

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1996, C. 38

- by -

639549 ALBERTA LTD. dba COMTEC COMMUNICATIONS
("COMTEC")

and

JUANITA TAYLOR
("TAYLOR")

and

RUTH E. MANNING
("MANNING")

- of a Determination issued by -

The Director Employment Standards
(the "Director")

ADJUDICATOR: Alfred C. Kempf

FILE NO: 96/164

DATE OF HEARING: August 15, 1996

DATE OF DECISION: September 5, 1996

DECISION

OVERVIEW

This is an appeal by Comtec, pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination of the Director of Employment Standards (the "Director") issued on February 12, 1996. In this appeal the employer claims that no wages are owed to Taylor and Manning.

A hearing was held in Penticton, British Columbia on August 15, 1996. Wayne Schafer ("Schafer") appeared on behalf of Comtec, Juanita Taylor and Ruth E. Manning each appeared on their own behalf and Ken R. Johnston appeared on behalf of the Director.

Comtec abandoned its appeal with regard to Taylor at the outset of the hearing.

Comtec also at the outset confirmed that it was not proceeding with its appeal regarding Manning's entitlement to statutory holiday pay and applicable interest for January 1, 1996. That left only the issue of deductions made in Manning's final pay for hours previously not worked by her.

FACTS

Manning worked in an administrative capacity for Comtec for approximately one year. Her last day of employment was January 2, 1996. She was paid a monthly salary of \$1,666.66.

Schafer on behalf of Comtec testified that her salary was arrived at by applying an hourly rate of \$10.00 per hour, however, I find that at all relevant times her salary was expressed in monthly terms and not on a per hour basis.

When Manning was hired by Comtec she lived in Summerland and her place of employment was in Kelowna but it was anticipated that the office would move to Penticton within a matter of months. Most, if not all, of the Comtec employees were hired in the Penticton area due to the plan to move the office to Penticton.

The office was not moved from Kelowna during Manning's period of employment.

Manning and other employees would usually eat lunch at the office. They were expected to deal with telephone calls and enquiries while on their breaks.

On November 7, 1995 a snowstorm occurred while Manning was at work in Kelowna. Due to her

concern with the weather and driving conditions she left after having worked half of her scheduled 8 hours. Her evidence was that she attempted to notify Schafer of this but his phone went dead during the conversation. There was evidence that another employee advised Schafer that Manning and other employees were leaving early. Manning that day drove with Kathy Riley, who carpooled with her to economize on the car expenses from Summerland to Kelowna.

Manning testified that the road conditions on the trip home to Summerland on that day were treacherous and caused her stress and anxiety. For this reason she took the next day off. There is evidence that some explanation was provided later to the employer although apparently no medical note was requested or provided. Even though this time off was taken in early November no deduction was made for these days off in Manning's next four paycheques. The employer did not have a satisfactory explanation for why her pay was not reduced in respect to these days off. There was no secret made of the fact that she had taken a day and a half off.

There was no evidence of any written or oral employment contract terms about the treatment of days off. Kathy Riley, the employee who was off for one half day on November 7, 1995 with Manning was not deducted any pay to the best recollection of Schafer. She worked in a similar administrative capacity with Comtec.

The next day off occurred on December 22, 1995. Manning requested time off to perform the duties of Santa Claus at a Summerland Shopping Centre. This time off was approved by the employer although there was no discussion of whether Manning would be paid for the time off. There was some evidence of this appearance being of promotional value to the employer since the owner of the shopping centre was a potential customer for Comtec's products. On balance, I accept that there might have been some marginal promotional value to the employer.

Manning testified that her Santa Claus duties were complete by early afternoon but rather than travelling into Kelowna to work she attended to some business matters of her own in Penticton that afternoon.

Manning received one more regular paycheque from her employer after December 22, 1995 without any deductions for time off.

On December 26, 1995 the office was closed. All employees were paid for this day even though it is not a statutory holiday.

The next day taken off was December 29, 1995. Again due to the emergence of difficult weather conditions Manning took one half day off as did other employees who had to travel back to the Penticton area. None of the other employees were deducted any wages for this half day off.

Comtec made no deduction from Manning's wages for the time off until after it chose to dismiss

Manning in January of 1996.

ISSUES TO BE DECIDED

1. Is there an express or implied provision in the contract of employment between Comtec and Manning dealing with compensation for time off and payment for "Boxing Day"?
2. Whether there was agreement or not to the deduction of wages in respect to the time off, is such deduction permissible under the Act?

ANALYSIS

Since there was no express employment agreement, we must look to the implied conditions of the employment contract. There is no doubt that under most employment contracts employees are not entitled to wages for time taken off work. There are, however, arrangements between employers and employees which are looser and which provide for some give and take and in which a strict account of hours is not kept by the employer or employee. In return for time off the employee might occasionally work through a break like Manning did in this case.

I find that it was an implied term of her employment that she was entitled to a reasonable amount of time off (if taken for a valid reason) without pay. The reasons for my conclusion are as follows:

- (a) no deduction was made or attempted from Manning until after she was dismissed;
- (b) no deduction was made from any of the other employees who took time off in similar circumstances;
- (c) the environment at the Comtec office allowed for some flexibility in hours. Staff worked through breaks occasionally and occasionally took time off;
- (d) the long delay in moving the Kelowna office was a great inconvenience and expense to the employees. It only seems logical that Comtec would allow its employees some concessions particularly where they related to travel difficulties.

Manning is, therefore, entitled to be paid without in full for November 7 and 8 and December 29, 1995.

I find that it was an implied term of the employment contract that Manning would be paid for Boxing Day. This finding is based in large part on the fact that Comtec paid all other employees for this day and made no deduction from the pay of any other employee even though in early January of 1996 it knew (or ought to have known) that certain employees had been paid for Boxing

Day. If this was an error one would expect it would have been corrected for all employees.

I am not satisfied on a balance of probabilities (which Comtec was required to do to be successful on this appeal) that there was not some promotional benefit to him in respect to the half day that Manning was Santa Claus in Summerland. I do have some concern about the additional half day she took off that afternoon to attend to personal business. I am not satisfied that the employer knew or consented to such additional half day in the sense that it could be said that he agreed to pay her for it.

There is nothing in the Act or Regulations dealing with the timing of deductions for overpayment of wages. The Director's representative submitted that there was case authority as to the timeliness of deductions but he could not refer me to any specific cases. He said that the position taken by Adjudicators and Referees is that in order to deduct an overpayment from the wages of an employee an employer must make the deduction forthwith. The logic of this proposition appeals to me although I would add that that may not necessarily apply when the employer is not aware of an overpayment assuming reasonable diligence on his part.

In conclusion, Comtec's appeal fails with the exception of the half day (4 hours) Manning took off on the afternoon of December 22, 1995.

ORDER

In summary, I order under Section 115 of the Act, that the Determination #01155 as to Juanita Taylor be confirmed.

Further, I order under Section 115 of the Act, that the Determination #01155 as to Ruth E. Manning be confirmed with the exception of a 4 hour deduction at \$10.00 per hour, to be allowed to the employer for December 22, 1995.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal

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