Employment Standards TRIBUNAL

An appeal

- by -

Howard C. Chui o/a Label Express
("Label Express" or "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2003A/117

DATE OF DECISION: July 23, 2003

DECISION

OVERVIEW

This is an appeal by an employer Howard C. Chui operating as Label Express ("Label Express" or "Employer"), from a Determination dated March 31, 2003 (the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The Delegate found that the Employee, Mui Ling Li was entitled to the sum of $127.06, plus interest of $5.93. The Employer sought to have the Delegate re-calculate the entitlement of Ms. Li (the "Employee") on the basis that it "overpaid" the Employee each day by paying the Employee for the meal break. The Employer further asserted that vacation pay was paid on the minimum wage portion of the pay and included within the 2 % bonus on daily sales. The Employer in effect argued that he should be credited with the amounts of the overpayment, which would mean that Ms. Li had no entitlement to wages under the *Act*.

The Employer's argument was premised on his error in the interpretation of sections 32(2) and 58 of the *Act*. It was apparent that Ms. Li was the only employee at a work location that was open between 10:00 am and 6:00 p.m. She was paid for 8 hours a day, and had her meal breaks interrupted by customers entering the shop. In my view, the Delegate did not err in the calculations, as the Employer indirectly required the Employee to work during the meal break, and that reality was recognized by the Employer's payment for the full 8 hour day. The Employer was required to count the meal break as time worked by the Employee.

Vacation pay is calculated on total wages, and commission earnings are part of total wages. The jurisprudence indicates that an Employer must pay "something extra" for the vacation. The proper interpretation of section 58 is that vacation pay cannot be included by the Employer in the commission. The Delegate did not err in the calculations, and therefore I dismissed the Employer's appeal.

ISSUE:

Did the Employer establish the Delegated erred in determining an entitlement to vacation pay in the Determination?

FACTS

I decided this case, on the basis of written submissions, after considering the notice of appeal filed by the Employee, the written submissions of the Employer and Employee, and reading the Determination and the record supplied by the Delegate.

The Employer operated a retail business which was open between 10:00 am to 6:00 p.m. Ms. Miu Ling Li worked as a salesperson at the store at minimum wage, plus 2 % commission on daily sales. Ms. Li worked for the Employer from October 1, 2000 to February 21, 2002. Ms. Li was laid off by the Employer. Ms. Li filed a complaint under the *Act* on June 12, 2002 alleging that she was entitled to vacation pay and statutory holiday pay.

When Ms. Li worked, she was the only person who worked at the location. The posted business times on the door were 10:00 to 6:00 Monday to Saturday and 12:00 to 5:00 p.m. on Saturday. As indicated by one of the employees, the Employer provided a microwave, chairs and benches, so that the employees could sit and eat. The Employer did not provide any employee to "relieve" Ms. Li during the day. The Employer did not require Ms. Li to take her lunch break at any particular time. The Employees were therefore available to serve walk in customers throughout the entire working day. Ms. Yip provided a written statement corroborating Ms. Li's version of the work shift. The evidence before the Delegate, consisted in part of a signed statement by two employees, Pinky Yuen and Doris Wan, confirming that the Employer supplied lunch room arrangements, and that the employees were paid for their lunch break.

The Delegate found that Ms. Li was entitled to total wages in the amount of $13,371.46 and annual vacation pay of $538.86. The Delegate credited the Employer with payment of the sum of $13,833.26. The Delegate found that Ms. Li was entitled to the sum of $132.99 consisting of a balance owing of $127.06, plus interest of $5.93.

The Delegate found that the Employer breached sections 18(2), 40, 44, 45 and 58 of the *Act*.

Employer's Submission:

The Employer submits that Ms. Li has been overpaid. The Employer submits that Ms. Li was paid for 8.0 hours per day, plus vacation pay and holiday pay, when in fact she only worked 7.5 hours per day, with a paid lunch. The Employer says it is not required to pay for the lunch break and 4 % vacation pay on top. The Employer claims that the 2 % commission on sales was inclusive of vacation pay.

The Employer says:

> Li had worked quite a while receiving 6.7 % overpayment (0.5 hour overpaid) and 2 % of daily sales if it is more than $330 per day without any complaint. (If she ever had she would have already filed on earlier.) because this is definitely better than being paid 7.5 hours at minimum rate with 4 % vacation which was guaranteed by the company and Employment Standard Act. After she was laid off finally, she filed the complaint and probably this is the only way to get more money than just receiving her EI. The company pay them more to cover the basic required by the Employment Standard Act and not the extra without the basic being covered. ...

Employee's Submission:

The Employee submits that she worked through her lunch hour, served customers as required. She submits that she was not paid vacation pay.

Delegate's Argument:

The Delegate provided the record, but did not provide a submission.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employer, to demonstrate an error such that I should vary or cancel the Determination.

Section 112 (1)(c) of the *Act* provides for an appeal on grounds that:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was made.

The Meal Break: Section 32(1) and (2)

The Employer's appeal point is premised on the assumption that the Delegate erred in the calculations by finding that the Employee worked 8.0 hours per day, rather than 7.5 hours per day. The Employer seeks to have the wages re-calculated on the basis of a 7.5 hour day with .5 hours per day (the meal break) deducted. The Employer claims that Ms. Li was overpaid 6.7 % per day (.5 hours).

In my view, given the facts in this case, it is apparent that the Employer expected and required the Employee to be available for work for the entire eight hour shift. There is no evidence of any direction given by the Employer to Ms. Li to close the store down during her break. There was no provision made by the Employer for relief of the Employee during a meal break. The Employer provided facilities to enable the Employee to remain at the work place, and be available to serve customers. In my view, there is ample support for the finding that the Employer indirectly required the Employee to work throughout her meal break, and the reality of this was recognized by the Employer in payment for the entire eight hour shift: *Speciality Motor Cars*, BCEST #D570/98. Regardless, of whether a store was busy or not, the Employer still required the Employee to be available to work. Section 32(2) reads as follows:

(2) An employer who requires an employee to work or be available for work during a meal break must count the meal break as time worked by the employee

In my view, the Delegate correctly applied the applicable Tribunal jurisprudence, and the Delegate did not err in finding an entitlement on behalf of the employee to be paid for an eight hour work day. The Director did not err in law by failing to provide a credit for wages paid by the Employer for the meal break.

Vacation Pay:

The Employer alleges that the Employee was fully paid vacation pay on the minimum wage, and the 2 % bonus includes vacation pay. Section 58(1) of the *Act* sets out the entitlement of the employee to vacation pay as follows:

(a) after 5 calendar days of employment, at least 4 % of the employee's total wages during the year of employment entitling the employee to the vacation pay

The words "total wages" are not defined in the Act, but in my view the meaning of wages is set out in the *Act*. Wages is defined in section 1 of the *Act* as including:

> (a) salaries, commissions, or money, paid or payable by an employer to an employee for work,
>
> (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency, [...]

In my view, the amount of the bonus, together with the hourly rate constitutes the wages of the employee. Vacation pay is calculated on wages, and wages includes the minimum wage paid or payable, as well as any bonus paid as an incentive by the Employer. It is clear that the bonus in this case was paid as an incentive.

It is apparent that the correct interpretation of section 58, is that vacation pay may not be included in a commission structure: *Atlas Travel Service Ltd. v. British Columbia (Director of Employment Standards) (1994), 99 B.C.L.R. (2d) 37 (S.C.)*. The Tribunal's jurisprudence in *British Columbia (Director of Employment Standards)*, BCEST #RD348/01, makes it plain that vacation pay cannot be included in a commission. This reasoning applies equally when the employee is paid by an hourly rate combined with a bonus or commission. By virtue of jurisprudence, section 58 of the *Act*, requires the Employer to "pay something extra" for the vacation. The Delegate did not err in law with respect to the finding that Ms. Li was entitled to vacation pay.

I note that the Employer has suggested, in effect, that the Employee's complaint was unjustified because it was made after lay-off. The *Act* clearly provides that Employees may file a complaint within six months of the date of termination. From the evidence before me, it is apparent that the Employer's common practice was to not provide relief to an employee during the meal break, where that employee worked alone at a business location. There is no basis for concluding, in this case, that Ms. Li was aware the Employer knowingly breached the *Act*, and acquiesced in that breach. Even if the Employee knew of the Employer's breach of the *Act*, and acquiesced during the term of the employment relationship, this does not excuse the Employer's breach of the *Act*. An Employer is required to know and apply the applicable minimum standards in its work place.

For all the above reasons, I dismiss the appeal.

ORDER

Pursuant to s. 115 of the *Act*, the Determination dated March 31, 2003 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal