

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 -

Estetica Professional Hair Care Centre Ltd.
("Estetica")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Alfred Kempf

FILE NO.: 98/348

DATE OF DECISION: October 16, 1998

DECISION

APPEARANCES

This appeal proceeded by written submissions.

OVERVIEW

This is an appeal by Estetica pursuant to section 112 of the Act of a Determination of the Director dated May 11, 1998 (the "Determination") regarding overtime pay due to one of its former employees, Stephanie Cleve ("Cleve").

ISSUES TO BE DECIDED

The issues are:

- A. deductibility from wages of a \$5 per month coffee charge;
- B. whether incentive sales commissions or bonuses should be included in the employee's wages for the purposes of calculating overtime entitlement; and
- C. whether the employer is liable for overtime when the employee works overtime without authorization as required by the employer.

FACTS

Cleve worked for Estetica for approximately 1.5 years as front end person at a Hair Salon. She filed a complaint on October 1, 1997 alleging that Estetica had not paid her for overtime hours due to her and that Estetica had improperly deducted from her wages a \$5 per month charge for coffee.

Estetica had a policy requiring all employees to pay the coffee charge. Cleve did not honour the policy. Estetica did not obtain a written assignment authorizing a deduction from her wages.

Estetica paid Cleve a 2% bonus or commission on sales of hair care products. The Director's Delegate when calculating Cleve's wages for the purpose of arriving at an hourly rate (regular wage) included this bonus or commission pay. Estetica argues on this appeal that to include these commissions has the effect of effectively increasing the amount of the bonus when overtime hours are worked.

Estetica submitted that overtime could only be worked with authorization by management. It further submits that Cleve worked overtime without authorization albeit with management's knowledge. Cleve was warned "on several occasions" not to do this. Cleve disputes this background to her overtime claim. For the reason set out below it will not be necessary to reconcile these disputed facts.

ANALYSIS

Deductions

The Act in Section 21 prohibits an employer from deducting or requiring payment of an employee's wages. Section 22 allows certain deductions if the employer obtains the employee's written authorization. The Act set out the minimum standards applying to employees in this Province. Estetica was not entitled to make deductions from Cleve without a written assignment.

Calculation of Wages for Overtime Purposes

Section 40 of the Act requires the payment of overtime calculated having reference to the "regular wage" of the employee. Section 1 of the Act defines "regular wage" several different ways depending on the manner of payment; i.e. if an employee is paid by the hour his or her regular wage is the hourly rate of pay or if an employee is paid on an incentive basis the worker's total "wages" over a pay period divided by the total hours worked.

Section 1 of the Act defines "wages" as including a broad range of types of payment including wages and incentive payments such as commissions.

Cleve received both incentive-based pay and hourly based pay. The definition of regular wage, which refers to incentive-based pay, would apply to her. In this case the Director's Delegate correctly calculated the "regular wage" by totaling all wages earned as hourly pay and commissions in a pay period and dividing this sum by the total hours worked. The regular wage thus included some incentive payments and some hourly wages.

Unauthorized Overtime

Section 35 of the Act provides that overtime must be paid if an employer directly or indirectly allows an employee to work overtime hours. Cleve recorded her hours regularly and the employer was aware that she worked overtime from time to time. The employer continued to employ her and "allow" her to work overtime even though it may not have authorized the overtime in advance. This was not a situation where the employer had no knowledge that unauthorized overtime was being worked. Estetica is liable for the overtime hours set out in the determination.

ORDER

In summary, I order under Section 115 of the Act, that the Determination #072617 be confirmed.

Alfred Kempf
Adjudicator
Employment Standards Tribunal

ACK/cef