Employment Standards TRIBUNAL

An appeal

- by -

NFC Canada Ltd. and Versacold Group operating as EV Logistics
(the “Employer” or “EV Logistics”)

- 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: Ib S. Petersen

FILE No.: 2002/326

DATE OF HEARING: September 17, 2002

DATE OF DECISION: October 4, 2002

DECISION

APPEARANCES:

Mr. Mike Wagner	counsel, on behalf of the Employer
Mr. Wayne Bampton	on behalf of himself

OVERVIEW

This an appeal by the Employer, EV Logistics, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director issued on May 21, 2002. The Determination concluded that Mr. Wayne Bampton was owed a total of $8,870.13 by the Employer on account of wages for "extra work."

Mr. Bampton worked for VersaCold, from October 6, 1999 to November 30, 1999, as a warehouse supervisor. From December 1, 1999, when he was transferred, until his termination on September 17, 2001, he worked for the successor, a partnership between NFC Canada Ltd. and Versacold, also as a supervisor. He was paid an annual salary, $41,000. At the time of his termination, he was paid $45,000. The salary was paid bi-weekly.

The nub of the Determination is that, while Mr. Bampton was a manager under the Act, the Delegate was of the view that there was an agreement between the parties that "specific hours of work would be compensated by a specific amount of wages." The Delegate was of the view that Mr. Bampton was entitled to compensation at straight time based on a "normal" 8 hour day or 40 hour week.

FACTS AND ANALYSIS

The Employer appeals the Determination and says that the Delegate erred in law or fact, or mixed fact or law. The Employer, as the Appellant, has the burden to persuade me that it is wrong. In the circumstances, I am of the view that the Employer has meet that burden.

The Employer presented an extensive review of authorities, including arbitral court and Tribunal decisions. However, in my view the law governing the resolution of this issue is relatively straight forward. Persons who are managers, and that is not in dispute here, are not covered by Part 4, hours of work provisions, and a claim to pay for "overtime" or "extra time" must, therefore, be founded on the employment contract between the parties: see for example, *Re UAC Inc.*, BCEST #D418/01. In that case, the panel noted (para. 35):

> "... if a 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*."

On the evidence, Mr. Bampton started working for Versacold, and transferred over to EV Logistics, on the same terms and conditions of employment, except that his annual salary increased from time to time. The letter offering him employment stated the salary as an annual salary and incorporated the terms of an

employee handbook. This handbook provided expressly that "generally, ... employees work 8 hours a day" and that "employees who are compensated on an hourly basis will be paid according to actual hours worked." Supervisors and managers were excluded from overtime. The handbook provided, under "eligibility" for overtime: "All non-bargaining unit employees with the exception of supervisors and managers." The handbook also explained that prior approval for overtime was required and the rates for such overtime. As noted, there is no dispute that Mr. Bampton was a manager for the purposes of the *Act*.

There can be no doubt, on the evidence, that Mr. Bampton during his employment worked considerably more than an 8 hour work day. In fact, some schedules indicated that he regularly worked at least 9 hours per day, 8 hours plus one half hour at the beginning and end of the shift he supervised. Mr. Bampton stated, in cross examination, that he worked an average of 11 hours per day. While Mr. Bampton's pay stubs consistently indicated 80 hours per bi-weekly pay period, there is nothing to support that these were his "normal" hours, quite the contrary.

Ms. Wheeler, the Employer's Human Resource Director, explained that this was simply for accounting purposes and bore no relationship to hours actually worked. On his first pay stub, the hours worked were recorded as 56, indicating that Mr. Bampton had worked less than a full pay period. Otherwise, the hours recorded were 80 and the earnings remained the same (other than as provided for by increases). Supervisors, such as Mr. Bampton, were expected to work the time necessary to accomplish the work required to be done. They did not record their hours, nor did they seek approval for overtime, as was the case for hourly compensated employees.

Mr. Bampton did, on at least one occasion, in October 2000, make a claim for "extra hours" worked in October and December 1999. He indicated that he had worked a little more than 140 hours and was also owed for statutory holidays and vacation time. The Employer recognized the "extra work" with an additional week's vacation and updated his vacation and statutory holidays. There is, in my view, no indication that the Employer considered that it did so on the basis of a contractual entitlement. Quite the contrary, it appears to me, on the evidence, that the Employer simply on a discretionary basis recognized the "extra work" of Mr. Bampton and other supervisors and managers.

In a broad sense, Mr. Bampton argues that there was an agreement. What this comes down to, in my opinion, is an assumption on his part that his "normal" work week would be 40 hours and that he, therefore, was entitled to be paid for "extra" hours worked. That assumption was, in part, based on previous experience with other employers. In my view, that assumption was neither reasonable in the circumstances, nor, in my view, a proper foundation for an employment contract. It was clear to me, from the outset of his employment, that his hours of work were considerably more than 40 hours per week and that his salary did not reflect, or was based, on those hours. His pay was not based on actual hours worked, it was based on the agreed upon salary with such increases as occurred from time to time, regardless of the hours worked. The Employer's practice over time was consistent with its view of the employment agreement. As an aside, if there was, at any time, any room for doubt as to the Employer's position on the matter, that doubt should reasonably have been eliminated when the Employer recognized "extra work" by giving additional vacation time.

The Employer argues that the Delegate was wrong in concluding that there was an agreement between the parties. The Employer argues that the Determination was "rationally indefensible." I agree. There is nothing in the evidence before me to support that "specific hours of work would be compensated by a specific amount of wages." Rather, the agreement was for an annual salary regardless of the hours worked. In the circumstances, I am persuaded that the Delegate erred. In short, the appeal is granted.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 21, 2002, be cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal