

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, C. 113

- By -

Stone's Jewellery Ltd.
operating Art of Man Gallery
(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/318

DECISION DATE: July 21, 1998

DECISION

SUBMISSIONS

Mr. Rai Sharma	on behalf of the Employer
Ms. Lea Ter Hart	on behalf of herself
Mr. Gerry Omstead	on behalf of the Director

FACTS AND ANALYSIS

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 May 7, 1999: one which found that Leah Ter Hart (“Hart” or the “Employee”) was entitled to \$2,450.48 on account of overtime wages and statutory holiday.

According to the Determination, Hart was employed by the Employer from April 23, 1997 to August 29, 1998. Hart indicated that she was paid on the basis of a base salary plus commissions and provided records of her hours worked to the delegate. The Employer did not keep daily time records. The delegate found Harts records credible and relied upon them in making his Determination.

The Employer appeals the compensation owing to Hart (it does not appear that the Employer is questioning the actual hours) and argues:

“We are making this appeal for the company has been giving Leah commissions and bonuses even it is not due in lieu of her extra time worked. Commissions are paid to employees based on a predetermined store’s budget and individual personal budget. Store’s and individual budget must be met to qualify for 3% commission....

.... The whole duration of Leah’s employment, she has not met her personal budget except for the month of March 1998, however, she has been paid commissions and bonuses almost every month calculated at 3% of her sales. In fact, according to our calculation Leah has been paid \$8,475.81 in commissions and bonuses which are not due to her in lieu of extra time worked.

This extra money has been categorized by our accountant as commissions and bonuses since it was not part of her salary in lieu of extra time worked. This was done to motivate Leah.

... we would like to appeal that Leah Ter Hart give our company the difference of her claim for the amount of \$2,450.48 from all the paid commissions and bonuses

not due to her in lieu of extra time worked totalling to the amount of \$6,025.33 which we deem fair.”

In short, what the Employer is arguing is that the salary, commissions and bonuses are inclusive of payment for the “extra time”. In my opinion, the Employer’s argument cannot succeed. There is, in this case, no suggestion that the wages paid to Hart was for a certain number of hours per week or month, or some other period. As noted by the delegate, wages include commissions or bonuses (“as an incentive and relates to hours of work, production or efficiency”) (Section 1 “wages”). Nevertheless, it is important that there is no agreement between the Employer and the Employee that she work certain hours, including overtime hours, in return for a wage (in this case made up of a salary, commissions and bonuses). In this case, there is simply the Employer’s understanding that Hart agreed to work “extra time”, leaving the amount of time undetermined. Such an arrangement is contrary to the Act. As mentioned in *Kask Bros. Ready Mix Ltd.*, BCEST #D311/98, at page 3:

“.....In my view, the Employer is not prohibited from agreeing with an employee to work for 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.”

The Employer may well have been paying Hart in excess of what the Employer initially agreed to pay through the commissions and bonuses. However, it is clear that the Employer has been doing so with full knowledge. In fact, the Employer’s appeal submission suggests that it made the payments “to motivate Leah”. It does not appear to me that the Employer can now argue that she was overpaid.

In my view, the appeal must be dismissed.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated May 3, 1999 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal