10 months before filing a complaint about that issue. I accept, on a balance of probabilities, that the issue of overtime was not raised with Arc until the Director's delegate suggested he do so, which was in July of 1996.

The appeal is denied in this respect.

Commissions

Lavery contended that he was not paid commissions due to him.

As I indicated to Lavery at the hearing, I was not prepared to review all the material he presented to the Director's delegate. I indicated that it was necessary that Lavery fully cooperate with Stea and provide him with all the necessary and relevant information in order that he make a proper Determination on his complaint. Once the Determination was issued, I indicated it was his obligation of showing that the Determination was in error. The Tribunal will not review documentation which has been demanded by the Director and not produced at the first instance. (see: *Tri West Tractor Ltd.* BC EST #D268/96; *Kaiser Stables Ltd.* BC EST #D058/97). I am satisfied that the Director has now reviewed that documentation fully, and that there has been no error in arriving at the decision.

I shall first address Lavery's contention that he has been unfairly treated by the Director's delegate. He alleges that Stea was biased against him in preferring Arc's evidence over his, and that he failed to fully investigate the complaint.

Section 1 defines wages to include salaries, commissions or money aid or payable by an employer to an employee for work. Section 17 sets out when an employee must be paid.

In reviewing commission structures, the Director may have regard to the contract between the parties with a view to ensuring that employee are paid commissions within a reasonable time of substantial completion and that the wages meet or exceed the minimum wage.

The contract between Arc and Lavery indicated as follows:

1. Commissions are paid on invoice amounts after discounts.
- ...
6. Commissions may be adjusted or chargebacks may occur for pricing errors, product returns, product omissions, insufficient delivery charges, insufficient restocking charges, or other costing errors deemed to be the responsibility of a sales rep.
7. Commissions will not be paid or chargebacks may occur in any sales in cases where company policy or credit sales or any sales on which credit or legal action must be taken to collect...

Stea, assisted by two accounting students, conducted an extensive review of records provided by Lavery and Arc. Based on that review, commission wages in the amount of \$562.58 were found to be owing. As I indicated to Lavery at the hearing, I was not prepared to review the enormous amount of paper he provided, nor was I prepared to send the matter back for a reinvestigation unless he satisfied me that the review was biased, or in error.

I accept that Lavery and Stea were not on good terms. Nevertheless, I have no evidence to support Lavery's claim that Stea was biased against him. I note that during that review, Stea made a determination in favour of Lavery on a commission which had not been paid because the goods were returned. Stea found that because a great deal of time had passed between sale and return, the return should not affect Lavery's commission.

Nevertheless, even if I were to conclude that the interpersonal difficulties between the parties would lead to a reasonable apprehension of bias on the part of the investigating officer, I note that much of the accounting work was done by accounting students in the office of the Director. Consequently, the review of the material provided by Lavery was primarily conducted by parties other than Stea, which leads me to conclude that there has been no unfairness in this aspect of the investigation.

I am unable to conclude, on the evidence, that further commissions are owing. I deny the appeal on this ground.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated December 17, 1997 be confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal