

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 -

Marjorie M. Wilson
("Wilson")

- of a Decision issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE No.: 98/416

DATE OF DECISION: September 14, 1998

DECISION

OVERVIEW

This is an appeal by Marjorie W, Wilson ("Wilson") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against a Determination of a delegate of the Director of Employment Standards (the "Director") on June 12, 1998. The Determination found that Wilson and a number of other complainants were not entitled to payment of overtime wages. Wilson appealed on the grounds that she had not been paid for overtime worked according to the Act, that she was entitled to compensation for length of service, and profit sharing. Wilson's former employer, Vanderpol's Eggs Ltd. ("Vanderpol's") responded that its hours of work were covered by a variance. The Director's delegate stated that he had not made a determination on compensation for length of service pending the outcome of a review of a decision of the Tribunal in another case. This case was decided on the basis of written submission.

ISSUES TO BE DECIDED

The issues in this case are whether Wilson is entitled to overtime pay and compensation for length of service. In addition, Wilson's complaint about profit sharing payments must be addressed.

FACTS

The basic facts of the case were not in dispute. Wilson was employed at Vanderpol's from May 3, 1973 through July 12, 1997 as an egg grader. On June 18, 1997, the president of Vanderpol's wrote Wilson informing her that the egg grading and distribution portion of Vanderpol's business had been purchased by Golden Valley Foods Ltd. ("Golden Valley") effective July 13, 1997. The letter further announced a working notice of a layoff to commence on July 12, 1997. The layoff did occur on July 12. On July 14, Vanderpol's paid Wilson her wages through July 11, vacation pay and overtime.

After the June 18 letter, Wilson successfully applied for a position with Golden Valley, commencing July 14, 1997. Wilson stated that she was subject to a probation period of three months and her seniority dating from July 17, 1997. Her new position was an "Egg Grader/Packer," whereas at Vanderpol's she was an Egg Grader.

Sometime later, Wilson filed a complaint with the Employment Standards Branch, apparently claiming that Vanderpol's owed her overtime pay, compensation for length of service and the proceeds of a profit sharing plan. Wilson produced records of her time worked for at least the two years prior to her layoff. Vanderpol's reviewed their payroll

records and concluded that it owed Wilson an additional \$217.67 in unpaid overtime and corresponding vacation pay. The company paid Wilson that amount.

Vanderpol's produced a copy of a variance issued on April 10, 1980 by the Board of Industrial Relations, the agency responsible for variances under the employment standards legislation in force at that time. The variance covered "drier, pasturizer, packaging and maintenance workers and provided that:

workers may work up to 10 hours per day and 50 hours per week to average not more than 40 hours per week over an 8-week period. Overtime to be paid as follows: (a) time and one-half after 10 hours per day, double time after 11 hours per day; (b) time and one-half after an average of 40 hours per week, double time after an average of 48 hours per week, excluding hours paid for under (a).

The Board required that the notice be posted in a conspicuous place on the employer's premises, and stated that if either party to the arrangement wished a change, the Board should be notified. Vanderpol's address on the variance was Surrey. According to Wilson, the Surrey plant moved to Abbotsford in the early 1990s. Vanderpol's head office was in Surrey in 1980. The variance was never cancelled, nor did any party request a change or file a complaint until after the layoffs of July 1997.

Wilson stated that she had never seen the variance and introduced a letter from another former employee of Vanderpol's to the same effect. She also stated that the variance did not cover Vanderpol's operation in Abbotsford, where she worked, but applied only to the company's Surrey plant.

The Determination in question found that the 1980 variance should apply to Wilson's employment relationship with Vanderpol's. In a statement to the Tribunal, the delegate pointed out that the Director was considering a request for reconsideration of a Tribunal decision and would issue a determination covering compensation for length of service in light of the outcome of the appeal.

ANALYSIS

Section 128(1) of the Act states that variances issued prior to November 1, 1995, when the current Act took effect, remain in force until they expire or are cancelled under the former statute. Wilson argued in effect that the variance should not apply, because she had not seen it or that it applied to another location. She produced no evidence concerning the locations of Vanderpol's plants.

While Vanderpol's may not have posted the variance as it required, no one complained about payment of overtime until the transfer of Vanderpol's operations to Golden Valley. Vanderpol's paid Wilson for overtime worked according to the variance. One effect of the variance was that employees were paid on the basis of a forty-hour workweek even when

hours worked varied from that level. Employees had reason to be aware that a variance existed. Section 128(1) of the Act covers the 1980 variance issued to Vanderpol's.

The Determination in question did not address compensation for length of service. The Director's delegate stated that he would issue a separate determination on that subject. Wilson correctly stated that the working notice in the June 18 letter did not cover her entitlement under Section 63 of the Act. The second determination, when it is issued, could affect Wilson's rights under Section 97 of the Act. In this case, I should rely on the delegate's undertaking that Wilson's entitlement to compensation for length of service and her status with Golden Valley will be addressed in a future determination. Wilson obviously will have the right to appeal that determination should she wish.

Section 1(a) and (b) of the Act defines wages as follows:

- (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
- (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,

The definition of wages does not cover profit sharing plans that do not relate to "hours of work, production or efficiency." Section 80 of the Act limits determinations to "wages" as defined above. Wilson presented no evidence on the operation of Vanderpol's profit sharing plan, but based on her statement, the proceeds, if any, from a profit sharing plan do not fall under the definition of wages.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination of June 12, 1998 is confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal