

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 -

The Leather Ranch Ltd.
("Leather Ranch")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Genevieve Eden

FILE NO.: 96/325

DATE OF HEARING: August 30, 1966

DATE OF DECISION: August 31, 1996

DECISION

APPEARANCES

Beth Kupka Operations Controller for The Leather Ranch Ltd.
David C. Beach on his own behalf
Ron Corrigan on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by The Leather Ranch Ltd. ("Leather Ranch") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination No. CDET 002189 issued by a delegate of the Director of Employment Standards (the "Director") on May 3, 1966. In this appeal, Leather Ranch seeks to have the Determination overturned on two grounds: that David Beach ("Beach") was a manager for purposes of the *Act* and *Regulation*, therefore, the overtime and statutory holidays provisions do not apply; and liability for one week's wages as compensation for length of service had been discharged in that written notice was given to Beach.

A hearing was held in Victoria on August 30, 1966.

ISSUE TO BE DECIDED

There are two issues in dispute:

1. Was Beach a manager for purposes of the *Act* and *Regulation*?
2. What wages as compensation for length of service, if any, are owing to Beach?

FACTS

Beach was employed by Leather Ranch from September 3, 1995 to February 22, 1996. His wage was the greater of \$7.00 per hour or commissions earned. On February 16, 1996, Beach was provided with one week's written notice of termination. He filed a complaint on February 19, 1996 claiming overtime, statutory holiday pay, and termination pay.

The Determination showed the total amount payable to Beach as \$630.44 including interest. At the beginning of the hearing, the Director submitted an amendment to the Calculation Schedule to show the amount payable to Beach as \$567.01 before accrued interest reflecting an oversight of a missed shift of 7 1/2 hours worked during the notice period. This amendment represented

a reduction in hours outstanding as compensation for length of service from 19.625 to 12.125 hours.

Beach was initially employed as a Sales Consultant with Leather Ranch. On October 17, 1995 he became the Assistant Manager reporting to a "Road Manager", Don Bryce ("Bryce"), who had been sent to Victoria on a temporary basis but remained there during Beach's employment to February 1996. Bryce reported to Beth Kupka ("Kupka"), the Operations Controller for Leather Ranch. Kupka worked out of Vancouver; her primary responsibilities involved supervising eight stores in Western Canada from Winnipeg to Victoria. She had phone and fax contact with all eight stores daily. She also would visit each store every three to eight weeks for two to three days at a time during which time her responsibilities included merchandising, displays, inventory counts, checks of paperwork, attending management and staff meetings, and training management persons (if needed). She also placed advertisements for vacant positions.

Bryce was not at the hearing to give evidence; he left Victoria to work for Leather Ranch in Edmonton after Beach's termination. Kupka gave all the evidence for the employer.

EVIDENCE

Issue 1: Was Beach a manager for purposes of the Act and Regulation?

Kupka testified that Beach had all the duties of a management person. While the Victoria store had only 5 people including the Manager and Assistant Manager, it was open 7 days per week and therefore a management person was always required on duty. During a busy time of the year such as December, the Manager and Assistant shifts would coincide about 50 percent of the time, while at less busy times such as January or February two thirds if not more of their shifts would coincide.

Kupka confirmed that there was no job description for the Assistant Manager position in the Victoria store during Beach's tenure. She maintained that the Manager and Assistant worked as a team hiring, training, and motivating their staff and assisting them to close sales. Each assumed direct responsibility for the hiring, training, and motivating of particular individuals. She contended that both the Manager and Assistant made the final decisions on hiring.

Kupka maintained that her own involvement in staffing was placing advertisements. Sometimes she would run an ad for Beach to fill, while at other times the ad came under Bryce's responsibility. She submitted in evidence an ad placed in the paper in November 1995 noting it requested that applicants contact Beach for interviews. She contended that the normal practice was for either the Manager or Assistant to conduct the first interview, then arrange for the other to conduct the second interview, after which they would both make the decision as to who was hired. While this would be the normal practice, she was "not sure who hired" during the time Beach was Assistant Manager, but maintained that he had interviewed applicants. Three people were hired while Beach was Assistant Manager, but again she stated she did not know who hired them. I note that Kupka's testimony at the hearing differs somewhat from her

prior written submission to the Tribunal which states that Beach "was involved with" hiring a minimum of two new employees. She submitted in evidence a letter written by Bryce attesting that part of Beach's primary duties involved staffing which included interviewing, hiring and training.

Kupka testified that, in addition to staffing, the Assistant Manager also performed sales duties, assisted staff to close sales, and had responsibility for paper work, merchandising and displays, as well as shipping and receiving of merchandise. These duties could be delegated to one of the staff at the Assistant's discretion.

When queried about responsibility for disciplining employees, Kupka testified that generally the "management people" had responsibility for the area in the store under their jurisdiction. In the event of dismissals, recommendations came to her from the "management". She would review the request ensuring it was done the right way and with proper notice, but asserted that the store management made the decision and her review was "simply a formality". She stated that in any company she knew of it was common to consult with a higher level of management with respect to these issues.

Kupka acknowledged that she assumed responsibility for staff scheduling at the Victoria store on the basis of sales records for each employee that would be faxed to her by the Manager.

When queried regarding the division of responsibilities between Beach and Bryce, Kupka testified that Beach was being trained to become a manager and worked "side by side" with Bryce. However, Beach did not meet the staff training and motivation responsibilities that were expected of him. She did not know what Beach and Bryce were being paid at the time but thought it would be very close. There was a management bonus based on store sales that was split between the Manager, Assistant Manager and herself, but the split varied depending on the store with the Assistant Manager in some stores receiving 25 percent of the bonus while in others receiving one third.

On cross-examination, Kupka wasn't sure of the time spent by Beach in a normal day supervising and directing employees as opposed to sales and paper work stating this would depend on whether a store operates with both a Manager and Assistant or just one management person.

Beach testified that he was not a manager. As Assistant Manager he worked primarily in sales and assumed the extra duties of operating the cash register, updating the daily sales records, and "closing out". He maintained that, while he did interview a few applicants, he then made recommendations to Kupka, as did Bryce. He stated he had no authority to reprimand, discipline, or dismiss anyone, rather Bryce and Kupka "were in charge of that". He did help other sales associates to close their sales, but had no supervisory duties. He had never been informed of any management bonus, nor did he receive any. He maintained that his salary reflected his commission on sales which usually exceeded his hourly rate of \$7.00.

Issue 2: Compensation for length of service.

Kupka's evidence is that Beach was given a full week's notice and was scheduled to work normal hours during the notice period. On questioning by me, she confirmed that the notice period in question was February 17th to February 23rd. She acknowledged she had not scheduled Beach to work on February 23rd, having erred at the time in thinking the notice period would end on February 22nd, but now recognized it should have ended on February 23rd.

Beach testified that his scheduled hours during the notice period represented a reduction in his normal hours. Normally, he would have worked 35 to 40 hours per week and would have only 2 days off per week or just one during the busy season. However, during the week of February 18th, he was scheduled for 3 days off, that is, February 18th, 20th, and 23rd. Further, on February 22nd, he was scheduled to work 6 hours, whereas normally he would have been scheduled to work 7 1/2 hours. At the hearing Kupka stated she was not sure what hours Beach would have been scheduled on February 22nd; her written submission attached to the appeal states "We were careful to make sure complainant (sic) was scheduled a full 7 1/2 to 8 hours on every day scheduled after notice was given".

Beach did not work on February 22nd as he felt that the employer was mistreating him and forced him to leave as will be discussed shortly.

It is common ground that Beach left work early on February 19th, however the time he left is in dispute with Beach maintaining he left at 3.30 p.m., while written letters submitted by Bryce and a new Assistant Manager, Dan Molzan, asserted he left at 2.30 which is consistent with the time marked on the schedule.

Beach also testified that he was relieved of his normal duties during the notice period. He maintained that he was taken off the floor and told not to conduct any sales, nor answer the phone, handle cash or write up bills. He maintained he was told he "was the cleaning boy now" and had to wash the floors, walls, beams and toilets. While normally all staff shared some cleaning duties, Beach asserted that, during this period, he was the only employee performing these duties. He contended that Bryce was "driving" him, attempting to force him to quit.

Kupka was not at the store during Beach's notice period but Bryce reported to her that, at no time were Beach's regular duties as Assistant Manager taken away from him. However, given that Bryce reported that Beach was belligerent, insubordinate, had sworn and raised his voice, she advised Bryce to keep him away from other staff. Beach acknowledged he had sworn at Bryce and apologized, but maintained this was a response to the unfair treatment he had been subjected to.

Kupka contended that management at Leather Ranch work as a team and she herself swept floors on occasion

ARGUMENTS

Issue 1: Was Beach a manager for purposes of the Act and Regulation?

Kupka argued that Beach had all the duties of a management person, therefore the overtime and statutory provisions of the *Act* did not apply. Managers and Assistants had responsibility for hiring, interviewing and training staff and would be expected to help staff close their sales. She stated that the business is run around sales and therefore managers are involved with sales, but that training and motivating staff is their number one priority. She contended that even managers have someone to answer to but that did not mean they didn't have the responsibility and authority of managers. She asserted that Beach's evidence may have reflected what he was doing but this did not reflect the store's expectations with respect to staffing and she didn't think the company should be liable for an employee not living up to expectations.

Ron Corrigan ("Corrigan"), the Director's delegate, argued that the evidence clearly revealed that Beach's duties did not meet the definition of a "manager" in the Regulations. There was no dispute that Beach was expected to and did perform some supervisory duties but they were not his primary duties. He had virtually no control over other employees. Further he did not schedule their work, rather this was done by Kupka. While he participated in interviews, he did not make the final decisions. The evidence revealed that his income derived primarily from commissions on sales. In the absence of evidence that his primary duties consisted of supervising and directing employees, it must be concluded that Beach was not a manager as defined by the *Act* and therefore was entitled to overtime and statutory holiday pay.

Issue 2: Compensation for length of service.

With respect to a change in Beach's duties, Kupka acknowledged that she didn't know exactly what was said between Beach and Bryce but was going by what she had been told by Bryce.

Beach reiterated that his duties had been changed and his hours reduced during the notice period and that he had been treated unfairly.

Corrigan argued the evidence revealed that Beach would normally work 5 days per week and "37 plus" hours per week on average. This was confirmed by his own calculation of average weekly hours over the 8 weeks preceding the notice which amounted to 37.625 hours as noted on the Determination. In the absence of direct evidence at the hearing from Bryce, Beach's evidence should be accepted that his duties had been changed and hours reduced. This was a breach of the intent of the notice requirements of the *Act* which enable an employee to work normal hours under normal conditions of employment. Accordingly, compensation for length of service was still owing.

ANALYSIS

The onus of proof for establishing that the Determination was wrong with respect to wages owing rests with the appellant employer, Leather Ranch.

Issue 1: Was Beach a manager for purposes of the Act and Regulation?

Sections 34 (1)(f) and 36 of the *Employment Standards Regulation* (the "*Regulation*") provide that a manager is excluded from the overtime and statutory holiday pay requirements of the *Act*. Section 1 of the *Regulation* defines a manager as:

- (a) a person whose primary employment duties consist of supervising and directing other employees, or
- (b) a person employed in an executive capacity.

In dispute in this appeal is whether Beach's **primary** employment duties involved supervising and directing other employees. On the evidence, I am not persuaded that Beach's duties met this definition.

There was no job description for his position which would indicate what his responsibilities were and what portion of his job was allocated to same.

While the evidence establishes that Beach did assume responsibility for interviewing applicants, the evidence falls short in satisfying me that he had responsibility for the final selection decision. Kupka's evidence is that an Assistant Manager would have the authority to make the final decision, but she was unable to state who had made the final decision on hires while Beach held that position. Bryce's letter states Beach's duties involved hiring, however, Bryce was not at the hearing to give direct evidence under oath or affirmation and have his evidence tested under cross-examination. Faced with what I find to be some ambiguity in the evidence of Kupka with respect to the actual practice while Beach was Assistant Manager, and no direct sworn evidence from the Manager, I accept Beach's sworn evidence that his responsibility went only so far as recommending candidates for hire.

The evidence also falls short in persuading me that Beach had independent authority to discipline and dismiss employee. He did not carry out performance appraisal activities. Further, he did not schedule the work of any employees, nor was he involved in the budgeting process.

Even if Beach did have some responsibility for staffing, training and motivating, I am unable to conclude that supervising and directing other employees was his primary employment duty. The evidence shows that his responsibilities also included sales, operating the cash register, updating the daily sales records, and "closing out". Evidence is lacking regarding what portion of his time was spent performing these duties in relation to any supervisory duties.

In my opinion, there is insufficient evidence to establish that Beach falls within the regulatory managerial exclusion. Therefore, he was entitled to overtime and statutory holiday pay under the *Act*. There was no error alleged by the appellant regarding the Director's calculation of overtime and statutory holiday entitlements.

Issue 2: Compensation for length of service.

Section 67 of the *Act* provides that, once notice of termination is given to an employee, the wage rate, **or any other condition of employment**, must not be altered without the written consent of the employee. Some of the factors which may be considered include a change in responsibilities, limiting of authority, and a reduction of hours.

In dispute is whether Beach's hours were reduced and whether his responsibilities were substantially changed during the notice period. Kupka confirmed that the notice period commenced on February 17th and should have ended on February 23rd rather than February 22nd. Beach's uncontradicted testimony was that he would normally have two days off per week. However, during the week commencing February 18, 1996, he was scheduled off 3 days up to the end of the notice period, February 23, 1996. In the absence of evidence to the contrary, I accept that Beach as a full time employee would normally be scheduled off at most 2 days per week. Accordingly, I conclude that Beach should be paid for February 23rd.

The other day in dispute with respect to wages owing is February 22, 1995. Beach did not work this day given what he perceived to be unfair treatment and a substantial change in his job duties. In the absence of direct sworn evidence to the contrary, I accept Beach's evidence that the work he was instructed to perform by Bryce was a substantial change from his regular duties. In these circumstances, it would be inconsistent with the *Act* to conclude that Beach was obligated to accept the change in job responsibility proposed by the employer, particularly in light of provisions of the *Act* which preclude an employer from changing conditions of employment after notice of termination and which recognize the concept of constructive dismissal where there is a substantial change to employment conditions (section 66). Accordingly, I conclude that Beach should be paid for February 22nd.

I accept the employer's evidence that Beach left at 2.30 p.m. on February 19th given that the letters of the Manager and new Assistant are consistent with each other and with the schedule submitted in evidence.

Given the evidence that Beach would have been scheduled to work at least 7 1/2 hours on his work days during the notice period, I conclude that 15 hours are owing to Beach as compensation for length of service. Accordingly, the Determination should be varied to show the following:

Statutory holidays:	\$216.13
Overtime:	244.19
Compensation for length of service (15 hrs. x \$7.00):	105.00
Annual vacation (4% x \$565.32):	22.61
Total payable before accrued interest:	\$587.93

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 002189 be varied to show an amount owing of \$587.93 plus interest in an amount to be calculated by the Director in accordance with section 88 of the *Act*.

Genevieve Eden
Adjudicator, Employment Standards Tribunal