

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 -

Sanpreet Enterprises Inc. operating as Xanavision
("Sanpreet")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NOs.: 98/661 & 98/662

DATE OF DECISION: December 14, 1998

DECISION

OVERVIEW

This is an appeal by Sanpreet Enterprises Inc. operating as Xanavision (“Sanpreet”), under Section 112 of the *Employment Standards Act* (the “Act”), against two Determinations which were issued by a delegate of the Director of Employment Standards (the “Director”) on September 22, 1998. One of the Determinations requires Sanpreet to pay \$798.49 (including interest) to Ryson Hillary on account of unpaid wages, overtime wages and statutory holiday pay. The second Determination requires Sanpreet to pay \$663.82 (including interest) to Carey Taylor on account of unpaid wages and statutory holiday pay.

Sanpreet makes its appeal for several reasons, namely:

- the employees agreed to receive Video Movies free-of-charge in lieu of statutory holiday pay;
- the Director erred in calculating the employees’ entitlement to statutory holiday pay;
- 4% vacation pay was paid as part of each paycheque issued by Sanpreet; and
- Carey Taylor agreed to be trained voluntarily on their own time before being employed by Sanpreet.

The appeal proceeded by way of written submissions.

FACTS

Ryson Hillary was employed as a video store clerk from November 16, 1996 to December 24, 1997. Carey Taylor was employed in the same capacity from March 18, 1997 to November 14, 1997. Both employees were paid \$7.00/hour as their regular hourly wage.

During the investigation of the employees’ complaints by the Director, it was established that “... the information provided by the employer and (Hillary) as to the hours worked are in agreement.” With respect to Carey Taylor, the Director found that the hours of work recorded and paid by Sanpreet were not in dispute, ...” except for the hours she spent in training (20 hours between March 18 and 27, 1997).

The Director relied on the following analysis to determine that Ryson Hillary’s entitlements under the *Act* amounted to \$798.49 (including interest):

On the issue of statutory holidays, section 20 of the *Act* stipulates payment in Canadian currency, by cheque or by deposit to a financial institution. It does not permit payment in kind.

Section 32 requires breaks to be taken such that no more than 5 hours are worked without a break.

Using the employer's records, and the employee's pay stubs for 31 December, 1997 (sic) and 26 December 1997 (which show the gross amounts paid in those years to date), a calculation has been made of the amount owing to the complainant.

Carey Taylor's entitlement was determined on the following basis:

The *Employment Standards Act* at section 1 defines "employee" as follows:

"employee" includes

...

- (c) a person being trained by an employer for the employer's business,

...

The complainant should therefore be paid for all hours spent training. The employer has no records of the time spent training, although it is admitted that some unspecified time was spent training the complainant. The complainant's records are very specific. I have no alternative but to accept the records provided by the complainant with respect to training hours.

On the issue of statutory holidays, section 20 of the *Act* stipulates payment in Canadian currency, by cheque or by deposit to a financial institution. It does not permit payment in kind. The information provided by the employer and employee as to the hours worked (excluding training) are in agreement. The employer's list of cheques paid show the net amount paid, and is inadequate to calculate whether the complainant was properly paid.

Using the employer's records of hours worked, the complainant's record of hours spent training, and the employee's pay stubs, a calculation has been made of the amount owing to the complainant. Adjustments have been made for applicable statutory holidays, minimum daily pay, additional pay when the employee is not given 32 hours free from work in a week (section 36) and vacation pay....

Sanpreet's appeal does not challenge or dispute the Determinations with respect to the employees' entitlements under Section 40 (Overtime Wages), Section 34 (Minimum Daily Hours) and Section 36 (Hours Free From Work).

The central focus of Sanpreet's appeal is that the Determinations are wrong:

"...because it was agreed that the staff would receive movie rentals (merchandise) of no charge, hence statutory pay and benefits would be applied towards movie rentals. This option was done at the request of the

staff, and they had the choice of getting all statutory pay and benefits or unlimited free movies.”

Sanpreet submits written statements by Eric Tolman (manager) and two employees (Katie Pomper, and Joanne Copeland) in support of the view that employees are given the option of being paid statutory holiday pay or receiving video movies free-of-charge and that they can change their option at anytime.

Further, Sanpreet submits, the Director erred in calculating the employees’ entitlement to statutory holiday pay under Part 4 of the *Act*.

ANALYSIS

Statutory Holiday Pay

I agree with the view expressed in the Determination that Section 20 of the *Act* requires that all wages be paid in Canadian Currency and it does not permit payments in kind.

Also, I agree that Section 4 of the *Act* prohibits an employer and an employee from agreeing to waive the requirements of the *Act*. For those reasons, I find that Sanpreet cannot rely on the verbal agreements it entered into with its employees to give them “unlimited free movies” in lieu of paying statutory holiday pay.

Section 46 of the *Act* contains the following requirements when an employee is required to work on a statutory holiday:

46. (1) An employee who works on a statutory holiday must be paid for that day
 - (a) 1 1/2 times the employee's regular wage for the time worked up to 11 hours, and
 - (b) double the employee's regular wage for any time worked over 11 hours.
- (2) In addition, the employer must give the employee a working day off with pay according to section 45.
- (3) The employee may choose to have the pay for the day off credited to the employee's time bank, if one has been established.
- (4) The employer must schedule the day off with pay
 - (a) before the employee's annual vacation,
 - (b) before the date the employment terminates, or
 - (c) if the pay for the day off is credited to the employee's time bank, within 6 months after the date of the statutory holiday, whichever is earliest.

Additionally, Section 24 of the *Employment Standards Regulation* (BC Reg. 396/95) contains the following explanation of how to calculate statutory holiday pay:

24. For the purposes of section 45 (b) of the Act, statutory holiday pay is calculated as follows:
- a) for an employee who does not have a regular schedule of hours and who has worked at least 15 of the last 30 days before a statutory holiday, by dividing the employee's total wages, excluding overtime wages, for the 30 day period by the number of days worked;
 - b) for an employee who has worked less than 15 of the last 30 days before a statutory holiday, by dividing the employee's total wages, excluding overtime wages, for the 30 day period by 15.

In reviewing the calculation schedules attached to the Determinations, I find that the Director made several errors in calculating the employees' entitlements according to Section 24 of the *Regulation* as follows:

Ryson Hillary

Christmas Day 1996

Statutory Holiday Pay

71 hours ÷ 15 (per sec 24(b))	=	4.73 hours/day
4.73 X \$7.00/hour	=	\$33.13
Amount Shown		\$29.82
	Difference	\$3.31

Minimum Daily Hours

Section 34(2)(a) of the *Act* entitles an employee to be paid for a minimum of 4 hours at the regular wage if the employee starts work. Since \$29.86 wages is owed for work on this day, Section 34 does not apply and the employee is not entitled to receive the \$7.00 amount shown in the Determination.

Net Difference (\$3.69)

New Years Day, 1997

98 hours ÷ 17 days	=	5.76 hours/day	
5.76 X \$7.00/hour	=	\$40.32	
Amount Shown		\$56.00	
	Difference		(\$15.68)

Good Friday, 1997

114 hours ÷ 18 work days	=	6.33 hours/day	
6.33 X \$7.00/hour	=	\$44.33	
Amount Shown		\$56.00	
	Difference		(\$11.67)

Victoria Day, 1997

136 hours ÷ 22 work days	=	6.18 hours/day	
6.18 X \$7.00/hour	=	\$43.26	
Amount Shown		\$56.00	
	Difference		(\$12.79)

Canada Day, 1997

140 hours ÷ 22 work days	=	6.36 hours/day	
6.36 X \$7.00/hour	=	\$44.52	
Amount Shown		\$56.00	
	Difference		(\$11.98)

British Columbia Day, 1997

143 hours ÷ 21 work days	=	6.81 hours/day	
6.81 X \$7.00/hour	=	\$47.67	
Amount Shown		\$56.00	
	Difference		(\$8.33)

Labour Day, 1997

145 hours ÷ 23 work days	=	6.30 hours/day	
6.30 X \$7.00/hour	=	\$44.10	
Amount Shown		\$56.00	
	Difference		(\$11.90)

Thanksgiving Day, 1997

142 hours ÷ 22 work days	=	6.45 hours/day	
6.45 X \$7.00/hour	=	\$45.15	
Amount Shown		<u>\$56.00</u>	
	Difference		(\$10.85)

Remembrance Day, 1997

137.5 hours ÷ 23 work days	=	5.98 hours/day	
5.98 X \$7.00/hour	=	\$41.86	
Amount Shown		<u>\$56.00</u>	
	Difference		(\$14.14)

Total Difference (\$101.03)

Total Wages Earned:	\$ 12,567.29
+ 4% (\$12,567.29)	<u>502.69</u>
Sub Total	\$ 13,069.98
- Wages Paid	<u>\$ 12,412.40</u>
Total Wages Owing:	<u><u>\$ 657.58</u></u>

(Note: Interest must be added to this amount per section 88 of the *Act*.)

Carey Taylor

Victoria Day, 1997

135 hours ÷ 23 work days	=	5.87 hours/day	
5.87 X \$7.00/hour	=	\$41.09	
Amount Shown		<u>\$56.00</u>	
	Difference		(\$14.91)

Canada Day, 1997

118 hours ÷ 20 work days	=	5.9 hours/day	
5.9 X \$7.00/hour	=	\$41.30	
Amount Shown		<u>\$56.00</u>	
	Difference		(\$14.70)

British Columbia Day, 1997

120 hours ÷ 19 work days	=	6.32 hours/day	
6.32 X \$7.00/hour	=	\$44.24	
Amount Shown		<u>\$56.00</u>	
	Difference		(\$11.76)

Labour Day, 1997

134 hours ÷ 21 work days	=	6.38 hours/day	
6.38 X \$7.00/hour	=	\$44.66	
Amount Shown		\$56.00	
	Difference		(\$11.34)

Thanksgiving Day, 1997

138 hours ÷ 23 work days	=	6 hours/day	
6 X \$7.00/hour	=	\$42.00	
Amount Shown		\$56.00	
	Difference		(\$14.00)

Remembrance Day, 1997

69.5 hours ÷ 15(per Sec 24(b))	=	4.6 hours/day	
4.6 X \$7.00/hour	=	\$32.20	
Amount Shown		\$36.12	
	Difference		(\$3.92)
	Total Difference		\$70.36

Total Wages Earned: \$7,246.12 - \$70.36	\$ 7,175.76
+ 4% (\$7,175.76)	\$ 287.03
Sub Total	\$ 7,462.79
- Wages Paid	\$ 6,905.08
Total Wages Owing:	<u>\$ 557.71</u>

(Note: Interest must be added to this amount per section 88 of the *Act*.)

ORDER

I order, under Section 115 of the *Act*, that the Determination be varied, for the reasons given above, to show Ryson Hillary's wage entitlement as \$657.58 and Carey Taylor's wage entitlement as \$557.71 together with interest pursuant to Section 88 of the *Act*.

Geoffrey Crampton
Chair
Employment Standards Tribunal