

An appeal

- by -

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

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/300

DATE OF HEARING: August 28, 2002

DATE OF DECISION: September 19, 2002

DECISION

APPEARANCES:

Blair Christie, Officer/Director

for Paradigm Management (B.C.) Ltd.

Rose C. Halendy

Official Court Reporter

OVERVIEW

This is an appeal filed by Paradigm Management (B.C.) Ltd. operating as “Expressions Hair Design” (“Expressions Hair”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Expressions Hair appeals a determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on May 7th, 2002 pursuant to which Expressions Hair was assessed a \$300 penalty (the “Penalty Determination”).

This appeal, together with two other appeals of a separate determination (E.S.T. File Nos 2002/301 and 2002/302) was heard at the Tribunal’s offices in Vancouver on August 28th, 2002. I am issuing separate reasons for decision regarding the other two appeals (see BCEST # D428/02).

At the appeal hearing, Mr. Blair Christie testified as the sole witness on behalf of Expressions Hair. The Director was not represented at the appeal hearing. In addition, I have also considered the various documents and submissions submitted by the parties to the Tribunal.

PREVIOUS PROCEEDINGS

As noted above, a Director’s delegate issued a \$300 penalty pursuant to the provisions of section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

By way of an earlier determination issued on April 5th, 2000, a \$0 penalty was assessed against Expressions Hair based on its contravention of, *inter alia*, section 46 of the *Act* (statutory holiday pay). Expressions Hair was also ordered, by way of the same determination, to pay \$781.19 on account of unpaid wages and interest owed to two employees.

Expressions Hair appealed both the unpaid wage award in favour of the two employees and the concomitant \$0 penalty. Expressions Hair’s appeal was unsuccessful [see *Paradigm Management (B.C.) Ltd.*, BCEST # D420/00]. In its appeal, Expressions Hair argued that the Director had not complied with section 77 of the *Act* (Director’s obligation to give a party under investigation a reasonable opportunity to respond) and that the delegate had incorrectly calculated the employees’ statutory holiday pay entitlements. On this latter point, Expressions Hair submitted that when calculating an employee’s “regular wage” for purposes of determining statutory holiday pay, the proper approach was “to exclude hours worked and commissions paid on a statutory holiday and use the remaining earnings and time worked to determine the regular wage” (BCEST # D420/00 at p. 6). This submission was rejected by the adjudicator:

“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." (at page 6)

Expressions Hair applied, under section 116 of the *Act*, for reconsideration of the adjudicator's decision but only with respect to the adjudicator's finding that the delegate had complied with section 77. The reconsideration application was refused because it was untimely and, in any event, without merit (see BCEST # RD291/01).

The \$300 Penalty Determination now under appeal was issued since there was a second contravention of subsections 46(1) and (2) as recorded in a determination issued on May 7th, 2002. I have now dismissed the employer's appeal of this latter determination (E.S.T. File No. 2002/301) in reasons for decision that are being issued concurrently with these reasons.

STATUTORY HOLIDAY PAY AND COMMISSIONED EMPLOYEES

The central dispute in this appeal concerns the proper formula or methodology for calculating statutory holiday pay for commissioned employees. In short, Expressions Hair says that it has fully complied with section 46 of the *Act*.

If an employee works on a statutory holiday, section 46 of the *Act* applies:

If employee is required to work on statutory holiday

46. (1) An employee who works on a statutory holiday must be paid for that day
 - (a) 1 1/2 times the employee's regular wage for the time worked up to 11 hours, and
 - (b) double the employee's regular wage for any time worked over 11 hours.
- (2) In addition, the employer must give the employee a working day off with pay according to section 45.
- (3) The employee may choose to have the pay for the day off credited to the employee's time bank, if one has been established.
- (4) The employer must schedule the day off with pay
 - (a) before the employee's annual vacation,
 - (b) before the date the employment terminates, or
 - (c) if the pay for the day off is credited to the employee's time bank, within 6 months after the date of the statutory holiday,

whichever is earliest.

Employees who work on a statutory holiday are generally entitled to a pay "premium" to compensate for the inconvenience or burden of having to work on a statutory holiday. I might note, however, that not all employees consider working on a statutory holiday to be inconvenient or burdensome. This may be particularly so for those commissioned employees who earn substantial commissions (well above their average daily earnings) on statutory holidays. For example, many retailers have special sales and promotions on certain statutory holidays and, as a result, generate substantially higher than average daily sales volumes which are reflected in higher earnings for the commissioned salespersons who work on those days.

Nevertheless, employees who work on a statutory holiday are generally entitled to a pay premium. The amount of the premium, in turn, depends on the employee's "regular wage". This latter term is defined in section 1 of the *Act*:

"regular wage" means

- (a) if an employee is paid by the hour, the hourly wage,
- (b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period,
- (c) if an employee is paid a weekly wage, the weekly wage divided by the lesser of the employee's normal or average weekly hours of work,
- (d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work, and
- (e) if an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work;

(my italics)

Where an employee is paid a fixed hourly, daily, weekly, monthly or annual wage (and has a regular work schedule), the calculation of the employee's statutory holiday pay "premium" is a relatively simple matter of arithmetic. For example, a employee whose hourly wage is \$10 per hour must be paid \$15 per hour for an 8-hour shift worked on a statutory holiday [section 46(1)] plus an additional day off with pay (based on the employee's regular \$10 per hour wage rate) [section 46(2)].

The statutory holiday pay calculation is much less straight-forward in the case of a commissioned employee. At the outset, it must be recognized that commissioned employees' wages can vary dramatically from day to day, week to week, month to month and year to year. Similarly, a commissioned employee's "regular wage" can vary significantly from one "pay period" to another. A "pay period" is defined, in section 1 of the *Act*, as "a period of up to 16 consecutive days of employment".

Mr. Christie, on behalf of Expressions Hair, submits that when calculating a commissioned employee's "regular wage", the wages earned (and the hours worked) on the statutory holiday must be ignored and that only wages earned on the other days in the pay period can be properly taken into account. I do not accept this submission as I believe it runs counter to the plain and ordinary language of the statute. It should also be noted that this is the identical argument that was previously advanced before, and rejected by, the adjudicator in BCEST # D420/00.

As defined in section 1, "wages includes...commissions...paid or payable by an employer to an employee for work". In this case, the employee--Ms. Catherine Richard--had a contractual entitlement to be paid a commission based on all the revenues she generated as a stylist. It matters not whether those revenues were generated on a regular work day or on a statutory holiday--in either case, she was entitled to be paid her usual commission. Section 17 of the *Act* could not be clearer--"an employer must pay to an employee all wages earned by the employee in a pay period" including, of course, those wages earned on any statutory holiday included within the pay period. While section 17 of the *Act* sets out an exception regarding immediate payment of all earned statutory holiday pay [section 17(2)(b)], that exception *only*

applies where the earned statutory holiday pay has been properly credited to the employee's time bank (a situation that is not applicable here).

Thus, when calculating a commissioned employee's "regular wage" for purposes of determining statutory holiday pay, *both* the commissions generated and the hours worked on the statutory holiday in question must be taken into account when calculating the employee's wages paid or payable in the pay period as well as the employee's total working hours during that pay period. The resulting "regular wage" will be used to calculate the premium pay for the statutory holiday actually worked [section 46(1)] and, in addition, this latter wage rate will be used to calculate the amount payable for the additional "working day off with pay" [section 46(2)]--unless section 45(b) applies.

Having calculated the employee's "regular wage", section 45(1) states that an employee who works on a statutory holiday must be paid 1.5 times that wage rate for all hours worked up to 11 hours and 2 times that wage rate for all hours worked over 11 hours. There is, however, a further complication, namely, where the employee earns *more* in commissions on the statutory holiday than 1.5 times (or even 2 times for hours beyond 11) their "regular wage".

As I previously noted, some commissioned employees generate commissions on statutory holidays that are well beyond their daily average earnings. For example, let us assume that a commissioned employee's "regular wage" is calculated to be \$10 per hour, however, on Labour Day (the employer has a widely advertised "back to school" sale), this employee generated \$200 in commissions during an 8-hour shift.

Mr. Christie submits that in the above circumstances, the employer is *only* obliged to pay the employee \$120 (\$10 x 1.5 x 8 hours) for the statutory holiday and on a strict reading of section 46(1) that submission is not entirely devoid of merit. Nevertheless, this position ignores the dictates of section 17 which states that an employer must pay all wages that are *earned* by the employee in the pay period--in my view, an employer cannot use section 46(1) as a mechanism to sidestep its contractual payroll obligations. It also, of course, follows that to the extent the employee's commission earnings on the statutory holiday fall below the section 46(1) threshold, the employer is obliged to "top up" the employee's earnings for that day to the level mandated by section 46(1).

Since Expressions Hair concedes that it did not pay Ms. Richard statutory holiday pay in accordance with the formula or methodology described above, it follows that the \$300 penalty must stand.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of \$300.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal