

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Ritva Mayer operating
Femme Skin Care & Cosmetics
("Femme")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 96/280

DATE OF DECISION: July 19, 1996

DECISION

OVERVIEW

This is an appeal by Ritva Mayer operating Femme Skin Care & Cosmetics ("Femme") pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against Determination No. CDET 001925 issued by a delegate of the Director on April 12, 1996. In this appeal Femme claims that the Director should not have issued this determination as she has no income and could not possibly pay this amount.

I have completed my review of the written submissions made by Femme and the information provided by the Director.

FACTS

Valerie Neilson ("Neilson") was employed by Femme from February 1992 until October 31, 1995 as an Esthetician.

Neilson filed a complaint with the Employment Standards Branch ("the Branch") which was received on December 6, 1995 alleging that she had never been paid for Statutory Holidays during her period of employment with Femme.

Both Femme and the bookkeeping services used agree that Nielson was never paid for Statutory Holidays.

Femme was unable to provide the daily records of employment for Neilson although the payroll records were provided.

Based on the payroll records and the days that Neilson claims to have been at work, the delegate of the Director calculated pay for the Statutory Holidays and subsequently, determination No. CDET 001925 was issued.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Femme owes Statutory Holiday pay to Neilson as calculated by the delegate of the Director.

ARGUMENTS

Femme argues that they did not pay Statutory Holiday pay to Neilson while she was employed because she was not really an employee, she was self-employed.

Femme also argues that Neilson should have requested pay for the Statutory Holidays at the time that the business was sold as she does not now have the money to pay this amount.

The delegate of the Director contends that a review of the payroll records clearly indicates that Femme treated Neilson as an employee in all respects, except for the payment of Statutory Holiday pay as annual vacation pay was paid, statutory deductions were remitted to Revenue Canada and finally severance pay was paid.

The delegate of the Director finally contends that Neilson was an employee and should have been paid Statutory Holiday pay.

ANALYSIS

The *Act* deals with entitlement to Statutory Holiday pay and the amounts of such pay in sections 44 and 45. Sections 44 and 45 state:

Entitlement to statutory holiday

- 44.** After 30 calendar days of employment, and employer must either
- (a) given an employee a day off with pay on each statutory holiday, or
 - (b) comply with section 46.

Statutory holiday pay

- 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.

The provisions of the *Act* permit a former employee to file a complaint within 6 months of their last date of employment. Nelson's complaint was filed within the time limits provided.

While I may have some sympathy for the circumstances for which Ritva Mayer now finds herself in, I conclude, based on the information provided, that Neilson is entitled to be paid the Statutory Holiday pay as calculated by the delegate of the Director.

The appeal is therefore dismissed.

ORDER

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 001925 be confirmed in the amount of \$2066.92.

Hans Suhr
Adjudicator
Employment Standards Tribunal

Date

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