Employment Standards TRIBUNAL

An appeal

- by -

Dream Carpets Ltd.
(the “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: Ib S. Petersen

FILE No.: 2001/195

DATE OF DECISION: May 25, 2001

DECISION

SUBMISSIONS:

Mr. Vinay Ahluwalia	on behalf of the Employer
Mr. Pritpal Kalra	on behalf of himself
Ms. Sharon Cott	on behalf of the Director

OVERVIEW

This is an appeal by the Employer 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 13, 2001. The Determination concluded that the Employee, Pritpal Kalra, was owed $4,633.68 on account of overtime, vacation pay, statutory holiday pay and compensation for length of service by the Employer.

The findings and conclusions in the Determination may be summarized as follows:

1. Kalra was employed as a sales representative by the Employer from September 15, 1997 to June 30, 2000.

2. The Employer is a retailer of carpets, furniture and electronics.

3. Kalra worked six days a week. According to the Determination, the Employer acknowledged that Kalra would have worked when the store was open. Thus the hours of work were from 9:00 a.m. to 5:30 p.m., Monday to Saturday and 11:00 a.m. to 5:00 pm. on Sundays. The store was open on all statutory holidays except January 1 and December 25.

4. While the Employer's did not keep records of hours worked by Kalra, he kept some records. Based on these records and the information provided by the Employer, the delegate determined the hours worked. The delegate found that Kalra consistently worked 46 hours per week to May 6, 2000 and determined that he was entitled to 6 hours of overtime wages per week (Section 40).

5. Kalra was paid $1,500 per month plus 3% commission on sales. According to the Employer the commission was to compensate Kalra for the sixth day of work. The commission was calculated and paid monthly, *e.g.*, the commission earnings for September would be paid on the pay period ending October 15.

6. Considering that the Employer did not keep daily records of hours worked, and that Kalra generally worked six days a week, the delegate preferred Kalra's records of work on

statutory holidays over those supplied by the Employer. The delegate found that Kalra worked without being paid at time and one half and not given an alternate day off with pay (Sections 45 and 46).

7. Kalra was given verbal notice on June 19, 2000. He received written notice on June 27, dated June 19 and for two weeks, and his last day of work was June 30. Kalra worked three days between June 19 and 27. The delegate concluded that Kalra was entitled to two weeks notice from June 27 less days worked between June 27 and 30.

ANALYSIS

The appellant, in this case the Employer, has the burden to show that the Determination is wrong. The Employer's appeal is based on the following:

1. The delegate erred in law when she concluded that Kalra was entitled to overtime when the parties had agreed that the 3% commission was to compensate him for the sixth working day.

2. The delegate erred in law when she did not include the verbal notice given on June 19 in assessing compensation for length of service.

3. The delegate erred in accepting "as is" Kalra's records without allowing the employer an opportunity to review those records.

In the circumstances, I agree with the delegate that Kalra was entitled to overtime pay. In my view, an Employer is not prohibited under the *Act* from paying a monthly or semi-monthly rate based on certain guaranteed or specified hours of work. In that regard, I refer to my comments in *Kask Bros. Ready Mix Ltd.*, BCEST #311/98, at page 4:

"While I accept that Mr. Bailey agreed to work the hours for the stated salary (but not the hourly rate), and the Employer questions the propriety of subsequently asserting a claim for overtime, that agreement is void under Section 4 of the *Act*. In my view, the Employer is not prohibited from agreeing with an employee to work or a certain hourly rate, with pay for a guaranteed or minimum number of hours, including overtime hours, and set out the wages on an annualized basis, provided the agreement otherwise meets the requirements of the *Act* and the *Employment Standards Regulation*. However, the hourly rate must be clearly explained to the employee."

In other words, there must be an agreement between the parties. In this case, there was no such agreement as to the hourly rate, the over time rate and, as well, the hours of work. In this case, assuming the Employer's assertions of the facts is correct, the agreement was that Kalra be remunerated by a fixed monthly salary plus commissions for six days of work. As noted by the delegate, the commission earnings were not specifically tied in to the work on the sixth day. At the end of the day, therefore, Kalra worked a relatively fixed number of hours per month, the hours the store was open, and was paid a variable amount, assuming sales and commissions

fluctuate. The delegate was, therefore, correct, in my view, when she applied the definition of "regular wages" to the circumstances. In the result, this ground of appeal fails.

With respect to the issue of notice of termination, I also agree with the delegate's conclusions. Section 63(3) specifically requires that notice be in writing. While I sympathise with the Employer's claim that the president of the company was in "frail health and could not be available to sign the notice," there is no requirement that the notice be signed by the president of the Employer. There is no reason someone else could not have signed the notice. The employer's interpretation would basically have me ignore the word "written" in Section 63. Kalra is entitled to the two weeks notice as awarded in the Determination.

With respect to the Employer's claim that the delegate accepted "as is" Kalra's records and failed to allow the Employer an opportunity to review the records, I am not convinced that this is sufficient in the circumstances. The Determination clearly states that the delegate contacted the Employer and was informed that the Employer did not have any records of hours worked and that Kalra would have been working when the store was open. Neither of those facts are in dispute in this appeal. As well, it is, in my view, telling that there are no specific factual assertions that the delegate erred in her calculations. I also deny his ground of appeal.

In brief, the appeal must fail.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated February 13, 2001, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal