

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-

Carmen Louise Gale

(“Gale”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 1999/300

DATE OF HEARING: September 23rd, 1999

DATE OF DECISION: September 30th, 1999

DECISION

APPEARANCES

Carmen Louise Gale on her own behalf

No appearance for ABJJ Holdings Ltd. (operating as “First Choice
Haircutters”)

David Oliver, I.R.O. for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Carmen Louise Gale (“Gale”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 27th, 1999 under file number 039992 (the “Determination”).

The Director’s delegate determined that ABJJ Holdings Ltd., operating as “First Choice Haircutters” (the “employer”), owed Ms. Gale the sum of \$158.58 on account of unpaid statutory holiday pay and interest.

The appeal was heard in Victoria, B.C. on September 23rd, 1999 at which time I heard the appellant’s testimony and submissions made by Mr. David Oliver on behalf of the Director. The employer’s principal had previously indicated to the Tribunal that he did not intend to produce certain payroll records (requested by Ms. Gale) at the appeal hearing and, indeed, that he did not intend to appear at the hearing--the employer did not appear at the hearing and thus the appellant’s evidence stands uncontroverted.

ISSUE TO BE DECIDED

Ms. Gale asserts that she was not paid any statutory holiday pay for some 18 statutory holidays spanning the period from May 22nd, 1995 to March 28th, 1997. There is no dispute as to her *entitlement* to be paid statutory holiday pay for each of the days in question.

The delegate determined that Gale was entitled to be paid \$1,315.19 in statutory holiday pay but was, in fact, only paid \$1,173.50 for the holidays in question and, thus, issued the Determination for the balance owed plus interest. Ms. Gale’s appeal, as noted above, is based on her assertion that she did not receive any statutory holiday pay whatsoever.

FACTS

Ms. Gale worked for the employer as a stylist from 1993 until mid-April 1997 when she quit. Under the terms of her agreement with the employer, Gale was paid an hourly wage (which ranged from \$7 to \$8.50 during her tenure) or a commission (which was either 45% or 50% of her revenues during the period in question), whichever was higher. Ms. Gale always exceeded (save for one day) the guaranteed hourly minimum through her commission earnings. In fact, her evidence is that her daily earnings typically exceeded \$75.

The uncontradicted and apparently credible evidence of the appellant is that she did not receive any statutory holiday pay for the days in issue on this appeal. According to Ms. Gale--and the payroll records before me are not inconsistent with this assertion--the employer simply "added" 7.5 hours for each statutory holiday worked to Ms. Gale's "guaranteed minimum pay". However, since Ms. Gale always exceeded her guaranteed minimum through her commission earnings, she was, in fact, not paid any statutory holiday pay.

In a pay period where there was a statutory holiday, the employer would pay the higher of commission earnings for the period or the "guaranteed minimum pay" (including an additional 7.5 hours to cover the statutory holiday). Given that Gale's commission earnings exceeded the guaranteed minimum (even with the extra 7.5 hours added in), she was only paid her commission earnings for the pay period. Thus, she did not receive any additional monies on account of statutory holiday pay.

Under the *Act*, employees who are paid by way of commissions are nonetheless entitled to be paid statutory holiday pay which pay is based on their average daily commission earnings. The delegate calculated that Gale's statutory holiday pay entitlement over the period in question, based on her average commission earnings, was \$1,315.19. The delegate then calculated Gale's unpaid statutory holiday pay entitlement based on the assumption that Gale was *paid* 7.5 hours, at the base hourly rate, for each statutory holiday. I find, however, based on the uncontradicted evidence before me, that the employer did not make *any* additional payment to Gale on account of statutory holiday pay.

Accordingly, the appeal is allowed and the Determination varied.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied and that an amended Determination be issued in favour of Carmen L. Gale as against ABJJ Holdings Ltd. (operating as "First Choice Haircutters") in the amount of **\$1,315.19** together with interest to be calculated by the Director as and from April 13th, 1997 in accordance with section 88 of the *Act*.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal