

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 -

Crestwood Draperies Ltd. and Adrian's Interiors Ltd.
("Crestwood")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 97/351

DATE OF HEARING: August 26, 1997

DATE OF DECISION: September 2, 1997

DECISION

APPEARANCES

Paul Kopinya	on behalf of Crestwood
Susan Kopinya	an observer
Darcy Braun	on his own behalf
Gayle Braun	an observer
Ray Laskiwski	on behalf of Darcy Braun

OVERVIEW

This is an appeal by Crestwood Draperies Ltd. And Adrian's Interiors Ltd. ("Crestwood") pursuant to Section 112 of the *Employment Standards Act* (the "Act") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") dated April 11, 1997. The delegate of the Director determined that Crestwood owed compensation for length of service, vacation pay and wages in the amount of \$4,461.08 plus interest to Darcy Braun ("Braun"). Crestwood alleges that the delegate of the Director erred in determining that compensation for length of service, vacation pay and wages were owing to Braun.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Is Crestwood required to pay compensation for length of service to Braun ?
2. Does Crestwood owe vacation pay to Braun ?
3. Does Crestwood owe wages to Braun ?

FACTS

The following facts are not in dispute:

- Braun was employed by Crestwood as Operations Manager from September 10, 1994 to April 30, 1996;
- A job description dated Sept./1994 set forth the responsibilities that Braun was to assume and the rate of remuneration which was \$2,500.00 (salary) plus \$500.00 (profit share) per month;
- The job description was amended on November 6, 1995 by including some additional duties and now indicating that the remuneration was to be \$3,000.00 per month plus commissions on sales;
- It was understood that any extra hours worked would be compensated by taking 'time in lieu' off with no reduction in pay;
- There was no other verbal or written terms or conditions of employment between the parties;
- Braun took no vacations in 1994;
- The operation was 'shut down' between Christmas 1994 and New Years 1995 however Braun was paid for this time;
- Braun took 1 weeks vacation with pay in August of 1995;
- The operation was 'shut down' between Christmas 1995 and New Years 1996;
- The payroll records indicate Braun was paid \$450.00 as "holiday pay" during this 'shut down' period although he had not requested vacations;
- The payroll records indicate that Braun was paid \$136.10 as "holiday pay" for 1 day in early April 1996 although he had not requested this day as vacations, but rather Braun took this day as a 'day in lieu' for working extra hours;
- Braun received a cheque in the amount of \$1,159.92 for outstanding vacation pay due at the time of termination of employment;
- Crestwood did not keep any records of either the regular or extra hours worked by Braun;
- Braun's records indicate that he worked a total of 154 extra hours or 19.25 days equivalent at 8 hours per day (excluding the day taken in April 1996);
- Braun was advised in April 1996 that Crestwood would be restructuring the operations and that Braun's duties would be changing;
- The alternative employment offered to Braun was to be remunerated at the rate of a guaranteed \$3,000.00 per month for 3 months plus commissions of 15% of new sales and 50% of net profit on blind cleaning performed;

Crestwood further states that:

- It was intended that Braun would be in charge of all aspects of the new expansion of the business with respect to the cleaning of blinds, soliciting business, overseeing the actual cleaning operations etc.;
- a 'test run' in March/April 1996 resulted in \$12,000.00 worth of sales of blind cleaning which would have resulted in a commission to Braun under the new remuneration scale of \$2,000.00 for the month of April;
- Braun did not approach Crestwood at any time to seek clarification with regard to the alternative employment being offered.

Braun further states that:

- he was concerned about leaving a salaried position for one, which was to be after 3 months, a commission only position;
- he did not expect the offered position to be a "key management position" as was the case with the position he had previously held as Operations Manager;
- the issues with respect to the offered position "wasn't all finalized" at the time he terminated his employment.

ANALYSIS

In order to determine whether the terms and conditions of Braun's employment were changed significantly and therefore constituting a 'constructive dismissal, I must carefully examine not only the documentary evidence before me but also consider the understanding of the parties with respect to the offered position. In regard to the remuneration, there is no disagreement that for the first 3 months at least, Braun would continue to receive \$3,000.00 per month plus any commissions. In regard as to whether the offered position was to be a key management position and such other issues as provision of a gas card and payment of profit generated commissions, Braun testified that "the issue of the offer wasn't finalized" at the time he left his employment.

I conclude based on the evidence provided, that Braun quit his employment before he fully understood or had discussed all aspects of the offered position and therefore compensation for length of service is **not** payable by Crestwood.

With respect to issue No. 2, vacation pay, I am satisfied that there was no agreement that Crestwood would pay full wages every time the operation was shut down at Christmas as they had done in 1994. Crestwood has the right to determine that the 3 working days between Christmas 1995 and New Years 1996 be considered as vacation days.

I conclude therefore that Braun is owed vacation pay calculated as follows:

1994 gross earnings	\$11,045.48 x 4%	= \$ 441.42
1995 gross earnings	\$35,811.81 x 4%	= \$1,432.47
1996 gross earnings	\$14,162.15 x 4%	= \$ 566.49
total		= \$2,440.78
less vacation pay paid		= \$2,234.92
Vacation pay owing		= \$ 205.86

(*Note: 1995 & 1996 gross earnings include vacation pay earned in previous year.)

With respect to issue No. 3, wages owing, I am satisfied that the parties agreed to provide time off with pay in lieu for any extra hours worked. As Braun's employment had terminated, he no longer had the opportunity to take the time off with pay in lieu for the extra hours he had worked. There is no dispute that Braun worked the extra hours as submitted.

I conclude that Crestwood must pay wages for the extra work performed by Braun.. I am satisfied that the hourly rate is established as $\$3,000.00 \times 12 \div 2080 = \$17.31/\text{hour}$. As Braun has already been paid 1 days wages in April 1996 for time in lieu, he has 19.25 days remaining which are calculated as follows:

19.25 x (\$17.31 x 8)	= \$2,665.74
plus 4% vacation pay	= \$ 106.63
wages owing	= \$2,772.37

The appeal by Crestwood is therefore allowed to the extent as set forth above. In all other respects, the appeal by Crestwood is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated April 11, 1997 be varied to be in the amount of **\$2,978.23** together with interest as calculated pursuant to Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal