

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Frans Markets Inc.

("Frans Markets")

-of a Determination issued by-

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/441

DATE OF HEARING: October 28th, 1996

DATE OF DECISION: October 30th, 1996

DECISION

APPEARANCES

Ahmed Bulbulia for Frans Markets Inc.

No appearance by Bernadette MacKenzie

Paul Harvey for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Frans Markets Inc. (“Frans Markets”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 003149 issued by the Director of Employment Standards (the “Director”) on July 3rd, 1996. The Director determined that Frans Markets owed Bernadette MacKenzie (“MacKenzie”) the sum of \$1,570.65 representing unpaid weekly overtime [section 40(2)], statutory holiday pay (section 46), severance pay (section 63), a vacation pay (section 58) adjustment and interest (section 88).

The appeal hearing in this matter was held in Vancouver at the Tribunal’s office on October 28th, 1996. The appellant Frans Market was represented by legal counsel and two witnesses, Mr. Prem Bhagi (the principal of Frans Markets) and a current employee, Ms. Janet Obrero. The Director was represented by Mr. Paul Harvey but the respondent employee, Bernadette MacKenzie, did not attend.

Mr. Harvey advised me at the outset of the hearing that, although he had repeatedly attempted to contact Ms. MacKenzie, she did not return any of his calls, or respond to his correspondence. I am advised by Tribunal staff that Ms. MacKenzie was served with notice of the appeal hearing and never contacted the Tribunal to advise that she would not be attending. Ms. MacKenzie’s failure to attend the appeal hearing is particularly problematic in that the dispute between the parties turns, in large measure, on an assessment of credibility.

FACTS

Frans Markets Inc. operates a small sandwich/deli/grocery operation. Mr. Prem Bhagi purchased the business in August 1994. Typically, the store is staffed by one other employee in addition to Mr. Bhagi. Ms. MacKenzie was hired, as a full-time employee, in late August 1995 and continued until February 13th, 1996 when her employment terminated.

There are several factual disputes between the parties, namely,

- MacKenzie maintains that her hourly rate was \$7.50 whereas Frans Markets says her hourly rate was \$9.00;
- MacKenzie says that she worked eight hours per day, six days per week whereas Frans Markets says she worked eight hours per day, five days per week;
- MacKenzie says that she worked on several statutory holidays for which she did not receive proper payment whereas Frans Markets says that MacKenzie *never* worked on statutory holidays and was always paid for statutory holidays in accordance with the Act; and
- MacKenzie says she was fired without proper notice whereas Frans Markets says that MacKenzie did receive proper notice and that she refused to work through her two-week notice period.

ISSUES TO BE DECIDED

The issues that need to be addressed are set out above; in many cases the disputes turn on findings of credibility rather than on legal analysis. I will deal with each of the matters in dispute between the parties in turn.

ANALYSIS

Rate of Pay

Although Frans Markets payroll records are somewhat inadequate, they nonetheless indicate that MacKenzie worked 40 hours each week for which she was paid a gross wage of \$360 (i.e., \$9 per hour). MacKenzie apparently admits that she received \$360 per week but maintains that she was paid for a 48-hour week rather than a 40-hour week (i.e., \$7.50 per hour).

In light of the following:

- i) the absence of any testimony from Ms. MacKenzie;
- ii) a payroll ledger record (Exhibit 6) indicating that MacKenzie worked (and was paid for) a 40-hour week;
- iii) sworn testimony from Mr. Bhagi that MacKenzie worked 40 hours per week and was paid \$9.00 per hour (this rate reflected her prior experience); and
- iv) sworn testimony from Ms. Oblero that she saw one of MacKenzie's payroll receipts which indicated a 40-hour week at \$9.00 per hour and MacKenzie's statement to Oblero that MacKenzie was earning \$9.00 per hour;

I am satisfied, on a balance of probabilities, that MacKenzie's hourly rate was \$9.00, that she worked a 40-hour week and thus does not have any claim for weekly overtime pursuant to section 40(2) of the Act.

Statutory Holiday Pay

Similarly, in the absence of any contrary evidence, I am satisfied based on the apparently credible testimony of Bhagi and Oblero that MacKenzie never worked a statutory holiday but was nonetheless paid her regular wage for all statutory holidays that occurred during her tenure with Frans Markets. I accept the testimony of Bhagi and Oblero that, on statutory holidays (except Christmas Day, Boxing Day and New Year's Day when the store was closed), the regular staff were given the day off with pay and that the store was staffed on holidays by Bhagi and his son (and, on occasion, by Harjinder Singh).

Severance Pay

Although the employer alleged a number of complaints regarding MacKenzie's work habits none of these complaints amount to just cause. There was some speculation advanced at the hearing by Bhagi that MacKenzie had, on occasion, stolen some cigarettes but the evidence fell well-short of proving such an allegation. MacKenzie was never formally disciplined for her alleged misconduct; nor was she apparently terminated for such alleged misconduct.

MacKenzie failed to show up for work in early February 1996. She says, based on her statements to Mr. Harvey and her statement in her original complaint, that she was "stranded" on Vancouver Island and could not catch a ferry in time to return to

work. Bhagi says that MacKenzie missed two days of work and only phoned on the morning of the third day (Thursday). MacKenzie says she phoned on the first day she was absent (Wednesday) and the employer's own record (Exhibit 6) appears to corroborate Ms. MacKenzie's version of events (in that the record suggests that MacKenzie worked Monday and Tuesday not merely Monday as suggested by Bhagi). Either way, it is common ground that when she did speak with Bhagi, he terminated her, purportedly with two weeks' verbal notice which he gave to her during their telephone conversation.

However, section 63(3) of the Act calls for *written* rather than verbal notice and Bhagi acknowledges that no written notice was ever given. I am not satisfied that a single absence, apparently with an explanation, justifies termination in this case. In any event, Bhagi, with full knowledge of all of the circumstances, nonetheless purported to give notice of termination and, in my opinion, therefore waived any right to subsequently assert just cause. Notice of termination must be given in writing and there was no such written notice in this case. Accordingly, at the point of termination, and in the absence of cause, the employer was then obliged to pay one week's wages as termination pay pursuant to section 63(1) of the Act.

Summary

I am not satisfied that MacKenzie is entitled to any weekly overtime or statutory holiday pay. On the other hand, MacKenzie was dismissed without just cause or written notice and, therefore, is entitled to one week's severance pay which I calculate as follows:

40 hours x \$9.00 per hour = \$360 x 1.04 (vacation pay adjustment) = \$374.40

ORDER

Pursuant to section 115 of the Act, I order that Determination No. CDET 003149 be varied and that a new Determination be issued as against Frans Markets Inc. in the amount of \$374.40 together with interest to be calculated by the Director in accordance with section 88 of the Act.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal

BC EST # D309/96