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-

Canadian Petcetera Warehouse Inc.

("Petcetera" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 99/005

DATE OF HEARING: March 29th, 1999

DATE OF DECISION: May 11th, 1999

DECISION

APPEARANCES

Melanie Samuels	Legal Counsel for Canadian Petcetera Warehouse Inc.
Simeeta Dass	on her own behalf
Robert Petruka	on his own behalf
Lesley A. Christensen	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Canadian Petcetera Warehouse Inc. ("Petcetera" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on December 11th, 1998 under file number 085-934 (the "Determination").

The Director's delegate determined that Petcetera owed its former employees, Simeeta Dass ("Dass") and Robert Petruka ("Petruka"), the combined sum of $4,996.19 on account of unpaid wages and interest. By way of the Determination, the Director also levied a $0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

The employer's appeal was heard at the Tribunal's offices in Vancouver on March 29th, 1999 at which time I heard testimony from Ms. Dana Babic, Mr. Dan Urbani and Ms. Jaime Flatekval, all on behalf of Petcetera. Both Dass and Petruka testified on their own behalf and neither one called any other witnesses. The Director's delegate did not call any evidence but did participate in the hearing by cross-examining witnesses and making a final submission.

Although the delegate issued a single determination regarding both former employees' claims, the two claims are quite independent and I propose to deal with them separately.

SIMEETA DASS' UNPAID WAGE CLAIM

The delegate found that Petcetera owed Dass $1,860.23 in unpaid overtime pay plus $98.48 interest for a total of $1,958.71. The employer appeals this finding arguing that Dass' regularly scheduled hours of work--which did not include overtime--were clearly explained to her and that if she worked any overtime hours such hours were worked without the employer's knowledge or consent (a similar argument was advanced with respect to Petruka's claim). Further, the employer, in any event, denies that Dass worked the overtime hours she claims to have worked. While the employer does not deny that Dass attended two social functions, referred to as the Rupert Street store "grand opening" and "Pet Games 1997", the employer submits that these events were purely social functions and, therefore, noncompensable.

Dass' evidence

Dass testified that following the completion of her marketing studies at BCIT in May 1997 she was hired, at a $24,000 per annum salary, as as assistant to Petcetera's merchandising manager. Upon being hired it was explained that her usual working hours would be from 8:00 A.M. to 5:00 P.M. but that she would be required to stay after 5:00 P.M. on occasion as work demands required. On her first day day of work, June 2nd, 1997, Dass says that she worked until 6:00 P.M.

After about 5 months on the job, Dass was the successful internal applicant for a position in the marketing department (which included a $2,000 per annum salary increase) where she continued until she resigned her employment in mid-February 1998. Dass says that throughout her employment she usually worked until 5:30 or 6:00 P.M. Dass says that she recorded her daily hours on a calendar and provided a summary record of her hours to the delegate. Dass conceded that she *never* claimed any payment for her overtime hours--or even raised the issue with the employer--while she was employed with Petcetera; her evidence is that she understood from her conversations with other employees that the employer simply did not pay overtime. Dass also testified that most days she took a lunch break but that only rarely was that lunch break 1 hour; on most days, her lunch break was of 30 to 45 minutes duration.

With respect to the October 1997 "Pet Games" evening of bowling and dinner (all paid for by the employer) for employees and their guests, Dass says that she felt obliged to attend although she never asked to be excused from the event. Dass also testified that she was, in effect, "on duty" during the November 14th, 1997 evening

"grand opening reception" at the Rupert Street store. She also testified that she worked on November 11th--otherwise a statutory holiday--preparing for the grand opening.

Dass conceded during her cross-examination that on August 22nd, 1997 she was paid for the day even though she was away from work that day attending a wedding. She also conceded that on some occasions she arrived late for work and left work early but was nevertheless paid for a full day.

The Employer's evidence

Ms. Babic, Petcetera's Human Resources manager, testified that although she (Babic) worked a considerable number of overtime hours, she observed that Dass was part of the "mass exodus" of staff at 5:00 P.M. During the period of her employment Dass took at least 5 paid "sick days". Dass alone, among all of the employer's employees, claimed overtime for "Pet Games" which was an event to thank staff and their spouses for their hard work; it certainly was not a mandatory company function although most employees welcomed the opportunity to bowl and dine at the company's expense. Dass, as were all staff, was invited to the grand opening--at which hors d'oeuvres and alcoholic beverages were served--but does recall seeing Dass at the front door greeting guests.

Mr. Urbani, the employer's president and chief executive officer, had little to say about Dass' claim except that he noted she was often tardy and, accordingly, he spoke to Dass' supervisor, Ms. Flatekval, about the matter. Ms. Flatekval, the employer's director of marketing, testified that Dass was assigned as her assistant in October 1997. Dass did not work past 5:00 P.M. except for one occasion when she stayed an extra 3 hours, as requested, the night before the grand opening reception. Dass on occasion arrived late for work and on at least 3 days left work early--in no instance was her pay docked. Flatekval testified that the "Pet Games" evening was an entirely social affair and that whatever tasks Dass performed at the grand opening--such as serving drinks--were only undertaken because she volunteered to do them; at the end of the evening Dass was given a "thank you" in the form of an unopened bottle of champagne.

In early February 1998 Dass was given a somewhat less than glowing performance appraisal--Dass was rated in the third of five performance categories (scoring 65 points out of 128). However, having read the entire document, in my view, it could hardly be characterized as a negative review--there are a number of positive comments and Dass' performance trend was said to be "improving" rather than

"continuing at same level" or "declining". In any event, Dass took the report to be highly critical, and shortly thereafter resigned. Her resignation letter, dated February 13th, 1998, referred to her appraisal as "a slighted and misdirected review" which she was "saddened and shocked" to receive; Dass also stated in her resignation letter that she was resigning on the advice of her physician due to "overwhelming stress". In this letter, for the first time, Dass raised the matter of overtime but only rather obliquely and without providing any particulars--"please forward all outstanding salaries, vacation pay, and overtime salaries (June 2, 1997-February 20, 1998) to my above address".

Analysis

A principal submission of the employer is that Dass' claim is retaliatory and not *bona fide*. Unfortunately for all concerned, the employer did not maintain records regarding employees' actual daily and weekly hours worked; the employer simply relied on its notice to employees regarding their working hours--8:00 A.M. to 5:00 P.M. for head office staff. It should be noted that this is not an employer that never paid overtime--a procedure was in place for managers to seek Urbani's authority regarding overtime and on several occasions overtime was approved and paid. However, it must be remembered that it is the employer's statutory obligation to maintain proper records relating to employees' working hours--see section 28(1)(d) of the *Act.*

Flatekval testified that Dass did not regularly work work past 5:00 P.M. but this position represents something of a retreat from the position taken by the employer in the investigation of Dass' complaint. In a letter to the delegate dated October 19th, 1998, the employer's legal counsel noted that Flatekval confirmed that there were "numerous times" when Dass worked past 5:00 P.M. but that on such occasions Dass indicated that she wished to work for the "experience" and to "learn to grow within her position" and refused to go home when told to do so. In this same letter, counsel confirmed that Dass worked overtime on November 13th, 1997 but took issue with the number of hours claimed.

Section 35 of the *Act* provides that an employer must pay overtime wages if it "requires or, directly or indirectly, allows an employee to work [overtime]". I accept both Dass' and the delegate's submission that there was a corporate culture that encouraged the professional staff--including someone in Dass' position--to work long hours. This culture emanated from the top--Urbani testified that he works very long hours, usually beginning his day at 6:00 A.M., and frequently works well into the late evening and even early morning hours; Babic testified that

her typical day begins at 8:00 A.M. and ends somewhere between 5:00 and 10:00 P.M.; Flatekval's evidence was that she frequently worked past 5:00 P.M.

I do not doubt that Dass, having observed the prodigious work habits of her superiors, concluded that a key to her continued success in the organization was a willingness to work long hours--this fact, more than anything else, I believe explains why Dass never submitted an overtime claim during her tenure with the employer. I am also of the view, however, that Dass quite willingly--even enthusiastically--worked past 5:00 P.M. and took abbreviated lunch breaks as a conscious and deliberate career strategy. This strategy, and indeed her enthusiasm for her career with Petcetera, lost all of its lustre when, in her view, her efforts were not being appropriately recognized, most particularly in her performance appraisal. Thus, she quit and then, for the first time, advanced a claim for overtime.

In such circumstances there well may be an element of retaliation to Dass' overtime claim. On the other hand, I do not conceive that her motive for filing a complaint is particularly relevant--she either worked overtime hours, as directed or permitted by her employer, and therefore is entitled to be paid, or she did not. I find, in general, that Dass did work the overtime hours she claimed.

I do not accept the employer's position, espoused in its October 19th letter to the delegate, that Dass is disentitled from claiming overtime because Flatekval told her to go home and Dass refused. This assertion was restated in the employer's appeal documents (page 2, item number 2): "On certain occasions Dass was adamantly instructed to 'go home'...[but] these requests were specifically refused...". As Dass' supervisor, Flatekval certainly had the authority to order Dass to leave work at the end of the day--if Dass refused, would not such behaviour amount to insubordination but if so, why was Dass never disciplined? The answer, of course, is that the employer benefitted from Dass' extra hours and saw no reason to direct her to leave work at 5:00 P.M. particularly when Dass never, during her tenure with the employer, advanced a claim for overtime pay.

The employer concedes that Dass worked overtime on November 13th but says that the claim is inflated. However, in the absence of any employer time records and in light of the Tribunal's decision in *Hofer* (B.C.E.S.T. Decision No. 538/97), I see no reason to disregard Dass' records and testimony which show that she worked 6 overtime hours on that day. Similarly, I see no reason to doubt Dass' claim that she worked 6 hours on the November 11th, 1997 statutory holiday. Babic did not work on the 11th and thus is not in a position to dispute Dass' evidence that she (Dass) did work that day; further, none of the employees (other than Urbani) who did

work the 11th were called to testify, nor did they provide statements, that Dass did not work. I find it quite plausible that in the rush before the grand opening of the Rupert Street store Dass would have been called upon to work overtime hours.

Further, I also find that Dass is entitled to be compensated for her attendance at the reception on November 14th; although most, if not all, other employees may have voluntarily attended this function as "invited guests", the evidence before me shows that Dass was more of a "host" and less of a "guest". The employer's own evidence shows that Dass was at the front door greeting guests as they arrived; spent 2 hours serving champagne to guests and socialized with the employer's suppliers and at the end of the evening spent some considerable time on clean-up duties. Dass' evidence is that she carried out a number of tasks prior to the reception--such as posting signs and ensuring that particular suppliers were given certain gifts--and other tasks at the reception itself--such as assisting the guests with an "orientation game" and handing out staff name tags. While it is true that Dass was given an unopened bottle of champagne as a form of "thank-you" at the end of the evening, that fact is just as consistent with her being thanked for the duties she undertook at the reception as with it being merely a gift. I note that Dass alone, among all employees present that evening, was given a bottle of champagne.

On the other hand, I cannot accept Dass' (and the Director's) position that her attendance at the "Pet Games" event was compensable time. This event was truly a social occasion and all employees viewed it as such. For example, Petruka did not claim any overtime pay for his attendance at the event which he characterized in his testimony before me as a "strictly social" occasion. No one other than Dass has claimed that they were "on the job" while bowling and having dinner at the employer's expense. While Dass may well have believed that it was in her best interests--in terms of her career prospects--to attend the event, she was under no express or implied compulsion to do so. I suspect that many employees view certain company functions, for example, the annual Christmas party, as something to be endured as much as enjoyed, but so long as there remains a true option to attend or not attend as the employee chooses, such events cannot be considered to be compensable working time under the *Act*. Accordingly, I would vary the Determination insofar as the claim for overtime for October 17th, 1997 is concerned (4.5 hours).

Finally, the evidence shows that Dass, at least on some occasions, arrived late and left early and yet was paid her usual monthly wage without deduction. Nevertheless, I also accept that on many occasions Dass did not take a full 1 hour lunch and thus, on balance, those "lost working hours" are more than

counterbalanced by the time that Dass worked through or took a less than an uninterrupted 1 hour lunch break. Therefore, I see no compelling reason to vary the Determination as it relates to Dass other than the minor variation noted above with respect to October 17th.

ROBERT PETRUKA'S UNPAID WAGE CLAIM

Petruka was employed as a labourer in Petcetera's warehouse from early September 1997 until his resignation in late January 1998. His rate of pay was $13 per hour. The Director's delegate determined that Petcetera owed Petruka $2,875.34 in unpaid overtime wages plus $162.14 interest for a total amount of $3,037.48. The delegate accepted Petruka's record of hours worked--the employer had no such records--as well as his assertion that he had frequently been called on to work overtime hours for which he was not paid.

Petruka's evidence

Petruka responded to an employment advertisement and joined Petcetera in September 1997 as a labourer in its warehouse; he was to be paid $13 per hour and his working hours were to be from 8:00 A.M. to 5:00 P.M. (with an hour lunch break) each weekday. At the outset of his employment he worked a regular 8-hour day but shortly thereafter he was asked to work overtime and continued to do so throughout his employment. He says that he sometimes started work as early as 5 A.M. and usually left sometime after 5:00 P.M. He says that he never submitted an overtime daim to his employer because he had understood that Petcetera did not pay overtime and he did not want to jeopardize his employment situation by filing an overtime claim. Petruka did not testify that his supervisor or someone else in authority told him not to claim overtime--he merely testified that he had a "general understanding" about the matter.

Petruka had a key to the premises and was given the security code. His daily routine was to arrive early and read the newspaper in the staff coffee/lunch room and then proceed to work. He recorded his hours on a daily basis and submitted that record to the delegate in support of his claim.

Petruka says he worked the November 11th statutory holiday; this was confirmed by Ms. Dass and the employer has not presented any contrary evidence on this point.

The employer's evidence

The employer presented almost no evidence regarding Petruka's claim. The only employer witness who touched on Petruka's overtime claim in any substantive fashion was Mr. Urbani. Urbani testified that he usually arrived at work by no later than 7:00 and regularly found Petruka in the staff lunch room reading the newspaper and drinking coffee. Petruka apparently commented to Urbani that he (Petruka) preferred to arrive at work early in order to "beat the traffic". Urbani was aware that Petruka worked overtime--indeed, he approved certain overtime hours--but was unable to produce any records regarding the dates and times of the overtime actually worked. At the relevant time, the warehouse where Petruka worked had anywhere from 4 to 8 employees, none of whom testified before me.

Analysis

In an appeal such as this the onus of proof lies on the employer to show, on a balance of probabilities, that the determination is in error. There is virtually no evidence before me upon which I could reasonably conclude that Petruka did not work the overtime hours he claimed to have worked. While I have some very real concerns regarding whether or not Petruka's record of hours worked is a *bona fide* document, prepared on a daily basis during the period of his employment (I believe it to be a record reconstructed after his employment ended), the fact remains that the employer has no records of hours worked--despite its legal obligation to maintain such records--and, further, the only *viva voce* evidence I have from the employer corroborates Petruka's evidence at least to the extent that he was on-site (although not working) prior to 7:00 A.M. most days. Even though I have expressed some concern about the *bona fides* of Petruka's documented record of hours worked, I am more than satisfied that he did, in fact, work a substantial number of overtime hours during his tenure at Petcetera.

On the basis of the evidence before me, I cannot conclude, on a balance of probabilities, that Petruka did not work the overtime hours he claimed to have worked during his employment with Petcetera. Further, at the very least, I am satisfied that the employer at least indirectly allowed and encouraged Petruka to work overtime.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination, as it relates to Ms. Dass, be varied in accordance with these reasons and that the Determination, as it relates to Mr. Petruka, be confirmed as issued. In addition, both Ms. Dass and Mr. Petruka are entitled to further interest, to be calculated by the Director in accordance with section 88 of the *Act*, as and from the date of issuance of the Determination until the date of actual payment. Finally, the $0 monetary penalty is confirmed.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal