EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

Devonshire Cream Ltd.
("Devonshire Cream")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 96/670

DATE OF DECISION: **May 3, 1997**

DECISION

OVERVIEW

This is an appeal by Devonshire Cream Ltd. ("Devonshire Cream") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from Determination CDET No. 004374 of the Director of Employment Standards (the "Director") issued on October 18, 1996 and varied on January 27, 1997. In this appeal, the employer claims that the Director has no jurisdiction to vary the Determination after the original Determination has been appealed to the Employment Standards Tribunal ("Tribunal"). It is also claimed that Joan Kallman is not owed an additional sum for unpaid wages.

ISSUES TO BE DECIDED

The issue in this appeal is whether the Director had the jurisdiction to vary a Determination after an appeal had been filed with the Employment Standards Tribunal. The other issue is whether Devonshire Cream is required to pay Joan Kallman overtime.

FACTS

Joan Kallman commenced employment with Devonshire Cream, a retail chain selling women's clothing, on October 30, 1994. She worked there until June 10, 1995. In letter of resignation dated June 9, 1995 to May Wong, Joan Kallman said that she was leaving Devonshire Cream "on good terms" and that the decision that she leave Devonshire Cream was mutual. She also received two week's salary.

On December 8, 1995, she filed a complaint with the Branch claiming that the employer wrongly failed to pay her overtime for hours worked in excess of 37 hours per week. On the complaint form, Ms. Kallman stated that she was paid $30,000 per year ($15.60 per hour) plus a bonus based on the store's sale performance. She said that while her hours of work were irregular, when regular, they were "7.5 hours per day or 37" hours per week. She listed her job title as "manageress".

In a submission dated June 2, 1996, Devonshire Cream argued that Joan Kallman was a manager and that her job performance was "inadequate, incompetent and haphazard". They argued that the management team in the store "consistently shows significant increases in their sales, have excellent staff development (recruitment and training) and problem-free physical inventory counts." Also submitted by Devonshire Cream were employee information and termination sheets; weekly staff schedules and budgets; and payroll sheets signed by Joan Kallman, as manager.

On October 18, 1996, the Director issued Determination CDET No. 004374, finding that Kallman was a manager within the meaning of the *Act* and was owed $2,299.08 for hours of work in excess of a 40 hour work week. It was reasoned that since there was no written contract of employment, Section 35(1) of the *Act* required the employer to pay Kallman for hours in excess of 40 hours per week, at straight time. (The Determination also dealt with moneys owed for uniform cleaning which is no longer at issue.)

On November 12, 1996 Devonshire Cream appealed Determination CDET No. 004374. While it agreed that Ms. Kallman was a manager within the meaning in the *Employment Standards Act*, it was argued that no standard week had been established. It also argued that the employee, as a manager, was excluded from the overtime provisions of the *Act*, by virtue of Section 34 of the *Regulations*. In submissions dated December 20, 1996, Devonshire Cream agreed that Kallman was a manager. They pointed out that Kallman had sufficient control and direction over other employees to be a manager and that other employees considered her to be their supervisor. It also argued that under the *Employment Standards Regulation* ("*Regulation*") the Director had exceeded her jurisdiction by ordering payment for hours worked in excess of 40 hours per week.

In a submission dated December 18, 1996 to the Tribunal, Ms. Kallman argued that she was not a manager as she never hired or fired. She says she kept track of the hours she worked and submitted them to the Director. She says she was not given the opportunity to act as a manager; she spent less than 10% of her time interacting with staff; and she was primarily involved in dealing with stock (pricing, receiving, merchandising, inventory, location and relocation) opening and closing the store; and interacting with customers. She also disagreed with the 40 hour work week and argued that the evidence shows that she was expected to work a 37 hour work week. She said she was often short staffed "with no assistant manager, supervisor or cashier" for relief and that she would operate the cash register for 12 hours with no break. She said that the store was chronically understaffed and that appeals "on my behalf for more staff" were largely ignored. She disagrees that she took it upon herself to work excess hours; she says she worked as long as was necessary to perform her duties and that "hours worked were factual and productive". She says that her experience as an employee of Devonshire Cream was negative and outlines her view of the role of that company in the industry. Letters of support from several co-workers have been filed on behalf of Ms. Kallman.

On January 27, 1997, the Director, on her own motion, varied Determination CDET No. 004374 and found that the employer owed Kallman $3,291.78. The Director's delegate found that Kallman was a manager and that her regular hours of work were 37 hours per week so that hours in excess of that were payable at straight time, plus related vacation pay.

In a Notice of Appeal filed on February 2, 1997, Devonshire Cream argued that the Director lacked the jurisdiction to vary the Determination once an appeal was filed with the Tribunal. In the alternative, they argued that given the finding that Ms. Kallman was a manager, the Director had no jurisdiction to make any Determination based on hours of work given the managerial exclusion from hours worked and over time provisions of the *Act*. There was an agreement that the work week was 37 hours and the Director erred in not crediting hours to the Employer in which Ms. Kallman worked fewer than 37 hours.

In submissions dated February 7, 1997, Devonshire Cream's counsel argued that the only issue relevant to the appeal is whether the Director had the jurisdiction to order the employer to pay straight time hours for hours worked in excess of 40 per week. He also reserved the right to make further submissions with respect to Ms. Kallman's December 18, 1996 submission if it was found that the Director had the jurisdiction to vary the Determination.

On February 10, 1997, Devonshire Cream's counsel wrote to the Minister of Labour and to the Attorney General concerning what he described as "a disturbing trend in the way cases are handled at the Employment Standards Branch." He complained that several Determinations were varied after an appeal had been filed with the Employment Standards Tribunal. In this case, the order to vary had been issued after all submissions had been made and a date had been suggested for hearing. He submitted that the sole reason for the order to vary was "to ensure a result favourable to the Complainant" and that this type of "bias was clearly contrary to the purposes of the *Act*." There was no new evidence before the Branch at the time the Determination was varied. He does not take issue with the Director's ability to vary a Determination after appeal such as for example where there are "obvious clerical errors" but says the action in this case is objectionable as it "is used to avoid the substantive matters directly under appeal".

By a letter dated February 27, 1997, counsel on behalf of the Branch wrote to the Tribunal to explain the reasons for the Director's decision to vary the determination. She pointed to Section 86 of the act which reads: "The Director may vary or cancel a determination" and said that the changes made by the Director responded to submissions made by the Employer in recognition of the fact that as a manager Ms. Kallman was not entitled to overtime. She argued that despite the exclusion, Ms. Kallman was still entitled to be paid for all hours worked by virtue of Part III of the *Employment Standards Act*.

ANALYSIS

Section 86 of the *Act* confers a power to "vary or cancel a determination" on the Director. Devonshire Cream's counsel does not take issue with the Director's ability to vary a Determination; he says this power is uncontestable. He does, however, take issue with the timing of the Section 86 variance, which was made after an appeal had been filed with this Tribunal. Thus the narrow issue before me is whether the Director has the jurisdiction to vary a determination after an appeal has been filed with the Tribunal.

A similar question was faced by the Federal Court of Appeal in *A.G. of Canada v. Von Findenigg* (1983) 46 N.R. 549 which considered the ability of the Unemployment Insurance Commission to reconsider one of its decisions which was on appeal to a Board of Referees. In the initial decision, the Commission refused to backdate a claimant's payment as he had not fulfilled certain preconditions for entitlement to benefits. This decision was then appealed to the Federal Court. Thereafter, the Commission issued a new decision, refusing to back date benefits for a different reason. Rather than the lack of compliance with certain preconditions, the reconsideration refused to pay benefits because the claimant had not established good cause for delay in making his application.

The reconsideration power conferred by Section 102 of the *Unemployment Insurance Act* empowered the Commission to "rescind or amend the decision on the presentation of new facts or on being satisfied that the decision was given without knowledge or, or was based on a mistake as to, some material fact". The Court concluded that once the decision was appealed, it was too late for the Commission to exercise its power to rescind or vary the decision.

> As the Commission's refusal to back date the respondent's claim was under appeal when the notice of August 28, 1981 was issued the matter was out of the Commission's hand and the notice was therefore, in my opinion a nullity.

The Court's conclusion did not rest on the unique provisions in Section 102 or the requirement of new facts or a mistake of material fact:

> Nothing in the present situation indicates that any new fact had been presented or that the Commission did not know of or based the refusal that was under appeal on any mistake as to a material fact. But apart from that, **once the appeal procedure had been invoked it was, it seems to me, too late for the Commission to exercise its authority under s. 102.** The section does not expressly put any time limit on the exercise of the power, but it seems to me that any other interpretation would enable the Commission at any stage, whether the matter was before the Board or the Umpire or before this court for review under s. 28 of the *Federal Court Act*, to intervene and interfere with the exercise by the claimant of his statutory right as well as with the proper exercise by the Board, the Umpire and the court of their functions. It would also lead to the conclusion that the Board of Referees could similarly interfere with the proceedings on an appeal to the Umpire and that the Umpire could change his decision while it is the subject of review in the court. I do not think that such could have been Parliament's intention. (emphasis added)

Regardless of the precondition to the exercise of reconsideration power, the court did not endorse the Commission's power to reconsider its earlier decisions once an appeal had been filed. It reasoned that the timing of the reconsideration interfered with the claimant's statutory right of appeal and with the proper exercise of function by appellate tribunals and the courts, and that such a result could not have been intended by Parliament.

A.G. of Canada v. Von Findenigg is of assistance in the instant case and the interpretation of Section 86 of the *Act*. Despite the differing statutory provisions, in that Section 86 contains no preconditions to the exercise of the power by the Director to vary or cancel, the decision is helpful since the Court made it clear that its conclusion about the timing of the appeal did not rest on the unique provisions in the *Unemployment Insurance Act*. I find that the Legislature could not have intended Section 86 of this *Act* to be used as a mechanism by the Director to interfere with Devonshire Cream's appeal rights or with the exercise by this Tribunal of its appellate functions under Section 108(2) of the *Act*. Once an appeal is filed, it is too late for the Director to exercise her jurisdiction under Section 86; such a limitation is implied by the presence of other provisions of the *Act*, including the right to appeal under Section 112 and the appeal powers of this Tribunal under Section 108(2) to "decide all questions of fact or law arising in the course of an appeal or review". Counsel impugned the motives of the Director in the decision to alter the earlier Determination but I find that the timing, alone, regardless of the motivation, invalidated the Director's actions. Only with the approval of the appellant to withdraw the appeal could the Director then proceed with the exercise of her powers under Section 86 once an appeal was filed. Counsel says that the Director could make minor changes to a Determination such as a correction of a clerical error, but I disagree. Once the appeal is filed, all jurisdiction ceases under Section 86. Consequently, I find that the order varying CDET No. 004374 is a nullity and that Devonshire Cream is not, on this account, required to pay Ms Kallman $3,291.78 for unpaid wages.

Turning now to the merits of this appeal, which involves the Determination of October 18, 1996, I find that Joan Kallman was a manager within the meaning of the *Act* as she exercised control over other employees and performed the functions of a manager. She argues that she did not hire or fire other employees and is thus not a manager. But whether she actually exercised these rights is not the issue; she had the ability to exercise if the circumstances warranted it. I also note in the supporting documentation that she signed the Termination of Employment forms of several employees. Because Section 34(f) of the *Regulation* exempts managers from Part 4 of the *Act*, Devonshire Cream is not liable for overtime. The evidence also establishes a salary of $30,000 per year, plus a bonus based on the store's performance. There was no understanding that Ms. Kallman was entitled to an hourly wage based on $30,000 for "regular" hours. The annual salary of $30,000 plus a bonus was intended to be all of the remuneration received regardless of the number of hours worked. Given this finding, I conclude from the evidence in this case that Devonshire Cream did not contravene the *Act* and does not owe any wages to Kallman.

ORDER

Pursuant to Section 115 of the *Act*, I order that determination CDET No. 004374 be cancelled.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal