

**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 -

Patricia Crumley  
("Crumley")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Mark Thompson

**FILE NO.:** 98/433

**DATE OF DECISION:** September 14, 1998

## DECISION

### OVERVIEW

This is an appeal by Patricia Crumley ("Crumley") 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 Crumley and a number of other complainants were not entitled to payment of overtime wages. Crumley 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. Crumley'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 request for reconsideration of a decision of this 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 Crumley is entitled to overtime pay and compensation for length of service. In addition, Crumley's complaint about profit sharing payments must be addressed.

### FACTS

The basic facts of the case were not in dispute. Crumley was employed at Vanderpol's from September 1974 through July 12, 1997 as an egg candler. On June 18, 1997, the president of Vanderpol's wrote Crumley (and a number of other employees) 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 on July 12, 1997. The layoff did occur on that date. On July 14, Vanderpol's paid Crumley her wages through July 11, plus vacation pay and overtime.

On June 18, Crumley applied for a position with Golden Valley. Golden Valley hired her, effective on July 14. The offer of employment included a probation period of three months. However, her rate of pay reflected service with Vanderpol's exceeding two years, twelve months' service with Vanderpol's for the "Group Plan" and five years' service for vacation eligibility. Her new position was "Candler/Packer."

In December 1997, Crumley filed a complaint with the Employment Standards Branch, claiming that Vanderpol's owed her overtime pay, compensation for length of service and

the proceeds of a profit sharing plan. Vanderpol's reviewed their payroll records and concluded that it owed Crumley an additional \$676.81 in unpaid overtime and corresponding vacation pay. The company paid Crumley that amount, less statutory deductions, on January 19, 1998.

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. The variance was never cancelled, nor did any party request a change or file a complaint until after the layoffs of July 1997.

In a marginal note on a copy of the variance, Crumley stated that the variance did not apply to the grading station.

The Determination in question found that the 1980 variance should apply to Crumley's employment relationship with Vanderpol's. In a statement to the Tribunal, the delegate pointed out that the Director was considering an appeal for review of a Tribunal decision and would consider issuing 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. Crumley argued in effect that the variance should not apply to her work. She produced no evidence concerning the organization of work at Vanderpol's plant.

While scope of the variance may not be completely clear, no one complained about payment of overtime until the transfer of Vanderpol's operations to Golden Valley. Crumley did not present any information about overtime she worked, but the delegate found that Vanderpol's paid Crumley for overtime worked according to the variance, after the adjustments made as a result of Crumley's complaint. 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. The determination, when it is issued, could affect Crumley's rights under Section 97 of the Act. The June 18 letter did not provide sufficient notice to fulfill Vanderpol's obligations under Section 63 of the Act to an employee with almost 23 years of service. In this case, I should rely on the delegate's undertaking that Crumley's entitlement to compensation for length of service and her status with Golden Valley will be addressed in a future determination. Crumley 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 in the Act. Crumley presented no evidence on the operation of Vanderpol's profit sharing plan, but on its face, the definition of wages does not apply.

## **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**