Employment Standards TRIBUNAL

An appeal

- by -

UAP Inc.
("UAP")

- 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: David B. Stevenson

FILE No.: 2001/340

DATE OF HEARING: July 16, 2001

DATE OF DECISION: August 2, 2001

DECISION

APPEARANCES:

on behalf of UAP Inc.	Michael R. Howcroft, Esq. Harvey Friesen
on behalf of the individual	In person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by UAP Inc. ("UAP") of a Determination that was issued on April 5, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded UAP had contravened Part 4, Sections 40(1) and 40(2) and Part 8, Section 63(2)(b) of the *Act* in respect of the employment of Steven Kirschner ("Kirschner") and ordered the UAP to cease contravening and to comply with the *Act* and to pay an amount of $19,564.45.

UAP says the Determination is wrong in certain respects and has set out three grounds of appeal:

1. The delegate of the Director of Employment Standards erred in finding that the Complainant was entitled to eight (8) weeks termination pay pursuant to Section 63 of the *Act*;

2. The delegate of the Director of Employment Standards erred in finding that the Complainant was entitled to compensation for hours worked in excess of forty (40) hours per week while employed as a manager with the Appellant; and

3. The delegate of the Director of Employment Standards erred in finding that the Complainant was entitled to compensation for overtime pay while employed with the Appellant for the period following April 25, 1999.

ISSUE

The issues in this appeal are framed by the grounds of appeal raised by UAP.

THE FACTS

Kirschner was employed by UAP from April 3, 1982 to February 23, 2000. He filed a complaint claiming length of service compensation and overtime pay for the period February 1, 1999 to February 23, 2000.

In January, 1999, Kirschner worked for UAP as Warehouse Manager in their Kelowna Distribution Centre. On or about January 18, 1999, Kirschner delivered a letter to Harvey Friesen, the Operations Manager for UAP at the Burnaby Distribution Centre, expressing his "wish to resign from the position of Warehouse Manager and from the company". The letter indicated his last day of work with UAP would be January 31, 1999. His resignation was accepted by Mr. Friesen on or about January 18, 1999.

Before January 31, 1999, Kirschner had a discussion with Myron Watson, the Sales Manager for UAP for all of the interior of the province. Kirschner told Mr. Watson that he had resigned from UAP, but said he would to stay if he could move to the Sales Department. Mr. Watson approved and called Mr. Friesen, who also approved. Mr. Watson offered Kirschner the job of Territory Manager, he accepted and was moved to sales. On January 29, 1999, a memo over the signature of Mr. Watson went out to "all UAP/NAPA Jobbers", saying, in part:

> We are pleased to advise you that Steve Kirschner has retracted his prior resignation and will be remaining with our Kelowna D.C.

Kirschner assumed the role of Territory Manager shortly after the date of the above memo. There was no interruption in his employment. For the period from February 1, 1999 to April 23, 1999, Kirschner also performed the duties of Operations Manager in addition to his Territory Manager duties. The Determination concluded, relative to the period covered by the complaint, that Kirschner was a manager for the purposes of the *Act* during this period. That conclusion has not been appealed. The Determination also concluded that Kirschner, while employed as Territory Manager after April 23, 1999, was not a manager for the purposes of the *Act*. That conclusion has also not been appealed.

On March 4, 1999, a letter was sent to Kirschner by Keith Graham, Vice President, Automotive of UAP/NAPA for the Pacific Region. The letter commenced with the following paragraph:

> This is to set out the agreement between you and UAP/NAPA Inc. (the "Company") in which the Company has agreed to rehire you notwithstanding your resignation delivered to the Company on January 18, 1999, effective January 31, 1999.

The letter went on to say that UAP was prepared to rehire Kirschner as the Territory Manager on the same terms that had been in effect as of the date of his resignation, except his years of service would not be recognized for the purposes of determining reasonable notice of employment or severance pay in lieu of notice. There was a place on the letter for Kirschner's signature, stating he understood and accepted the agreement.

Kirschner said in his evidence that there had been no discussion of UAP not recognizing his years of service for notice or severance purposes before the March 4 letter was received. Kirschner was not happy with the letter and he had some discussion with Mr. Graham. The

discussions weer ongoing when, in June, 1999, Mr. Graham called Kirschner, said he was going back east and wanted the letter signed. Kirschner signed the letter on June 14, 1999.

No record of hours worked by Kirschner was kept by UAP. Kirschner kept his own record of hours worked from mid-March, 1999 until his termination.

The Determination concluded that Kirschner was entitled to be paid eight weeks compensation for length of service because his employment was continuous from April 3, 1982 until his termination on April 23, 2000 and the March 4, 1999 letter was inconsistent with Section 4 of the *Act*. The Determination concluded Kirschner was entitled to be paid for the extra hours worked as a manager, although the reason for that conclusion is not apparent.

ARGUMENT AND ANALYSIS

Subsections 63(1) and 63(2) of the *Act* read:

> *63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one weeks' wages as compensation for length of service.*
>
> *(2) The employer's liability for compensation for length of service increases as follows;*
>
> *(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages,*
>
> *(b) after three consecutive years of employment, to an amount equal to three weeks' wages plus one additional weeks' wages for each additional year of employment, to a maximum of eight weeks' wages.*

Counsel for UAP argued that the Director was wrong to not give effect to the Kirschner's resignation and UAP's acceptance of that resignation as constituting a break in Kirschner's employment for the purpose of Section 63 of the *Act*. In effect, counsel for UAP has taken issue with the Director's conclusion that Kirschner's employment was "continuous" from April 3, 1982 to April 23, 2000 for the purposes of the *Act*. Counsel also noted that the Tribunal's conclusion on length of service compensation issue would apply equally to whether Kirschner was entitled to have annual vacation pay on the amounts found owing calculated at 6% instead of 4%.

I find no error in the Determination on this point for the reasons given in the Determination: there was no break or interruption in Kirschner's employment. Counsel for UAP argued that the fact of Kirschner's resignation and the acceptance of it by Mr. Friesen should have compelled a different conclusion. However, on the facts, both the resignation and its acceptance were

retracted before January 31, 1999, the date it was to become effective. Mr. Watson's memo is instructive when it speaks of Kirschner "continuing" his employment with UAP in a different position. I give no effect in this regard to anything contained in the letter of March 4, 1999 for two reasons. First, there is nothing in the events up to the date of Mr. Watson's memo, January 29, 1999, to suggest Kirschner's employment with UAP had ended. And second, even if the letter was not caught by Section 4 of the *Act*, the condition upon which UAP agreed to "rehire" Kirschner was never communicated to him at the time UAP retracted its acceptance of the resignation and agreed to allow him to move to a position in sales.

From a policy perspective, the Tribunal has noted on many occasions that the *Act* should be interpreted and applied in a manner that is consistent with its remedial nature and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects: see *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R.(4th) (B.C.C.A.). The *Act* sets minimum standards of employment. The following comment from the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 guides the interpretive approach to the *Act*, including subsection 63:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament

Section 63 of the *Act* is part of the legislative scheme to "ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment".

In *Machtinger v. HOJ Industries Ltd., supra*, the Court stated:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over on that does not.

This ground of appeal is dismissed.

UAP contends that the Director has erred in finding Kirschner was entitled to compensation for extra hours worked as a manager and for overtime worked as an employee.

The latter contention does not challenge Kirschner's entitlement to overtime as an employee, but challenges the conclusion that he worked the number of overtime hours accepted by the Director, or that he worked overtime at all. This aspect of the appeal does no more than challenge the conclusions of fact made by the Director. As far as the Director using Kirschner's record of hours worked, the Tribunal made the following comment in *Re Mykonos Taverna operating as Achillion Restaurant*, BC EST #D576/98:

> After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving "efficient" resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged *on its facts*, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the *Act* (see *Shelley Fitzpatrick operating as Docker's Pub and Grill*, BC EST #D511/98). In this case, the question is whether the appellant has shown the decision is unfair or unreasonable.

The Director based her calculations on the record of hours recorded in Kirschner's daily journal. The basis for accepting that record is set out in the Determination:

> In the absence of employer records, the records submitted by a complainant can be used for calculating wages owing. In this case, the complainant recorded his hours on a journal and a copy of that journal was provided to this office. The information appears credible.

The Director also noted that Mr. Watson confirmed Kirschner had worked overtime. In his testimony before me, Mr. Watson said that he told Kirschner to keep a record of actual hours worked that he and Kirschner reviewed those hours from time to time. He said there were two reasons for telling Kirschner to keep a record: the first was to provide a basis for monitoring whether it was more cost effective to have Kirschner travel back and forth between Kelowna and some work locations or stay in out of town accommodations; and second, he saw some things happening within the company and sensed it might be in Kirschner's interest to have an accurate record of hours worked.

The burden is on UAP to show that decision was wrong in the sense described in *Re Mykonos Taverna*, *supra*. Counsel referred to the Tribunal's decision *Re Egerdeen*, BC EST #D080/99. The point of the decision, however, is that Egerdeen had not satisfied the Director, and was not able to satisfy the Tribunal on appeal, that his record of hours was credible. I am satisfied there was a rational basis in this case for the conclusion reached by the Director.

Counsel for UAP questioned whether the time spent by Kirschner travelling to the stores he was responsible for servicing should have been considered time worked. He referred to the decision of the Tribunal in *Re Millar*, BC EST #D208/97, for the proposition that employees are not

usually entitled to payment for travelling to work. That decision, however, does not assist UAP in this appeal. The Tribunal made the following statement:

> There is no mechanism in the Act for compensating the travelling employee unless a construction of his or her employment contract leads to the conclusion that the employee is working and not merely commuting to work.

The evidence of Mr. Watson, however, suggested quite convincingly that Kirschner was considered to be working when he travelled to the stores he serviced as Territory Manager. Kirschner was required to travel as part of his duties and Mr. Watson viewed the costs associated with such travelling as a liability to UAP.

I have concluded that UAP has not shown any error in either the decision of the Director concerning the credibility of the journal or in calculating the amount of overtime hours worked.

As indicated above, UAP also challenged the conclusion by the Director that Kirschner was entitled to wages for extra hours worked as a manager. I have carefully reviewed the Determination for the basis for this conclusion and have found none expressed. In her reply to the appeal, the Director submitted that Kirschner was entitled to be paid straight time for any hours worked in excess of 40 hours in a week on the basis:

> . . . that there was an implied agreement that the complainant's hours of work were 40 in a week.

The agreement referred to was based on the pay information contained on Kirschner's payroll deposit notice, which showed Kirschner being paid a weekly salary of $836.56 comprised of $20.914 an hour paid over 40 hours a week.

Mr. Friesen testified that managers at UAP are not paid for extra hours of work. No hours of work have ever been set for managers. He said the reference to 40 hours at an hourly rate on the payroll information is for accounting purposes. It does not reflect the salary arrangement covering managers at UAP. He said managers are expected to work until the job is done. If extra hours are required, extra hours are worked. If a manager works excessive hours, he, or she, can take time off without any reduction in their weekly salary. Kirschner did not seriously contest that evidence, except to say that a Manager puts in a lot more hours extra than he takes off.

I do not accept the position of the Director that there should be an "implied" agreement that managers do not work more than 40 hours a week. Persons who are managers for the purposes of the *Act* are not covered by Part 4, the hours of work provisions, of the *Act*. There is nothing in the legislation that "implies" a manager will work no more than 40 hour a week. I agree, substantially, with the argument of counsel for UAP that whether a manager under the *Act* is entitled to be paid for extra hours worked depends on the terms of their employment agreement.

Counsel for UAP referred to *Re Devonshire Cream*, BC EST #D122/97. In that decision, the Tribunal said that an agreement between the employer and the employee, who was a manager under the *Act*, that her annual salary plus a bonus would be all the remuneration she would receive regardless of the number of hours worked. He also referred to *Re Anodyne Computer 97 Ltd.*, BC EST #D389/98 (Reconsideration denied, BC EST #D545/98), where the Tribunal stated:

> An employer need not agree to pay its employees an hourly rate above the minimum wage, but, of course, many employers decide to do so and having agreed to pay wages over and above the minimum, will be held liable for the full amount of wages contractually agreed to be paid. Similarly, "managers" are not entitled to be paid overtime, but nevertheless can, by contract, enter into enforceable agreements with their employers for the payment of overtime wages.

The same point was made by the Tribunal in *Re Dusty Investments cob Honda North*, BC EST #D043/99 (Reconsideration of BC EST #D108/98), where it was stated:

> The second misconception by counsel for Honda North is that the Director concluded there was some provision in the *Act* that set the maximum number of hours of work in a day or a week for managers and that managers were entitled under the *Act* to be paid for hours worked in excess of 8 in a day or 40 in a week. In fact, all the Director concluded was that the basic terms of the employment agreement between Honda North and Downey was that Downey would be paid $3200.00 a month (later increased to $3286.66 a month) to work eight hours a day, 40 hours a week. That was a conclusion that was specific to the employment relationship between Honda North and Downey. It was not intended to, and does not, have general application to the employment relationship of other managers with their employers. *That is simply a question of fact about the terms of the employment relationship and is conceded by Honda North.*
>
> (emphasis added)

Later in the decision, the Tribunal stated:

> It is a simple enough analysis. First, an employee is entitled to be paid for work performed for his or her employer. Second, if an employee is paid a weekly, monthly or yearly wage to do a finite amount of work, then any work in excess of that amount is work for which the employee is entitled to be paid.

Conversely, if the manager is hired at an agreed salary that is paid regardless of the number of hours worked, that agreement should be given effect, unless it does not meet the minimum requirements of the *Act*. The *Re Devonshire Cream* case was the converse of the above situation, as the result indicates.

The Director did not find an agreement that UAP would pay Kirschner for extra hours worked as a manager under the *Act*. The evidence, in fact, supports the opposite conclusion. The evidence indicates that as a manager Kirschner was expected to put in extra hours without extra pay. There is no support in the *Act* for finding an "implied" agreement that managers will work no more than 40 hours in a week. UAP has shown the conclusion of the Director that Kirschner was entitled to be paid extra hours worked as a manager under the *Act* to be wrong and the Determination will be varied by reducing the amount owed by $1,496.50 (plus the interest that had accrued on that amount prior to the Determination being issued).

The above conclusion does not, of course, affect the conclusion that Kirschner was entitled to overtime wages after April 23, 1999, when he was no longer a manager under the *Act* and Part 4 of the *Act* applied to his employment.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 5, 2001 be varied in accordance with this decision.

David B. Stevenson
Adjudicator
Employment Standards Tribunal