

**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 -

Torin Sommerfeld  
("Sommerfeld")  
-and-  
Canada Photofax Ltd.  
("Photofax")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**Adjudicator:** Hans Suhr

**File No.:** 96/771

**Date of Hearing:** April 2, 1997

**Date of Decision:** April 9, 1997

**DECISION**

**APPEARANCES**

Torin Sommerfeld	On his own behalf
Fred Spaner	On behalf of Canada Photofax Ltd.
Terri Paul	On behalf of Canada Photofax Ltd.

**OVERVIEW**

This is an appeal by both Torin Sommerfeld (“Sommerfeld”) and Canada Photofax Ltd. (“Photofax”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination letter which was issued by a delegate of the Director of Employment Standards on December 9, 1996. Both appellants allege that the delegate of the Director erred in the Determination letter. Sommerfeld seeks as a remedy, \$2,558.09 in the form of wages owed. Photofax contends that the amount of rent paid on behalf of Sommerfeld should be deducted from wages alleged to be owing. The Director’s delegate concluded that unpaid wages in the amount of \$708.27 were owed to Sommerfeld.

**ISSUES TO BE DECIDED**

1. Is Sommerfeld owed regular wages ?
2. Is Sommerfeld owed statutory holiday pay ?
3. Is Sommerfeld owed annual vacation pay ?

**FACTS**

Sommerfeld was employed by Photofax as a Sales Representative from November 24, 1995 to April 15, 1996. Sommerfeld was hired over the telephone by the owner of Photofax, Mr. Fred Spaner (“Spaner”).

The parties agreed that the payroll information provided by Photofax accurately sets forth the dates worked and the amount of wages paid.

The parties further agreed that the document entitled “Photofax Commission Structure” was accurate with only the *application* of the “Draw per month” provision being in dispute.

Sommerfeld resided at Spaner's residence during the course of his employment.

**ARGUMENT**

Sommerfeld stated that he is owed regular wages for the period November 24, 1995 to January 31, 1996 as he was paid at the rate of \$1,000 per month and this did not equal at least the minimum wage for all hours worked.

Sommerfeld also stated that he had not been paid annual vacation pay for his period of employment.

Sommerfeld further stated that he was not paid for the statutory holidays which fell in the period November 24, 1995 and April 15, 1996 ( a total of 3 statutory holidays ).

Sommerfeld further stated that the "Photofax Commission Structure" document provides that a "draw of \$1,000 per month be paid for all months employed and that the payroll evidence is that he only received this amount for the first 3 months of his employment.

Sommerfeld further stated that he has no quarrel with the calculation of commissions payable by Photofax except for a \$50 deduction from his March commission and the calculation of the \$1,000 per month draw after January 31, 1996.

Sommerfeld finally stated that he had never seen the "terms and conditions of employment" presented by Photofax at the hearing and the only terms and conditions discussed with Spaner prior to his employ was the rate of \$1,000 per month plus commissions and \$50 per month for utilities.

Spaner testified on behalf of Photofax and stated that when the "value" of the free rent for the first 3 months is included, the amounts paid to Sommerfeld clearly exceed the minimum wage.

Spaner also stated that the payroll records clearly indicated that annual vacation pay had been paid to Sommerfeld.

Spaner further stated that the payroll records clearly indicated that Sommerfeld was paid for the statutory holidays.

Spaner further stated that the terms and conditions of employment were discussed with Sommerfeld prior to his being hired and it was clearly understood by Sommerfeld that the \$1,000 draw would be for only the first 3 months of employment. Spaner further stated that he kept notes of the conversation with Sommerfeld during which the terms and conditions were discussed and that those notes were transcribed by Paul for the file.

Spaner further stated that the ‘Commission Claim Forms’ submitted by Sommerfeld for February, March and April were incorrectly completed with the rate of commission being claimed was in excess of the commission structure set forth on the ‘Photofax Commission Structure’ documents. Spaner adjusted those claim forms and those adjustments were accepted by Sommerfeld as being correct.

Terri Paul (“Paul”) stated that she has been the office administrator for Photofax for more than 2 years and, as a part of her regular duties, prepares the payroll.

Paul further stated that the guaranteed \$1,000 per month has always been applied to only the first 3 months of a sales representative’s employment as after that, the sales representative is paid on a “straight commission” basis.

Paul further stated that she brought the matter of the incorrect ‘Commission Claim Forms’ to Spaner’s attention and, after discussions with Sommerfeld, Spaner prepared an adjusted claim form which was then used to calculate Sommerfeld’s pay.

Paul further stated that she had calculated the annual vacation pay owed to Sommerfeld and issued a cheque for that amount.

Paul further stated that she transcribed the notes from Spaner with respect to the terms and conditions of employment and the transcription was performed prior to Sommerfeld commencing employment.

Paul finally stated that the amount of “rent” to be paid by Sommerfeld was not shown on the payroll records as she had not been instructed to do so.

## **ANALYSIS**

Section 16 of the *Act*, sets forth the requirement to pay minimum wage and states:

*Employers required to pay minimum wage*

16. *An employer must pay an employee at least the minimum wage as prescribed in the regulations.*

As the employer is required by the provisions of Section 17 of the *Act* to pay at least semi-monthly **all** wages earned by an employee, the consideration of whether minimum wages have been made must be made on a pay period basis.

Sommerfeld was paid at the rate of \$1,000 per month for the period November 24, 1995 to January 31, 1996. Photofax's pay period was semi-monthly and the wages earned for the period of November 24, 1995 to January 31, 1996 are therefore calculated as follows:

<b>Period</b>	<b>Hours worked</b>	<b>Wages paid</b>	<b>Minimum Wage</b>	<b>Difference</b>
Nov 15-30 / 95	40	\$227.25	\$280.00	\$52.75
Dec 1 - 15 / 95	88	\$500.00	\$616.00	\$116.00
Dec 16-31 / 95	64	\$500.00	\$448.00	\$<52.00>
Jan 1-15 / 96	80	\$500.00	\$560.00	\$60.00
Jan 16-31 / 96	96	\$500.00	\$672.00	\$172.00
<i>Wages Earned</i>		<i>(\$2,227.25)</i>	<i>(\$2,576.00)</i>	
<b>Wages Owed</b>				<b>\$348.75</b>

Sommerfeld commenced working on a 'straight commission' basis Feb 1, 1997 and a comparison of his commission earnings to the minimum wage entitlement for the period February 1 to April 15, 1996, indicates that Sommerfeld's commission earnings for February, March and April were:

<b>Month</b>	<b>Commission Earned</b>	<b>Minimum Wage</b>	<b>Wages Owing</b>
February	\$2,081.73	\$1,176.00	0
March	\$1,452.88	\$1,176.00	0
April	\$ 720.88	\$ 560.00	0
<b>Wages Owed</b>			<b>0</b>

The commissions earned by Sommerfeld exceed the amounts generated by calculating minimum wage for all hours worked.

There was a deduction of \$50.00 from Sommerfeld's March commission for a portion of the cost of a copier stand supplied to a customer by Photofax. This deduction should have been properly considered in the 'gross profit' amounts and the commission rate of 25% adjusted accordingly. The commission for March should therefore be in the amount of \$1490.38 which means that Sommerfeld is owed an additional **\$37.50** in commission.

The evidence of Sommerfeld and Spaner differs in respect to the issue of the \$1,000 per month draw and for how long this amount was to be paid, therefore I must assess the credibility of the evidence provided. In assessing credibility, a number of factors are to be considered. These include:

- the demeanour of the witness
- opportunities for knowledge
- powers of observation
- judgment and memory
- ability to describe clearly what has been seen and heard
- the probability of the event happening in the manner suggested

Upon consideration of the evidence provided, I conclude, on the balance of probabilities, that the payment of the \$1,000 draw was to be for only a period of 3 months.

With respect to Photofax's contention that I should allow the deduction of 'rent' from the calculation of wages owing, I am satisfied from the evidence that there was no written authorization from Sommerfeld to deduct any such 'rent' payments, therefore, no such deduction is permissible.

*The answer to issue No. 1 is that Sommerfeld is owed regular wages in the amount of \$386.25.*

The payroll records indicate that Sommerfeld was not paid statutory holiday pay for the 3 statutory holidays which occurred during his period of employment. Sommerfeld is therefore entitled to be paid statutory holiday pay calculated as follows:

<b>Statutory Holiday</b>	<b>Entitlement</b>	<b>Pay</b>
Dec 25 / 95	8 hours x \$7.00	\$56.00
Jan 1 / 96	8 hours x \$7.00	\$56.00
Apr 5 / 96	March commissions (adjusted) (\$1,490.38) ÷ 21 working days	\$70.97
<b>TOTAL OWING</b>		<b>\$182.97</b>

*The answer to issue No. 2 is that Sommerfeld is entitled to statutory holiday pay in the amount of \$182.97.*

With respect to the issue of annual vacation pay, Sommerfeld conceded that he had received a cheque from Photofax for annual vacation pay.

Photofax does however, owe Sommerfeld annual vacation pay on the amounts determined to be owing in this decision,  $(\$386.25 + \$182.97 = \$569.22 \times 4\%)$  **\$22.77**.

*The answer to issue No. 3 is that Sommerfeld is entitled to annual vacation pay in the amount of \$22.77.*

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination letter be varied to be in the amount of **\$591.99**, plus interest as calculated under Section 88

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**