

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 -

Thomas M. Sanders
("Sanders")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: James Wolfgang

FILE NO.: 98/355

DATE OF HEARING: August 14, 1998

DATE OF DECISION: September 1, 1998

DECISION

APPEARANCES

Jack Derish for Crystal Pacific Bevelling
Shelly Derish for Crystal Pacific Bevelling
Thomas Sanders for himself

OVERVIEW

This is an appeal by Thomas Sanders (“Sanders”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 13, 1998. The Determination found no further money was owed to Sanders by Crystal Pacific Bevelling (“CPB”). Sanders had claimed wages were owed him for work in excess of his normal hours. The Director found that time had been taken off with pay and the amount owed had been liquidated.

A hearing was held on August 14, 1998 at which time I took evidence from all parties.

ISSUES TO BE DECIDED

Does CPB owe any money to Sanders for extra time worked?

FACTS

Sander was employed as a plant supervisor by CPB from September 01, 1990 to February 14, 1997. On January 14, 1997 CPB gave Sanders 6 weeks notice of termination noting the last day worked would be February 24, 1997. In an undated memo CPB gave Sanders his last week off with pay as business was slow.

Sanders was paid a salary of \$3200 per month.. There was no formal contract of employment between CPB and Sanders. Both parties agree extra time was worked by Sanders. No record was kept by the company of the amount of that time. In 1996 Sanders began to keep a record of the amount of extra time he was working but did not provide a copy to CPB.

CPB was approached by Sanders in 1996 claiming he had worked extra hours and was entitled to time off at straight time for those hours. When asked how much time was

outstanding Sanders indicated “about a week or so”. CPB told Sanders to take the time off and to tell them when they were even. CPB records show a number of days were taken in 1996 and early 1997. CPB claim Sanders came to them in late December 1996 and indicated “o.k. we are now even”.

The company had a policy on overtime or extra time worked. The company wanted to keep overtime to a minimum. It was to be approved by the supervisor prior to the work being performed. In the case of Sanders, that approval should have come from Jack Derish, (“Derish”) the owner. Derish admitted the policy was not enforced and Sanders never came to him prior to working extra time.. We have no evidence if overtime was worked by other employees with or without prior approval.

When Sanders was terminated he filed a complaint with the Employment Standards Branch claiming he had not been paid for extra time worked. He stated it was not until 1996 that he became aware, as a supervisor, he was entitled to at least straight time pay or time off for extra hours worked in excess of the regular working agreement. This was when he began a record of the extra hours worked. He would tell his wife what extra time he had worked and she would keep a record in a diary. Sanders admits he took some time off but not to the extent claimed by CPB. Specifically, he claims he was at work 2 days they claim he took off . He presented a purchase order from CPB dated on one of the days in question to support his position that he was at work.

CPB has a security system which indicates who opens and closes the system. On the two days in question the evidence from CPB was that Sanders did not open or close the business on those days.

CPB claim they did not see Sanders’ claim or record of hours worked until after he had filed his complaint. The company countered by claiming Sanders had been paid more than was owed him. They have taken the position that statutory holidays which had been paid could be used to offset the extra time worked by Sanders. They indicate Sanders claim is for 112 hours and they have paid a total of 113.5 hours . My calculation shows Sanders has claimed 116 hours.

ANALYSIS

CPB acknowledge Sanders had worked extra time. How much and was it taken off is the question. There are some company records showing time taken off by Sanders. There was no regular working agreement in effect for Sanders however all the calculations made by payroll show the normal working day to be 8 hours and the week 5 days.

Sanders was a manager and under Section 36 of the *Regulations* was excluded from statutory holiday pay requirements. However, as a salaried employee, if a statutory holiday were to fall within the month it was not deducted from his salary. It was not until Sanders made a claim for the extra hours worked that CPB attempted to deduct the statutory holidays from the amount he was claiming. For 1996 CPB indicate Sanders received 4 weeks vacation pay however, according to the vacation planner filed with the Tribunal, one of those weeks was for 1995 vacation not taken. They further claim he had 9 statutory holidays plus 4 additional days in 1996.

He also took December 30 off due to weather and closed 1.75 hours early on December 31 making a total of 113.5 hours off in 1996. They further claim, in addition to January 1, he took January 6, 8, 10 and 1/2 day January 13, 1997 off.

As the company has no record of the extra hours worked by Sanders we must rely on his records even if they may be flawed. Equally, we must rely on the company records for the time Sanders has taken off even though he has disagreed with the amount of time shown.

I do not believe CPB can retroactively deduct statutory holidays from Sanders. The record indicates he had received the same rate of pay from January 1, 1994 to February 24, 1997 when he was terminated. We have no indication any statutory holiday pay had been deducted until after the complaint. I believe, by doing so, the company changed the employment contract retroactively. The company could have taken the position to deduct statutory holiday pay in the future by notifying Sanders of their intentions but they failed to do so.

I find Sanders is entitled to be paid for the extra hours worked in 1996 and 1997 less any time he had taken off, according to the company records. Sanders claims to have worked 116 extra hours in 1996 and 1997. CPB records show Sanders took 41.75 hours off in 1996 and 28 hours off in 1997 for a total of 69:45 hours. That leaves a balance of 46.25 hours to be paid. CPB and Sanders agree that, at the time his employment was terminated, Sanders' wage rate was \$20.00 per hour therefore he is entitled to 46.25 hours times \$20.00 equals \$925.00 plus vacation pay of \$55.50 for a total of \$980.50.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 13, 1998 be canceled and the following be substituted. I order CPB pay Sanders the amount of \$980.50 as calculated above.

James Wolfgang
Adjudicator
Employment Standards Tribunal