

An appeal

- by -

Clifford Margoese
("Margoese")

- 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: Mark Thompson

FILE No.: 2001/11

DATE OF HEARING: March 23, 2001

DATE OF DECISION: May 23, 2001

DECISION

APPEARANCES:

Ben Karls	For Ben Karls Inc.
Kathleen Geiger	For Ben Karls Inc.
Clifford Margoese	For himself

OVERVIEW

This is an appeal by Clifford Margoese (“Margoese”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards on December 6, 2000. The Determination found that Margoese was a “commercial traveller” for purposes of the *Employment Standards Regulation* (the “Regulation”) and consequently was not covered by the overtime provisions of the Act. The Determination further found that, based on Margoese’s records, he had received the minimum wage during the period of his complaint and that he had not demonstrated that he worked on statutory holidays or was entitled to vacation pay.

Margoese appealed the Determination on the grounds that he was not a commercial traveller and that his records of hours worked were accurate. He did not appeal the conclusion of the Determination concerning vacation pay.

ISSUE TO BE DECIDED

The issues to be decided in this case are: was Margoese a commercial traveller and should his records of time worked be accepted as evidence of time worked for the purposes of entitlement to overtime pay and statutory holiday pay.

FACTS

Margoese was employed as a sales representative for Ben Karls Inc. (the “Employer”) from February 17, 1997 to November 22, 1999, when he was terminated. The period under review is the 24 months prior to Margoese’s termination.

The Employer acts as a sales agent for a number of clothing manufacturers. The Employer represents several product lines or types of garments manufactured in Canada or elsewhere and sells these goods to retail stores. The company headquarters is in Montreal. For most of his employment, Margoese was the Employer’s only employee in Vancouver.

The work of the sales representative was focused on garment trade shows or markets held in Western Canada. Normally four shows occurred each year in different cities, each running three to four days. Before the show, Margolese called customers and made appointments for the time of the shows. He packed the samples to be displayed and drove a van to the shows to display the Employer's product lines. At the show, he took orders for the forthcoming season. These orders were then forwarded to the manufacturers and ultimately shipped to the customer. After a show, he contacted customers to follow up on orders, returned samples and responded to complaints. Ben Karls ("Karls"), a principal of the Employer, flew from Montreal to join Margolese at these markets.

Both parties acknowledged that Karls visited Vancouver infrequently between shows. Consequently, Margolese worked without supervision much of the time. The Employer did not keep payroll records of the daily hours Margolese worked.

Margolese and Karls differed on the volume of work Margolese was required to do before and after the trade shows. Margolese testified that he began preparations for the spring shows at the beginning of August each year, primarily by telephoning clients. He had a list of 900 retailers in Western Canada to contact. The times around the markets were extremely busy. Between shows, Margolese sold from his office. He was never told to take time off for a vacation, and in his experience there was always work to be done.

Karls agreed that Margolese was busy during the market period, about four months a year, but the other eight months were slow. During the slow months, the sales representatives do follow ups, arrange appointments with customers during the markets and deal with complaints. He estimated that there were a total of 70 days per year in the markets. In addition, Margolese worked 20 to 30 days per year driving to and from the trade shows. In December and January Margolese was basically free to do what he wished, and little work needed to be done in July and August. Margolese was not necessarily expected to come into the office each day. In fact, Karls did call Vancouver from time to time, and Margolese was not in the office, which did not concern Karls. He never told Margolese to take time off. According to Karls, after the market season, Margolese had to check on orders, return samples and supervise four show rooms in Vancouver.

When Margolese began work, there were two other staff employed by the Employer in Vancouver. They left the company and were not replaced. Margolese received a fixed salary throughout his period of employment. The salary was increased from time to time, but no bonuses or commissions were paid. There was a difference between the parties about commissions Margolese earned directly by representing manufacturers. However, this issue was not the subject of the appeal.

The other issue between the parties concerned the hours Margolese worked. In particular, Margolese asserted that he had worked on statutory holidays without compensation as required

by the *Act* and that he did not receive vacation pay in accordance with the *Act*. He worked many overtime hours during the markets and travelling to and from them.

According to the Determination, Margoese initially provided a “summary of hours,” several ledger sheets, for the entire period of his employment. When the records were presented to the Employer, it questioned their reliability. The Employer further took the position that the nature of the job required Margoese to work long hours part of the year and take time off during the slow periods. When the Director’s delegate asked Margoese to produce original records on which he relied for his summary of hours, he provided copies of day-timer pages for the period in question. Some weeks contained no notations of any work, which Margoese explained by his flexible work schedule, since he was the only person in the office. Upon request of the delegate he then produced pages from a day-timer which contained appointments only, not a complete summary of the work he performed.

In his testimony before the Tribunal, Margoese stated that he prepared the ledger sheets each day to record his hours worked, while the day-timer contained a list of appointments.

The Employer presented a statement that contradicted some of the records contained in Margoese’s records, alleging that he had over-stated the time spent in his work and travelling to markets.

ANALYSIS

The first issue of interpretation between the parties was Margoese’s status as a commercial traveller. The Determination found that Margoese’s job fell under the definition of a commercial traveller, and consequently the overtime provisions of the *Act* did not cover him. The Determination further concluded that, accepting the hours Margoese claimed he had worked, he had received at least the minimum wage for the period in question. Margoese argued that he was an employee, not a commercial traveller. Karls was a commercial traveller as defined in the *Regulation*, not himself.

Section 34(1) of the *Regulation* states:

Part 4 of the *Act* does not apply to any of the following

- (l) a commercial traveller who, while travelling, buys or sells goods that
 - (i) are selected from samples, catalogues, price lists or other forms of advertising material, and
 - (ii) are to be delivered from a factory or a warehouse.

Based on the evidence presented by the parties, it is clear that Margoese fell under the provisions of the *Regulation* while he was travelling to the markets, during the times he was working at the markets and returning to Vancouver. When he attended the trade shows, it was

for the purpose of selling goods from samples or other sources of information about their style or quality. The goods ordered at the shows were to be delivered to the customer by a manufacturer or other source of supply.

In *Re Monarch Beauty Supply Co.* BCEST #D041/98, the Tribunal found (at paragraph 10) that commercial travellers were excluded from coverage of Part 4 “when they buy or sell goods while travelling.”

No dispute existed that Margolese was an employee of Ben Karls Inc. He was entitled to all of the rights of any other employee except when he was engaged in the functions of a commercial traveller. During those periods, he was not covered by Part 4 of the *Act*, which regulates hours of work and overtime. Based on limited evidence, it appears that Karls himself was a manager of the Employer or perhaps a principal of the Employer, not a commercial traveller, who are employees. In *Monarch Beauty Supply*, *supra*, original determination established that a commission salesperson was an employee, but not covered by Part 4 of the *Act* for part of his employment. This conclusion does not contradict Margolese’s argument that he worked long hours during the markets. However, the *Regulation* was designed to cover such arrangements. To some extent Margolese and the Employer, anticipated these conditions when they agreed to his terms of employment.

The second issue to be decided is the status of the records of hours worked Margolese submitted. The evidence he presented to the Tribunal was essentially the same as he had provided to the Director’s delegate in support of his original complaint. He copied a day-timer, which contained a number of notations of appointments, meetings and the like. Apparently, he then constructed a ledger containing his hours of work. The delegate found a number of inconsistencies between the two sets of documents. These inconsistencies were not explained at the hearing. The ledgers did not have the appearance of contemporaneous records and were not convincing as records of hours actually worked.

As the appellant, Margolese bore the onus of demonstrating that the Determination contained an error of fact or law. To support his position on the alleged error of law, he repeated the arguments he had made to the delegate. The material he presented was not persuasive. Some entries were added after the complaint was filed. Many gaps in the records of hours worked existed. It was not possible to conclude that he worked more than 8 hours per day or 40 hours per week at any time when he was not engaged in the work of a commercial traveller. Nor did they show that he worked on statutory holidays. Margolese did not appeal the Determination as it concerned vacation pay.

ORDER

For these reasons, the Determination of December 6, 2000 is confirmed, pursuant to Section 115 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal