

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-

Wen-Di Interiors Ltd. and Wen-Di Interiors (B.C.) Ltd.

(“Wen-Di” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	1999/339
DATES OF HEARING:	September 14th & 27th, 1999
DATE OF DECISION:	November 19th, 1999

DECISION

APPEARANCES

Paul M. Pulver & Andrea Karr	for Wen-Di Interiors Ltd. and Wen-Di Interiors (B.C.) Ltd.
Melany Bosch	on her own behalf
Adele Adamic & James R. Dunne	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Wen-Di Interiors Ltd. and Wen-Di Interiors (B.C.) Ltd. (“Wen-Di” or the “employer”) 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 May 6th, 1999 under file number ER 086064 (the “Determination”).

The Director’s delegate determined that Wen-Di Interiors Ltd. and Wen-Di Interiors (B.C.) Ltd. were “associated corporations” as defined by section 95 of the *Act*. This aspect of the Determination is not in issue before me. The delegate also determined that Wen-Di owed its former employee, Melany Bosch (“Bosch”), the sum of \$10,451.36 on account of unpaid wages and unauthorized payroll deductions. By way of the Determination, the Director also levied a \$0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*. The penalty was issued based on the employer’s contravention of sections 16, 17, 21, 40, 45 and 58 of the *Act*.

The appeal was heard at the Tribunal’s offices in Vancouver on September 14th and 27th, 1999. The employer called two witnesses, Diana Joseph and Cheryl Murray--Ms. Joseph is the president and a director of both employer companies; Ms. Murray is a vice-president of Wen-Di Interiors Ltd. Ms. Bosch testified on her own behalf and did not call any other witnesses. The Director appeared at the hearing and made submissions but did not call any evidence.

I should note that this appeal was heard concurrently with another appeal also filed by Wen-Di of a determination, similarly issued on May 6th, 1999 under file number ER086064, pursuant to which Ms. Bosch’s former colleague, Lonni Hamill, was awarded \$5,628.46 on account of unpaid wages. Some of the issues raised on this appeal--particularly in regard to the employer’s commission structure and the complainant’s overtime claim--are also raised by the “Hamill” appeal. My Reasons for Decision in the “Hamill” appeal are being issued concurrently with these Reasons and address the employer’s commission system in detail; for that reason, I do not propose to repeat, in these reasons, what I have stated in the Hamill appeal on that particular matter.

ISSUES TO BE DECIDED

At the outset of the appeal hearing Wen-Di's legal counsel submitted that the delegate erred:

- in determining that Bosch's regular working hours consisted of 7.5 hours worked over 5 days each week (*i.e.*, a 37.5 hour work week);
- in finding that the employer's commission pay structure did not comply with the *Act*;
- in awarding Bosch overtime pay based on her having worked at least 1 Saturday every month;
- in determining that the employer made unauthorized deductions from Bosch's pay.

FACTS AND ANALYSIS

The essential facts are set out in the Hamill decision (B.C.E.S.T. Decision No. 481/99) and need not be repeated here in any great detail. Wen-Di offers interior design services and also sells window coverings from four retail locations--three in Alberta and one in Kelowna, B.C. Ms. Bosch formerly worked at Wen-Di's Port Coquitlam store which opened for business some 5 years ago but was closed down in May 1999 due to poor performance.

Bosch's employment commenced on March 7th, 1997 and ended on September 28th, 1998. Bosch was employed by Wen-Di as a commissioned sales representative (her official title was that of "decorator"). At the outset of her employment, she was paid solely on the basis of her earned commissions; in November 1997 Wen-Di introduced a system whereby its commissioned sales staff received a guaranteed minimum monthly wage of \$1,000 irrespective of actual commission earnings in the month.

During her tenure with Wen-Di, there were about 4 to 5 employees at the Port Coquitlam store all of whom were supervised by the store manager, Carla Loewen (Ms. Loewen did not testify before me).

Bosch's Hours of Work and Overtime Claim

The delegate found that Bosch worked 37.5 hours each week, plus additional Saturday overtime hours (one 5-hour shift each month)--Wen-Di does not accept these findings.

Bosch's "Commission Sales Contract Agreement" does not specify her working hours but she was obliged under this agreement to "provide her services as a decorator exclusively to [Wen-Di] and

to no other person or business during the term of this Agreement”. Ms. Joseph testified that part-time employees typically devoted from 10 to 20 hours per week to their duties; full-time employees, on the other hand, worked 37 to 40 hours each week. The evidence before me suggests that Bosch was hired as a full-time, rather than a part-time, employee.

Wen-Di’s sales staff were not expected to be in the store, nor were they, from 9 to 5 each weekday; obviously, the nature of the work entails some evening and weekend work as not all customers (most of whom were residential, not commercial, customers) are available for sales calls or installations during regular weekday daytime hours. Ms. Bosch was adamant that she never worked less than 35 hours each week and often worked considerably more hours.

Ms. Joseph characterized Bosch as a pleasant employee but an inconsistent performer. Her sales performance was poor relative to other decorators. Both Ms. Joseph and Ms. Murray believe that Bosch could not have been working full-time hours. However, neither Ms. Joseph nor Ms. Murray was in a position to testify, from her own personal knowledge, about Bosch’s actual working hours. Ms. Joseph stated that the store manager, Ms. Loewen, told her that she (Loewen) felt that Bosch was only working 20 to 25 hours each week but this evidence is of limited probative value in that it is hearsay evidence. Ms. Loewen did not testify before me and, thus, Bosch’s evidence as to her work schedule is uncontradicted. The employer did not maintain a record of daily hours worked for its sales staff.

Ms. Joseph confirmed that the Port Coquitlam store was open on Saturdays from 11 A.M. to 4 P.M. and that employees were expected to “take their turn” working Saturdays although employees were supposed to take the following Monday off after having worked a Saturday shift. Bosch testified that she worked at least one (and sometimes more than one) Saturday 5-hour shift (11 A.M. to 4 P.M.) each month and that she was never instructed to, nor did she, take the following Monday off after working on a Saturday. Had the employer wished, it could have instructed Bosch not to report for work on the Monday following a Saturday shift and if she failed to honour such a direction, she could have been sent home, or I suppose, even disciplined for having refused to follow a lawful direction to leave the workplace. However, there is absolutely no evidence (recall that the store manager was not called as a witness) before me that Bosch was instructed not to report on Mondays after having worked a Saturday or was instructed to go home when she did so report.

In light of the foregoing, I cannot conclude that the delegate erred with respect to his finding regarding Bosch’s regular hours of work or overtime claim.

The Employer’s Commission Structure

As previously noted, I have addressed this issue, at some length, in the Hamill decision. For the reasons given in the Hamill appeal, I am of the view that the Determination must be varied as it relates to Bosch’s unpaid “minimum wage” claim.

Unauthorized Payroll Deductions

The delegate awarded Bosch an additional sum of \$1,577.50 as unauthorized payroll deductions (see section 21 of the *Act*). The uncontradicted evidence before me is that three separate advances were made to Bosch--two \$500 advances (March 31 and May 31st, 1997) and a \$2,000 advance on June 30th, 1997. This latter advance consisted of a direct rent payment to Bosch's landlord (\$1,650) and a further \$350 deposited directly to her account. Ms. Bosch testified that all advances were repaid in full from future commission earnings whereas Wen-Di's position is that these advances were not, in fact, fully repaid.

In any event, the delegate dealt with the matter of "advances" in a similar fashion in both the Bosch and Hamill determinations. I have fully addressed the matter of "unauthorized deductions" in the Hamill appeal and, for the reasons given in that latter decision, the "unauthorized deductions" award cannot stand.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied (including any necessary adjustments regarding statutory holiday pay, vacation pay and interest) in accordance with the findings and directions set out in both this decision and my decision in B.C.E.S.T. Decision No. 480/99 (*Wen-Di and Hamill*).

Since Wen-Di, at the very least, contravened section 16 of the *Act*, the \$0 monetary penalty is confirmed.

I will leave it to Wen-Di's counsel and the delegate to determine between themselves Bosch's precise monetary entitlement. In the event that they are unable to reach such an agreement, I will retain jurisdiction to determine Bosch's entitlement.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal