

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 -

Paradigm Management (B. C.) Ltd., operating as Expressions Hair Design
("Paradigm")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE No.: 2000/304

DATE OF DECISION: October 19, 2000

DECISION

APPEARANCES

Blair Christie For Paradigm

Catherine Richard For herself and Dee-Anne Hackett

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Paradigm Management (B.C.) Ltd., operating as Expressions Hair Design (“Paradigm”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 5, 2000. The Determination found that Paradigm owed Catherine Richard (“Richard”) \$713.00 for overtime wages, statutory holiday, wages due from not receiving 32 consecutive hours free from work in a week, vacation pay and interest. The Determination also found that Paradigm owed Dee Anne Hackett (“Hackett”) \$68.19 for statutory holiday pay and vacation pay, plus interest.

Paradigm appealed the Determination on the grounds first that the Director’s delegate violated Section 77 of the *Act* by failing to notify management of the complaint against it until 7 months after the complaint had been filed, thus affecting the limit on the amount of wages to be paid under Section 80 of the *Act*. Secondly, Paradigm appealed on the grounds that the Determination contained an incorrect calculation of wages for statutory holidays by including the payments actually made to the complaints for statutory holidays as part of “regular wages” as required by the *Act*

The Director’s delegate argued that Paradigm was given ample opportunity to respond to Richard’s complaint after management and Richard were unable to resolve their differences. She also maintained that the calculation of “regular wage” for the calculation of statutory holiday pay was correct.

Richards appeared on behalf of herself and Hackett. She and Hackett also appealed the Determination, and that appeal is the subject of a separate Decision, BC EST #D421/00.

ISSUE TO BE DECIDED

The issues to be decided in this case are: whether the date on which the Director’s delegate informed Paradigm of Richard’s complaint affected the limit on the amount of wages to be paid; and whether the Determination contained a correct calculation of Richard’s regular wage for purpose of statutory holiday pay.

FACTS

Paradigm operates two hair salons in Surrey. Richard began work for Paradigm on February 5, 1996 and was still employed on the date of the hearing. Hackett was employed by Paradigm from February 5, 1996 through January 14, 1999. Richards received wages consisting of 50 per cent of net revenues (gross revenues less deductions) from the styling services she performed as commissions and the minimum wage for time she spent at the front desk and attending staff meetings. The arrangements for Hackett were the same except that she received 45 per cent of net revenues from the services she performed as a commission.

According to the Director's delegate, the Employment Standards Branch received the complaints in question on April 8, 1999. Richard testified that she told Blair Christie ("Christie"), president of Paradigm, in August 1999 and told him that she had filed a complaint covering a number of issues. In particular, she showed him Section 46 of the *Act*, which covers pay for work on a statutory holiday. Christie stated that he did not learn of the complaint until he received a letter from the Director's delegate dated November 1, 1999 and did not receive copies of the complaints until November 22, 1999. The complaints contained allegations of violations of a number of sections of the *Act* by Paradigm. Richard told the delegate that she had requested information related to her complaint from management prior to August 1999 in an effort to resolve any issues between them. The delegate stated that she waited two weeks in August to give the parties time to settle their differences, in part because she realized that Richard was still employed by Paradigm. Richard testified that she had raised the issue of holiday pay in 1997 and gave a copy of the *Act* to management in 1998.

Richards and Christie were unable to resolve the issues raised in her complaint, so the investigation proceeded. The delegate met with Christie on November 29. She and Christie exchanged correspondence in December 1999 and February 2000. On February 17, 2000, Christie wrote to the Director's delegate essentially complaining that he had not been asked for additional information for the previous two and one half months. He offered to submit payroll records after November 1, 1999, the first day the delegate informed him of an outstanding complaint. He also asked for an extension of the deadline for submitting the records. The delegate replied on the same day apologizing for a misunderstanding about the records required and submitted a Demand for Employer Records. She also summarized previous correspondence with Christie, including records submitted by the complainants. The delegate did not receive records from Paradigm that she considered complete until March 22, 2000. The delegate and Christie corresponded further, in part because Christie made the argument he presented in this case, i.e., the date from which the time limits in Section 80 of the *Act* should run. Ultimately, the Determination in question was issued on April 5, 2000.

The Determination found that a number of violations by Paradigm alleged in the complaints were incorrect. However, the Director's delegate did conclude that Paradigm had violated Sections 36(1), 46(1) and 46(2) of the *Act*.

A statement of the calculation of wages owed to the complainants was attached to the Determination. The basis of the calculation of "average daily" for statutory holiday pay was the "commissionable" gross wages earned in the 30 days prior to the statutory holiday, divided by the number of days worked. The regular hourly wage was calculated by taking 50 per cent of commissionable gross wages (gross revenues less product deductions), plus hours worked at

the minimum wage, divided by total hours worked. The statutory holiday pay was calculated on the basis of 6 hours worked at 1.5 times the normal rate plus one day's pay for a total of \$163.05 for July 1997. Similar calculations were made for each month in which a statutory holiday occurred.

ANALYSIS

Paradigm appealed the Determination first on the grounds that the delegate had failed to notify it of the complaint as required by Section 77 of the *Act*. Stated briefly, Paradigm argued that it should be liable for payment of statutory holiday pay and other wages owed to the complainants from November 22, 1999, the date on which it received copies of the complaint. Section 80(a) of the *Act* should be read in conjunction with Section 77. In particular, Paradigm argued that previous cases on Section 77 decided by the Tribunal involved former employees of the employer in question. In this case, the employer's liability continued to run while the complaint was investigated but before it was notified of the complaint.

The Director's delegate argued that she had delayed completion of her investigation in the hopes that the complainants could resolve their differences, recognizing that the complaints were still employed at Paradigm.

Section 77 of the *Act* states:

If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

Section 80 of the *Act* deals with the limit on the amount of wages an employer must pay as follows:

The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning

- (a) *in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment, and*
- (b) *in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination.*

Paradigm pointed to *Competition Towing Ltd.*, BC EST #D392/99, in which the adjudicator held that when an individual is to be liable under the act (for penalties) that person must be notified of the specific allegations and be given "meaningful opportunity to respond." Similarly, in *Cineplex Odeon Corp.*, BC EST #D577/97, a determination was referred back to the Director on the grounds that the person under investigation had not been provided with submissions filed by the complainant.

On a factual basis, Paradigm clearly knew of a complaint before November 22, 1999. Evidence before the Tribunal showed that management discussed the merits of the complaint with Richard (and perhaps Hackett) at least by August 1999. The law requires that the

Director “make reasonable efforts to give a person under investigation an opportunity to respond.” The onus is on the Director, not a complainant, to make an employer aware of a complaint so that he or she can respond. After November 22, the delegate gave Paradigm ample opportunity to respond, including extensions of deadlines for submitting records and the like, so the principles of *Competition Towing Ltd.* and *Cineplex Odeon, supra*, do not apply. The remaining issue is the impact of the delay in providing the complaint to Paradigm on its liability.

The purpose of Section 80 is to limit the liability of an employer to pay wages required by a determination to 24 months. The plain wording of paragraph (a) is that when a complaint is filed, the employer’s liability begins on the earlier date of 24 months before the date of the complaint or the termination of employment. Since the complainants’ employment was not terminated in this case, the employer’s liability must begin from the date of the complaint. Paradigm’s frustration with the delay in beginning a formal investigation is understandable. However, the language of the *Act* is unequivocal. Liability must begin on the date of the complaint. There is no statutory authority for an adjudicator to alter that requirement by a reading of Section 77 to establish a maximum interval between the filing of a complaint and the Director’s informing an employer of the details of a complaint.

Paradigm’s argued that the Director’s delegate has improperly calculated Richard’s “regular wage” for the purpose of establishing her entitlement to holiday pay. It acknowledged that its method of payment prior to receiving the complaint had not met the requirements of the *Act*. The parties agreed that, when Richard worked on a statutory holiday, she was entitled to 1.5 times her regular wage, plus a day off or pay in lieu of a day off. Paradigm’s position was that in calculating Richard’s earnings, the delegate had included the commissions she earned on the statutory holiday, but had not included the hours she worked on a holiday to determine her regular wage

The statute defines “regular wage” in Section 1 as follows:

- (b) *if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee’ wages in a pay period divided by the employee’s total hours of work during that pay period,*

Section 46 of the *Act* requires that an employee must be paid 1.5 times her “regular wage” for hours worked on a statutory holiday.

Paradigm argued that the law was not clear about the calculation of regular wages when a statutory holiday fell within a pay period. It urged that the proper interpretation would be to exclude hours worked and commissions paid on a statutory holiday and use the remaining earnings and time worked to determine the regular wage. Paradigm provided alternate calculations in support of its appeal, showing the effect of deducting hours worked and commissions earned on statutory holidays.

While Paradigm’s argument has internal consistency, it is not supported by the plain meaning of the definition of “regular wage” in the *Act*. The law states that the regular wage should be based on an “employee’s wages in a pay period divided by the employee’s total hours of work during that pay period.” No basis exists in the law for excluding earnings or time worked on a

statutory holiday. Contrary to Paradigm's assertion, the law is clear about the inclusion of wages paid and hours worked for the calculation of a regular wage.

ORDER

For these reasons, the Determination of April 5, 2000 is confirmed as it relates to overtime wages, annual vacation pay and hours free from work. The Employer is obligated to pay Richard \$713.00 and Hackett \$68.19, plus any additional interest due under Section 88 of the *Act* from the date of the Determination.

Mark Thompson

Mark Thompson
Adjudicator
Employment Standards Tribunal