



An appeal

- by -

Karen Merton
("Merton")

- 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.: 2000/773

DATE OF HEARING: February 23, 2001

DATE OF DECISION: March 12, 2001



DECISION

APPEARANCES:

Karen Merton appeared on her own behalf.

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Karen Merton (“Merton”) of a Determination issued on October 18, 2000 (the “Determination”) by a Delegate of the Director of Employment Standards (the “Director”).

The Determination found that the Appellant received all monies due to her for the period of her employment as a housekeeper with the employer, Tobien Enterprises Ltd. operating as the Best Western Villager West Motor Inn (the “Best Western”) in Salmon Arm, British Columbia, between July 1, 2000, and September 7, 2000.

ISSUES TO BE DECIDED

Whether the Director was wrong in his Determination that the Appellant was owed additional monies for Statutory Holiday pay.

In appealing the Determination, Merton bears the onus of establishing that the Determination was wrong on a balance of probabilities.

FACTS AND ANALYSIS

The Appellant was employed as a housekeeper with the Best Western from July 1, 2000, to September 7, 2000, at a rate of \$8.00 per hour.

The employer paid statutory holiday pay not on the basis stipulated by the *Act* but as follows, as set out in the Determination:

“If an employee works a holiday the employer pays 2 x the employee’s hours worked on a statutory holiday plus an averaging of the 10 days prior to the holiday as a day’s pay in lieu. If an employee is entitled to compensation for a statutory holiday which they have not worked, they would be paid a day’s wage calculated on the previous 10 days earnings”

(the “employer’s formula”)



The *Act* in Sections 45 and 46 specify when and how employees are to be compensated for statutory holidays:

45. An employee who is given a day off on a statutory holiday or instead of a statutory holiday must be paid the following amount for the day off:
 - a) if the employee has a regular schedule of hours and the employee has worked or earned wages for at least 15 of the last 30 days before the statutory holiday, the same amount as if the employee had worked regular hours on the day off;
 - b) in any other case, an amount calculated in accordance with the regulations.

46. (1) An employee who works on a statutory holiday must be paid for that day
 - a) 1 ½ times the employee's regular wage for the time worked up to 11 hours, and
 - b) double the employee's regular wage for any time worked over 11 hours

- (2) In addition, the employer must give the employee a working day off with pay according to Section 45.

- (3) The employee may choose to have the pay for the day off credited to the employee's time bank, if one has been established.

- (4) The employer must schedule the day off with pay
 - a) before the employee's annual vacation,
 - b) before the date the employment terminates, or
 - c) if the pay for the day off is credited to the employee's time bank, within 6 months after the date of the statutory holiday,whichever is earliest.

("the *Act*'s formula")

The Appellant's first day of work was July 1, 2000. The Appellant was paid 2 x her rate of pay for this holiday although not entitled to double time as it was her first day of work. The Appellant says that she brought this overpayment to the attention of the principle of the Best Western, Mrs. Tobien, and she told her to keep it.

The Appellant was paid according to the employer's formula for the statutory holidays on August 7 (worked) and September 4 (not worked).



Taking into account all monies received during the term of her employment and applying the *Act*'s formula for statutory holiday pay for July 1, August 7 and September 4, the Director found that the Appellant received all monies due to her during the term of employment according to the *Act*. In fact, she had been overpaid the sum of \$29.13.

The Appellant argues that the overpayment for July 1, 2000, should not be taken into account because she says it was a gift. The *Act* does not grant to the Director or this Tribunal the jurisdiction to consider the issue whether the overpayment was a gift.

The Director correctly applied the *Act* and the Determination is therefore confirmed.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated October 18, 2000, is confirmed.

CINDY J. LOMBARD

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal