

An appeal

- by -

M.S.A. Ford Sales Ltd.
("MSA" or the "Employer")

- 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.: 2001/140

DATE OF HEARING: June 14, 2001

DATE OF DECISION: September 12, 2001

DECISION

APPEARANCES:

Mr. Bernie Saywell	on behalf of MSA
Mr. Daniel Bishop	on behalf of himself

OVERVIEW

This matter arises out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director issued on January 23, 2001. The Determination concluded that Bishop was owed \$11,261.64 by the Employer on account of minimum wages (Section 16), overtime wages (Section 40), vacation pay (Section 58), and deductions on account of business costs (section 21).

I wish to apologize to the parties for the time it has taken to dispose of this appeal. I appreciate the parties’ patience in that regard.

ISSUES

The Employer appeals the Determination. The Employer says that the Delegate erred:

1. There are calculation errors.
2. Bishop is not entitled to the overtime wages and statutory holiday pay awarded.

The Employer does not take issue with the other aspects of the determination. I will only deal with those matters raised in the appeal.

FACT AND ANALYSIS

MSA, as the appellant, has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am of the view that the appeal must succeed in part.

MSA is an automobile dealership in Abbotsford, British Columbia. Bishop was employed there from May 15, 1997 to January 30, 1999, as a sales person on a commission basis.

A. Overtime

The issues on appeal are, in part, of a factual nature and turn on the proper interpretation of Section 35 of the Act:

35. An employer must pay overtime wages in accordance with section 40 or 41 if the employer *requires or, directly or indirectly, allows* an employee to work

(a) over 8 hours a day or 40 a week, ... (emphasis added)

The conclusions in the Determination with respect to overtime may briefly be set out as follows. Bishop claimed that he routinely submitted time sheets showing that he was regularly working in excess of 8 hours in a day. It appears that the Delegate accepted this. The Delegate concluded that the Employer directly or indirectly allowed Bishop to work the overtime and, therefore, must pay for that time. The Delegate did not accept that the statement in MSA's employee handbook to the effect that overtime was not allowed without written approval as sufficient. She found that MSA did not provide any information indicating that Bishop was directed to stop working overtime or was disciplined for working unauthorized overtime. Based on the time sheets "provided by MSA," the Delegate calculated that Bishop was owed \$4,280.08 on account of overtime.

It is fair to say that MSA disagrees that it provided the time sheets. Quite the contrary its position is that these records are fabricated by Bishop and that Bishop only worked scheduled hours (8 hours per day, 5 days per week, for a total of 40 hours per week).

At the hearing, a number of witnesses testified on behalf of MSA.

Saywell, the president of MSA, explained that its employee policy is only to allow overtime when absolutely necessary and that overtime must be approved by management. As well, overtime is distributed equally among employees. The employee handbook provides as follows:

"We do not approve of overtime unless it is absolutely necessary. This will be determined by your Department Manager. If you are to be monetarily paid, your time card must be initialled by your Department Manager...."

Saywell said that Bishop did not submit any overtime records during his employment and that he did not work the overtime.

Saywell also testified that on a number days claimed to have been worked by Bishop, he did, in fact, not work. Saywell pointed to specific dates:

- Bishop's time sheet for July 1998, indicated that he worked from 8:30 a.m. to 6:00 p.m. on July 13. Saywell stated that Bishop went to the dentist on that day and that the dentist's office was not open before 8:30 a.m. and after 6:00 p.m.

- On December 9, 1998, where Bishop claimed an 8 hour day, he had a dental appointment.
- On December 23, 1998, Bishop also had a dental appointment.
- On December 30, 1998, Bishop claimed to have worked 12 hours. Yet records from Crown Canada, the Employer's insurance carrier, indicated that Bishop had attended a medical appointment. According to Saywell, the dates indicated on the insurance records are the dates the services were rendered.

Norman Grant, the secretary-treasurer of MSA, in charge of accounting and payroll, explained that he had no recall of ever receiving overtime time sheets from Bishop. If he had, he explained, he would have referred them back to the sales manager. He said that Bishop never made a request for overtime. Grant confirmed the Employer's policy with respect to overtime, as set out above. A claim from Bishop would have been brought to his attention and it was not.

Heather Miller, who took over payroll in 1998, explained that the procedure was to refer a claim for overtime to the relevant manager for approval. She denied receiving a time sheets for overtime from Bishop. She denied ever receiving a claim for overtime from sales persons. She would also discuss such (unusual) claims with Grant. She indicated that she had access to sales and personnel files and denied that overtime records were in the personnel files. He explained that if an employee was entitled to overtime he or she would have come to her and discussed the claim, and that she never had a discussion with Bishop.

Dave Shantz, the sales manager until about 1998, testified that Bishop never submitted a request for overtime. He also said that he has no recall that overtime was ever discussed. A request for overtime would have come to Shantz' attention. Schantz confirmed the Employer's overtime policy set out in the employee handbook.

In cross examination by Bishop, Shantz agreed that Bishop was a "paper person" who kept good records.

Mike MacDonald, the sales manager who succeeded Shantz, denied that Bishop had ever requested overtime. He also denied ever seeing overtime time sheets. MacDonald confirmed the Employer's overtime policy as accurately reflecting the practice at the work place. MacDonald also testified that if Bishop was ever not paid for something, he would not forget about it, but would always ask for the money. MacDonald says that Bishop never worked overtime. MacDonald did not agree, in cross examination, with the suggestion that the duties claimed by Bishop to have been done outside regularly scheduled hours.

A letter to the Tribunal, authored by MacDonald, asserts that Bishop was away from work on dates when he claimed to have worked:

- Bishop took time off from July 7 to July 14, 1998 to travel to Calgary. He had been informed that his father had passed away in hospital (which turned out not to be the case). He asked for an advance to pay for the trip to Calgary. The Employer advanced him \$700 (a copy of the cheque was entered into evidence). Bishop's time sheets indicated that he worked on July 7-10 and on July 13 and 14.
- On March 17, 1998, Bishop took time off from work to go to Kelowna. He did not return until March 20. The time sheets indicate that Bishop worked on March 18 and 19.
- On November 5, 1997, Bishop took time off to attend court. MacDonald's letter explained that he gave MacDonald the day off. The time sheets indicate that Bishop worked on that day.

Bishop stated that the time sheets were submitted by MSA to the Delegate. Moreover, he explained that his copies of the time sheets have a calculator tape attached to them, adding up the hours worked each month. He insisted that he submitted his time sheets to the Employer. His evidence is that the records are accurate with respect to the hours worked by him.

In a letter to the Tribunal, Bishop responded to many of the factual allegations, including those made by MacDonald (referred to above):

- He explained that he worked more than his scheduled hours because he took on additional duties, including duties related to internet sales--"Megawheels." He also explained that the Employer was generally short-staffed.
- Bishop disputed Saywell's allegations regarding claiming that he had worked when he had really taken time off for medical appointments etc.
- Bishop agreed that he was informed that his father had passed away and that he went to Calgary. However, this happened in September and he was away from work from September 4 to September 11. He did not claim that he worked this time. The cheque for \$700 was an advance to cover rent payments and was not related to the trip to Calgary.

In cross examination, Bishop agreed that he understood the company's policy with respect to overtime, at least from 1998. He agreed that he did not have approval to work overtime from management. He had no explanation of why, if, as he claimed, he submitted overtime records, he did not request payment. He agreed that he never brought up overtime with the Employer or payroll staff. While he characterized himself as a "paper person," his explanation was that he "assumed that he had been paid." He said that he was under that assumption until the Delegate brought it to his attention. He did agree that he on occasion asked for advances. Bishop was

asked why he did not request the money he felt he was owed in overtime rather than asking for advances. He responded that he “didn’t feel it was relevant.”

On the basis of the evidence before me I am reluctant to find that Bishop’s time records are “fabrications,” as alleged by the Employer. In my view there was no clear and cogent evidence before me to support that assertion, which is tantamount to an allegation of fraud. I am, however, of the view that they are inaccurate as to his hours of work. Possibly, they record the time he spent at the work place. Clearly, as noted by the Delegate in her findings, he did take breaks, which are not recorded, and she took those into account in her award. In my view, the records exaggerate Bishop’s hours of work and while he may, indeed, have worked some hours in excess of the scheduled hours, relied upon by the Employer and its payroll staff, I am not convinced that his records are reliable and accurate.

In any event, I am, as stated, not prepared to find that the documents are “fabricated.” First, the Employer’s evidence with respect to the documents is, in some places, internally inconsistent. MacDonald testified that Bishop had been in Calgary between July 7 and 14. Saywell testified that his information was that Bishop had taken time off for a medical appointment. In part, that Saywell’s testimony was based on insurance records which--he said--indicated a date of service. However, it was not clear to me whether the date indicated was the date that the transaction was processed or the date Bishop received the service. In my view, the content of these insurance documents is not self-evident. Second, for the most part, Bishop was able to explain the dates questioned by the Employer. For example, I accept his explanation that he went to Calgary in September and not in July. It is unlikely that Bishop would have fabricated this. Undoubtedly, if he had, witnesses could have been called to that effect. I accept that some dates, for example, the March 17-20 absence, testified to by MacDonald, remains unexplained. Third, I am not convinced by Saywell’s evidence regarding the medical and dental visits. The evidence regarding the office hours of the various medical professionals seen by Bishop is hearsay evidence and, in the circumstances, I place little weight on that. These professionals could have been called to testify at the hearing. Moreover, on some of the dates referred to Bishop worked the 12:00-8:00 p.m. shift, it is entirely within the realm of possibility that he attended these appointments outside working hours.

I agree that Bishop may, in fact, have worked some hours in excess of those he was scheduled to work. He may have remained at the dealership after his hours of work. However, I accept the evidence from Bishop’s managers and other Employer witnesses that they were not aware of his working overtime hours. I have serious doubts as to the amount of overtime he claims to have worked. In light of my conclusions below, I do not propose to make any findings with respect to the actual hours worked by him.

Considering all of the evidence before me, and the parties’ submissions, I am persuaded to uphold the Employer’s appeal with respect to the claim for overtime. Considering the Employer’s evidence as a whole, in light of the surrounding circumstances, it is clear to me that the Employer did not “require” or “directly or indirectly allow” Bishop to work overtime.

First, the Employer required Bishop to work the hours on the schedule. The Employer had a scheduled work week for its employees, including Bishop and other sales staff. Schedules before me supported that. The evidence was that employees worked an 8 hour shift, 5 days a week. Bishop was paid on the basis of those hours. His assertion, that he did not know he was not paid for such overtime hours as he may have worked, is not credible in the circumstances. I accept MacDonald's testimony that Bishop was not a person likely to forget a claim for money he may have had against the Employer, and that he was always asking for money. Taken together with Bishop's characterization of himself as a "paper-person," I am of the view that Bishop, had he, in fact, worked the hours now claimed by him, he would likely have made a claim for those money.

On that note, I find it less than credible that Bishop says he was not aware of his entitlement to overtime pay until the Delegate pointed it out to him. His complaint to the Branch, which was part of the record before me, had a number of components, one of which--in fact, accounting for almost half of his claim against the Employer--was for overtime.

Second, the Employer had a policy in place regarding overtime. This policy, which Bishop knew and understood to be in effect, required that employees have overtime approved by the department manager. Bishop clearly did not comply with this policy.

Third, based on the evidence, I find that Bishop did not inform his Employer of his overtime hours. He did not report his overtime hours to management. A memorandum, signed by Bishop on or about November 4, 1998, required Bishop to record hours on a daily basis and submit those to the sales manager on a monthly basis. It is clear on the evidence that he did not do that. His evidence was that he did provide it to management or payroll. In all of the circumstances, I do not accept this testimony. The Employer's witnesses were consistent in that regard: Bishop did not hand in records of hours worked.

On balance, I find that the Employer did not require, or directly or indirectly, allow Bishop to work overtime. I agree that the Employer has the responsibility to control when an employee works and to record those hours. However, in this case, the Employer specifically required the Employee to follow a certain process and obtain approval for his overtime hours. The employee did not follow that process. Moreover, the Employer was not aware that he worked any overtime hours. I, therefore, set aside the award of overtime.

B. Calculation Issues

The Employer's concerns with respect to the Delegate's calculations are set out in a letter, dated May 4, 2001, to the Tribunal.

As I understand the Employer's concern, it is that the Delegate in her calculation sheet concluded that Bishop should have been paid \$41,908.70 (\$40,296.91 plus 4% vacation pay, \$1,611.88), *including minimum wages and overtime*. The Employer was credited as having paid \$37,628.71 for the period September 1, 1997 to January 31, 1999. The difference between these two amounts is \$4,280.08. The Employer, therefore, questions the award of \$4,299.43 in minimum

wage adjustments which, it says, has already been taken into account. The Employer also questions an amount of \$967.99 which it characterizes as a further “minimum wage adjustment.”

Bishop does not see the relevance of the Employer’s concern with respect to the Delegate’s calculations. In short, he suggests that the Employer’s concern is irrelevant. He stated that both he and the Employer had input into the calculations. That may well be the case.

Dealing first with the amount of \$967.99, it does not appear that this was on account of minimum wages, as suggested by the Employer, rather it was account of “charge-backs.” The Employer has not addressed these “charge-backs” in any substantive manner, and I am not persuaded that the Delegate erred in this respect.

However, turning to the award of \$4,299.43, for “claw-back” of commissions, I am of the view that the Delegate erred. These “claw-backs” were deductions made by the Employer in respect of pay periods where the Employee did not make minimum wages. In my view, whatever amounts are owed are provided for in the calculation sheet. Simply put, I do not understand how the Delegate arrived at the conclusion that the Employer owed another \$4,299.43, when she found that the difference between what Bishop was owed and what he was paid was \$4,280.08. It would appear to me that the Delegate erred in adding an amount on account of “claw-backs” to her award. Even accepting the Delegate’s approach--and I do not--that it is contrary to the *Act* to allow the Employer to “claw-back,” on its face it would appear that this amount has already been accounted for in the calculation sheet which sets out what the Employee should have earned and what the Employer did, in fact, pay.

I disagree with the Delegate’s approach which, in effect, means that a commission sales person is entitled to “commission plus.” In doing that she is, in effect, amending the employment agreement between the Employer and the Employee.

The Adjudicator in *Athlone Travel (Oak Bay) Ltd.*, BCEST #D210/00, reviewed the decision of the Tribunal in *Wen-Di Interiors Ltd.*, BCEST #D481/99 and cited the following excerpt (in part):

“... While I agree that employees must be *paid* at least minimum wage for all hours worked in a pay period, it does not necessarily follow that monies so earned can be characterized as an ‘earned amount’--such monies may or may not be, depending on the nature of the parties’ negotiated wage bargain.

....

However, as long as the employee is paid at least minimum wage in each pay period, monies so paid over and above actual commission earnings may be treated as an “advance” against future commission earnings and, therefore, should not be treated as an ‘earned amount’.”

The Adjudicator in *Athlone Travel* concluded:

“Where these two decisions [*Wen-Di* and *Steve Marshall Ford*] conflict I prefer the reasoning in *Re: Wen-Di Interiors Ltd.* In my view, the adjudicator in *Steve Marshall* did not distinguish the right to be ‘paid’ minimum wage and the requirement to be paid all of the ‘earnings’ in that pay period. Simply put the law requires a person to be paid minimum wage whether they have earned it or not. Where no commissions are made in a pay period the minimum wage payment cannot be considered ‘earnings.’ The stated purposes of the *Act* are, *inter alia*, to ensure that employee receive at least basic standards of compensation but also to promote the fair treatment of employees and employers. It would be unfair to employers to expect them to pay additional wages to a commission salesperson in a poor pay period when the very next pay period earnings may exceed the minimum by a wide margin.

In this case I find that there was an express employment agreement that ensured that the employee was paid at least minimum wage in every pay period whether she earned it or not. It was a term of the employment contract that such payments were ‘advances’ against future commission earnings. In my opinion, such an arrangement does not offend the provisions of Sections 16 and 17 of the *Act*.”

I agree with the principles set out in *Athlone Travel* and find that the delegate erred in law in adding the “claw-backs.”

In any event, the Employer’s payroll records, and Bishop’s pay statements, indicate that he was, in fact, paid \$45,878.64 (plus allowances) in respect of the relevant period. It appears that this amount exceeds the amount the Delegate calculated Bishop was entitled to. I appreciate that part of this amount was paid by the Employer to the Branch after the Determination was issued.

In the circumstances, I refer the calculation of the amount owed to Bishop, if any, back to the Director on an expeditious basis, and in accordance with the above. I cancel and set aside the award of \$4,299.43 for “claw-backs.”

In short, I am of the view that the Employer has discharged the burden on the appeal and it is upheld in part.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated September 8, 2000, be confirmed except:

1. the appeal with respect to the claim for overtime wages is upheld and that part of the Determination is cancelled. The award of \$4,280.08 is cancelled and set aside.

2. the appeal with respect to the claim for minimum wage adjustment is upheld and that part of the Determination is cancelled. The award of \$4,299.43 is cancelled and set aside.
3. I refer the calculation of the amount owed to Bishop, if any, including interest, back to the Director in accordance with this Decision.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal