

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 -

Kimberley M. Getz

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: James E. Wolfgang

FILE NO.: 97/534

DATE OF HEARING: October 24th, 1997

DATE OF DECISION: November 21st, 1997

DECISION

APPEARANCES

Kimberley Getz	Kimberley’s of Nanaimo Ladies Fashions Inc.
Karren E. Vachon	On her own behalf
Ian MacNeill	On behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Kimberley’s of Nanaimo Ladies Fashions Inc. (“Kimberley’s”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards July 11, 1997.

The Determination found Kimberley’s contravened Sections 44, 45, 46, 58(3), 18(1) of the *Employment Standards Act* and ordered them to pay compensation to Karren E Vachon (“Vachon”) in the amount of \$1,448.97.

Kimberley’s filed an appeal dated July 15, 1997 against the Director’s Determination.

A hearing was held on October 24, 1997 at which time I heard evidence from all parties.

ISSUE TO BE DECIDED

Is Vachon entitled to compensation for statutory holidays?

FACTS AND ARGUMENT

Vachon was employed by Kimberley’s from March 16, 1994 to February 1, 1997. She was laid off when the business was sold.

Vachon claims she was working part time with another employee when she was approached by Kimberley’s to accept the position of manager to allow the owner to take time off to raise her family.

Kimberley's argue that Vachon was manager for 2½ years with full management authority. Vachon had accepted the position with the specific and detailed job description that included:

- supervision and direction of staff
- training and evaluating staff
- hiring and interviewing potential employees
- all scheduling of hours
- all daily business paperwork and bank preparation
- organizing and delegating of all daily routines and providing customer services

Kimberley's maintain, with the exception of duties in customer service, no other employee had the above responsibilities.

Further, based on those responsibilities, Vachon agreed to the following wages and benefits.

- wage and manager bonus
- clothing allowance of \$500.00 and 30% off all clothing purchased at Kimberley's
- buying trips with full pay, expenses and the opportunity to purchase clothing at cost.

Kimberley's claim no other employees received such benefits and that Vachon was given no less than 35 hours per week, and that if hours had to be cut the two other employees would have their hours reduced.

The Determination found Vachon received regular pay only for work on a statutory holiday and received no pay if she did not work.

Kimberley's feel they have no obligation to pay Vachon for statutory holidays as managers are excluded from such payment as per Section 36 of the *Employment Standards Regulation*. Vachon received payment for Christmas Day and New Year's Day as a goodwill gesture.

Kimberley's understand that a manager is defined as one whose primary duty consists of supervising and directing other employees, which they believe was the case with Vachon. However, due to heavy losses in the fiscal years of 1995 and 1996, it was crucial to keep staff at a minimum. In honoring their agreement not to reduce Vachon's hours, the situation resulted in her working more often on her own. It would have been possible to continue to have more staff under Vachon if she, too, had worked fewer hours. However, although she supervised staff less often, her responsibilities had not changed, and if business had improved she would have, once again, had more staff to manage.

Kimberley's argue that during the 2½ Vachon managed the store she did not question her wages, benefits or responsibilities. Having been a manager for over 20 years she was well aware of the labour law concerning statutory holiday pay yet agreed to her exemption before accepting the position. It was not until after Vachon's layoff that she presented a grievance.

Vachon was hired for the position of manager because of her experience in managing, and while her duties changed over the years she continued to receive the benefits of a manager in a small business.

Vachon contends she was manager for only 1½ years not the 2½ years claimed by Kimberley's. Further there was no formal job description as the duties were discussed over dinner.

Vachon claims she only supervised employees on Saturdays, during store sales, and the Christmas season. She hired one experienced salesperson with Kimberley's consent, who required no training. Discipline or termination was handled by Kimberley's

Vachon claims she had been doing the scheduling before she became manager. It required little change as the employees worked a fairly standard pattern of hours. Daily reports were completed by the employee on duty and were merely checked for accuracy. Banking was done by the owner or herself once a week.

Each employee was responsible for customer alterations, special and repeat orders, and pricing merchandise as these were daily routines.

Vachon states the clothing allowance was a one time offer of \$400.00 rather than \$500.00. The 30% discount for purchases made at the store was made available to all employees. Buying trips were organized by Kimberley's, and took ten to twelve hours with no overtime. Whoever went with the owner was able to make purchases at cost.

Vachon agrees the 35 hours per week were as a result of her position as manager and other employees hours were cut to maintain her hours.

She was paid for statutory holidays as manager at her previous company because it was unionized. As Kimberley's was non-union she believed she was not entitled to this benefit. She found she was eligible after her layoff.

ANALYSIS

There is no dispute both parties understood the position Vachon held was that of manager and while there was no formal contract a verbal agreement existed covering the responsibilities and benefits that came with the position. Other employees may have enjoyed some of these benefits

but certain special conditions were negotiated for the position held by Vachon. There was no doubt the employer entered the agreement in good faith and upheld all the terms that were negotiated. To maintain Vachon at her promised 35 hours did, in fact, result in a reduction in hours for the other employees to the point where she became, at most times, the sole employee.

One seeks in this case the definition of what constitutes a “manager” under the *Act*. The *Act* provides us with a clear definition. A primary duty of a manager is to supervise employees. This has been supported in several cases before the Tribunal dealing specifically with this subject.

Parties cannot enter into agreements which provide less than the *Act* requires, even if made in good faith. The provisions of the *Act* are the minimum and cannot be circumvented by the argument that extra pay, hours, or benefits were paid. For, while it was evident Vachon’s benefits continued, here duties were not those of a manager as defined under the *Act*. The title and/or extra responsibilities do not exclude a person from being an employee. Both parties admit Vachon worked alone 80% of the time, thereby not meeting the key element of a manager’s duties, that of supervising or managing other employees.

I believe there was no deliberate attempt by Kimberley’s to avoid their responsibility. I appreciate the term “manager” may be perceived in a different light by a small business, however, Vachon did not meet the exemption of a manager as defined in the *Act*. I find no reason to change the Determination.

ORDER

I order, under Section 115 of the *Act*, the Determination dated July 11, 1997 against Kimberley’s of Nanaimo Ladies Fashions Inc. be confirmed.

James E. Wolfgang
Adjudicator
Employment Standards Tribunal

JW/bls