

An appeal

- by -

Wind Enterprises Ltd. operating as Canim Lake General Store
("Canim Lake General Store")

- 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: David B. Stevenson

FILE No.: 2002/096

DATE OF HEARING: June 24, 2002

DATE OF DECISION: July 18, 2002

DECISION

APPEARANCES:

on behalf of Canim Lake General Store	Grace Buse Robert Brunet
on behalf of the individual	Len LeBlanc Sally Hammond

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Wind Enterprises Ltd. operating as Canim Lake General Store (“Canim Lake General Store”) of a Determination that was issued on February 7, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Canim Lake General Store had contravened Part 4, Section 40(1), Part 5, Section 46(1) and Part 8, Section 63(2) of the *Act* in respect of the employment of Sally Hammond (“Hammond”) and ordered Canim Lake General Store to cease contravening and to comply with the *Act* and to pay an amount of \$3,281.08.

Canim Lake General Store does not agree with the amounts found owing. Specifically, Canim Lake General Store says the overtime and statutory holiday pay calculations should be adjusted. Canim Lake General Store says the overtime calculations should be adjusted to show Hammond was on a flexible work schedule and that she was paid for lunch and coffee breaks taken. Canim Lake General Store also says the statutory holiday pay calculations should be adjusted to show only six statutory holidays were owing.

ISSUE

The issue in this appeal is whether Canim Lake General Store has shown there is an error in the Determination requiring the Tribunal to exercise its authority under Section 115 of the *Act* to vary the Determination or to refer it back to the Director.

THE FACTS

Canim Lake General Store operates a small retail store selling general merchandise. Hammond was employed at Canim Lake General Store on and off for a period from September 1995 to September 14, 2001 as a clerk at a rate of \$8.25 an hour at the time her employment was terminated. Hammond’s last period of continuous employment, for the purposes of the *Act*, was from May 17, 1999 to September 14, 2001.

The Determination concluded Hammond was terminated on September 14, 2001 without cause and without notice or compensation. The material on file indicates that Hammond worked between 7 and 10 hours a day during the last period of continuous employment. On the days she worked, Hammond was

frequently the only employee in the store. During the busy summer months, Grace Buse, the owner of the store, testified that she ensured Hammond was never alone between the hours of 11:30 am and 1:30 pm.

The Determination found that Hammond was entitled to overtime as she often worked in excess of 8 hours in day. The Determination also considered the argument by Canim Lake General Store that Hammond was on a flexible work schedule and found that the requirements of the *Act* for establishing flexible work schedules had not been met and that in any event the schedule worked by Hammond did not conform to any of the allowable work schedules. The Determination found that Hammond was paid for some but not all statutory holidays and, where a statutory holiday was worked, Canim Lake General Store did not give Hammond another day off with pay as required by Section 46(2).

Mrs. Buse gave evidence on behalf of Canim Lake General Store. She said that, in her view, there was just cause to terminate Hammond's employment on September 14, 2001. She also testified that Hammond had been paid for the Victoria Day 2000 statutory holiday. She pointed out that an error had been made on the Paystub Detail showing the pay period as 02/16/00 - 02/29/00 instead of 05/01/00 - 05/15/00 and that Hammond had been paid for 12 hours more than she had worked during that period (an amount of \$93.00) and had been overpaid by 2 hours (\$15.50) in the following pay period. Overall she was overpaid 14 hours in May, 2000. She also said that Hammond was paid for 52 hours in the pay period 04/01/01 - 04/15/01, during which the Good Friday statutory holiday occurred, but only worked 43 hours, indicating she got 9 hours pay for the Good Friday statutory holiday. The Determination concluded no statutory holiday pay had been paid during that period. Finally, she said that Hammond was paid for the Victoria Day 2001 statutory holiday, but that was not recognized by the Director.

Mrs. Buse also pointed to statutory holidays where the Determination found an amount owing although Mrs Buse said that Hammond had not qualified.

ARGUMENT AND ANALYSIS

There are four matters that need to be addressed: just cause, overtime, meal breaks and statutory holiday pay.

Just Cause

I am not convinced there was any error in the Determination on the question of whether Canim Lake General Store had established just cause for terminating Hammond. The Determination contains a thoughtful and comprehensive analysis on the question of just cause, which took into account the positions of the respective parties and witness statements supporting their respective positions. I can find no flaws in the analysis and the conclusion was a reasonable one based on the facts provided during the investigation.

Overtime

For the same reasons as those stated in the Determination, I conclude Hammond was entitled to be paid overtime for hours in excess of 8 in a day or 40 in a week. There was no approved flexible work schedule in place and, consequently, the requirements of Section 40 applied to Hammond's employment. The Determination also correctly noted, in response to the argument that Hammond had agreed to the

schedule, that Section 4 of the Act effectively prohibited Hammond agreeing to less than the minimum standards set out in the legislation.

Meal Breaks

Canim Lake General Store says that there should be an adjustment in the daily hours of work (and consequent overtime calculations) to reflect that Hammond had been paid lunch and coffee breaks. While this argument does not appear to have been raised during the investigation, I have nonetheless considered it and do not accept it. It is clear from the evidence presented and the material on file that Hammond had no scheduled meal or other break and was required to be available at all times during her shift to respond to customers entering the store. There is no doubt that Hammond had free time during her shift. The store, particularly during some times of the year, was not particularly busy. The evidence indicated that there could be, on average, as few as 5 customers an hour. There is, however, no factual basis for concluding Hammond was not at work at all times during her shift, even during these slow periods. The definition of work in Section 1 of the *Act* says:

- (1) “work” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.
- (2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee’s residence.

An employee is entitled to be paid for all time worked. The concept of a meal break is a time free from work. That much is apparent from subsection 32(2), which says:

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

As a result of the above provisions, Hammond, who was required to remain in the store during her working hours and to be available to attend customers as the need arose, was at work and was entitled to be paid for all of those hours. There can be no discounting for breaks she may have taken during the day as that time was never her own.

Statutory Holidays

Section 44 of the *Act* sets out the basic entitlement to statutory holiday time off and pay:

44. After 30 calendar days of employment, an employer must either
 - (a) give an employee a day off with pay on each statutory holiday, or
 - (b) comply with Section 46.

Based on the above provision I reject the contention that Hammond had not qualified for some of the statutory holidays which the Determination found she was owed. In fact, she had qualified under the Act for time off and statutory holiday pay as of June 16, 1999, 30 calendar days after commencement of her last period of employment with Canim Lake General Store. The amount of statutory holiday pay to which she was entitled is determined by applying Section 24 of the *Employment Standards Regulation*:

24. For the purposes of section 45(b) of the Act, statutory holiday pay is calculated as follows:
- (a) for an employee who does not have a regular schedule of hours and who has worked at least 15 of the last 30 days before a statutory holiday, by dividing the employee's total wages, excluding overtime wages, for the last 30 day period by the number of days worked;
 - (b) for an employee who has worked less than 15 of the last 30 days before a statutory holiday, by dividing the employee's total wages, excluding overtime wages, for the last 30 day period by 15.

An analysis of the Determination shows the Director correctly calculated Hammond's statutory holiday pay entitlement according to the requirements of the *Act*. Canim Lake General Store did pay Hammond for some statutory holidays and where they did so Hammond was usually paid more than what was required by the *Act*. Most of those amounts were recognized and recorded by the Director and set off against the statutory entitlement. All of that was explained in the Determination.

I accept, however, the evidence that Hammond was overpaid by 14 hours in May 2000, that she was paid for 9 hours more than she worked in the pay period during which the Good Friday 2001 statutory holiday fell and that she was paid for the Victoria Day 2001 statutory holiday. If there was any dispute about that I would have expected Hammond, who was present at the hearing, to have given contradictory evidence. The Determination will need to be varied to reflect that Hammond was paid statutory holiday pay for April 13, 2001 and May 21, 2001 in the amount of \$72.00 on each day and that Hammond was paid an amount of \$92.00 in May, 2000 which should be treated as statutory holiday pay for May 22, 2000. This last matter is simply an application, in the circumstances, of the statutory objective of fairness found in Section 2. Hammond was overpaid for the month of May, 2000. There is no reason that should not be reflected in the resulting amount owed unless I am prohibited from doing so by specific provisions of the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 7, 2002 be varied by reducing the amount owing by \$252.50 plus vacation pay and accumulated on that amount. The resulting amount is confirmed as payable, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal