Employment Standards TRIBUNAL

An appeal

- by -

Manjit Dhaliwal
("Dhaliwal")

- 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: Mark Thompson

FILE No.: 2002/207

DATE OF HEARING: July 10, 2002

DATE OF DECISION: August 26, 2002

DECISION

APPEARANCES:

Manjit Dhaliwal,	For herself
Fidali Meghji	For Treen Gloves & Safety Products

OVERVIEW

This is an appeal by Manjit Dhaliwal ("Dhaliwal") 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 March 26, 2002. The Determination concluded that Dhaliwal was not entitled to a production bonus for the years 1999 and 2000.

Dhaliwal disputed the Determination on the grounds that her contract of employment provided for a production bonus for 1999 and 2000. Her former employer Treen Gloves and Safety Products ("Treen") argued that the contract required the bonus be paid for 1996 and 1997 only.

ISSUE TO BE DECIDED

The issue to be decided in this case was whether Treen was required to pay Dhaliwal a production bonus for 1999 and 2000.

FACTS

Dhaliwal was employed by Treen from February 1987 until February 23, 2001. Dhaliwal began her employment as a production manager and was promoted to factory manager in September 1995. Her salary was $2200 per month. She did not receive a written statement of her terms of employment as a manager and did not receive a raise during her term as factory manager. Dhaliwal presented a memo "To whom it may concern" written by the factory manager May 30, 1995 stating that Dhaliwal was earning $2200 per month.

According to Dhaliwal, Treen management promised her in the beginning of 1996 an annual bonus of $3000 per year or 10 per cent of the profit earned in the plant earned more than $30,000. In December 1996, Fidali Meghji ("Meghji"), president of Treen, wrote a memo "To Whom it may concern," stating that Dhaliwal's annual compensation "depending on her bonus," was between $28,000 and $32,000. Some time in 1996, Dhaliwal stated that Meghji told her that she would receive a bonus if the operation was profitable.

Dhaliwal received a bonus for 1996 of $3626, paid in three installments in 1996 and 1997. The final installment was paid in March 1997. Dhaliwal acknowledged that the payment was made without a written agreement. However, payment was initiated when she wrote a memorandum to Meghji after the end of a calendar quarter, in which she stated her calculation of the amount owed to her. Magi authorized payment in each case.

Treen presented a letter from Meghji to Dhaliwal written on May 20, 1997, Meghji wrote to Dhaliwal regarding her "year-end bonus." He stated:

> You will continue to receive 10% of the profit made from the factory during 1997, payable every quarter but due to you continuously working towards reducing cost and being more efficient in our manufacturing, I will guarantee you a minimum bonus for the year 1997, an amount of $3,000, the difference being payable in early 1998.

Dhaliwal testified that she did not see the letter until November 2000 after she requested a bonus for 1999.

Dhaliwal received a bonus for 1997, based on a profit of $29,571.41. The first installment for the first two quarters was paid after Dhaliwal wrote Meghji in August 1997. The process was repeated in October 1997 and February 1998. Dhaliwal wrote Meghji, asking for the bonus as she calculated it, with a financial statement attached.

According to Dhaliwal, the plant she managed did not make any profit in 1998. She continued to do the calculations, and did not claim that she was entitled to any bonus. She asked Meghji about a bonus for that year. He said that there was no profit, but she could take a day off if she worked on Saturday. Dhaliwal was emphatic that Meghji did not tell her that she would not receive a bonus in the future. He acknowledged that Dhaliwal did not receive a raise during her term as Factory Manager.

Dhaliwal stated that there was considerable turnover in Treen's accounting department in 1999-2000. She described the 1999 financial reports as a "nightmare." Meghji acknowledged that several persons had left the firm and had to be replaced, but accounting information was available if necessary. Dhaliwal stated that she raised the matter of her bonus with Meghji in August 1999, and he told her he would have to wait until the accounting department was functioning properly by the end of the year.

In July 2000, Dhaliwal provided Meghji with a year-end report for 1999, showing a profit for the year. She asked him about a bonus, but, according to Dhaliwal, Meghji told her that he could not find the year-end report. On September 15, 2000, She then sent him a copy of the statement with a request that she be paid 10 per cent of the profit for 1999. She also sent Meghji an e-mail September 22, 2000 asking for her bonus. Meghji responded by e-mail, stating that he could not find any record confirming an agreement between Dhaliwal and Treen to pay her a bonus for 1999. Dhaliwal sent a reply, stating that she had received bonuses according to a verbal agreement for 1996 and 1997. At this point, Dhaliwal stated that she became aware of Meghji's letter to her of May 20, 1997. Dhaliwal spoke to Meghji and said that she would discuss the matter further when she returned from her vacation, scheduled for January 3-February 23, 2001.

In fact, Ms. Dhaliwal did not return to work. On February 22, 2001, she sent Treen a fax with a medical certificate stating that she was unable to return to Vancouver. Treen terminated her in writing on March 21, 2001, and she returned to Vancouver March 26, 2001. While the record is not clear, it appears that Treen terminated Dhaliwal because she did not return to work in February. There was a difference between Treen and Dhaliwal concerning a fax that Dhaliwal stated she sent on March 7.

In her initial complaint, Dhaliwal claimed compensation for length of service, in addition to overtime worked in 1998 and the unpaid bonuses for 1999 and 2000. Treen paid length of service compensation according to the schedule in the *Act*, and the delegate found that a claim for overtime worked in 1998 was

out of time under Section 80 of the *Act*. Dhaliwal did not pursue either the overtime or the length of service compensation in her appeal to the Tribunal.

ANALYSIS

The arguments in this case were advanced very clearly. Dhaliwal maintained that she was entitled to a production bonus for 1999 and 2000 based on the practice Treen established in 1996 and 1997. She acknowledged that she had no written agreement with Treen. The May 20, 1997 letter, which she did not see until 2000, supported her position. She attributed the delay in her requesting payment of the 1999 bonus to problems in the accounting department.

Treen stood on the lack of any written agreement between Dhaliwal and her employer. The May 20, 1997 letter referred to a bonus payable for 1997, but no written evidence of an agreement to continue the practice was available. Meghji argued that Dhaliwal's delay in asking for her 1999 bonus was evidence that she was aware that no agreement to pay the bonus that year existed.

Section 1 of the *Act* defines "wages" as follows:

> money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency

Neither party contested the delegate's finding that the bonuses in question were "wages" ad defined in the *Act*. As the appellant, Dhaliwal had the burden to show that the Determination was based on errors of fact or law. The evidence presented to the Tribunal was essentially identical to that available to the delegate when she issued the Determination.

While it is understandable that Dhaliwal expected to receive a bonus in 1999 and 2000, she presented no evidence that both she and Treen had agreed to the bonus system past 1997. (See *Re Lisa Julson*, BC EST #D106/97). When a former employee seeks to recover unpaid wages, he or she should present clear evidence that an agreement between the employer and the employee existed. The doctrine of promissory estoppel, drawn from contract law, requires a clear statement of the rights of one of the parties (*Re Wen-Di Interiors Ltd.*, BC EST #D481/99) and no such statement existed in this case.

ORDER

For these reasons, the Determination of March 26, 2002 is confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal