

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 -

Vancouver East Automotive Clearance Centre Ltd.
(“Vancouver East Automotive”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Hans Suhr

FILE NO.: 97/773

DATE OF DECISION: January 5, 1998

DECISION

OVERVIEW

This is an appeal by Vancouver East Automotive Clearance Centre Ltd., (“Vancouver East Automotive”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated October 1, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). The Determination deals with Section 58 of the *Act* (Annual Vacation Pay) and Section 45 of the *Act*. (Statutory Holiday Pay) arising from a complaint by a former employee, Gui Bin (Benny) Yao (“Yao”), in which he alleges that neither vacation pay nor statutory holiday pay were ever paid.

This decision follows my review and analysis of the Determination and of the parties’ written submissions.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Yao is entitled to statutory holiday pay and annual vacation pay pursuant to Sections 45 and 58 of the *Act*.

FACTS

The following facts are not in dispute:

- Yao was employed as a car salesman at Vancouver East Automotive from February 27 to September 26, 1996.
- Yao worked a regular schedule of hours each week.
- Based on the payroll records supplied Yao’s total wages were \$9590.51

The Director investigated the complaint of Yao and issued a Determination in the amount of \$687.16

ANALYSIS

The onus is on the appellant, in this case Vancouver East Automotive, to provide evidence that would establish that the Director erred in the Determination. Vancouver East Automotive has failed to provide any evidence to challenge the Determination.

Sections 44 and 45 of the *Act* specify an employee’s entitlement to and pay for statutory holidays:

Section 44, Entitlement to statutory holiday

44. After 30 calendar days of employment, an employer must either

- (a) give an employee a day off with pay on each statutory holiday, or*
- (b) comply with section 46.*

Section 45, Statutory holiday pay

45. An employee who is given a day off on a statutory holiday or instead of a statutory holiday must be paid the following amount for the day off:

- (a) if the employee has a regular schedule of hours and the employee has worked or earned wages for at least 15 of the last 30 days before the statutory holiday, the same amount as if the employee had worked regular hours on the day off;*
- (b) in any other case, an amount calculated in accordance with the regulations.*

There is no dispute that statutory holiday pay is owing to Yao as Vancouver East Automotive acknowledges in their appeal letter dated October 21, 1997 that “However there is statutory holidays pay for this sales-person which has not been paid yet”.

Section 28 of the *Act* requires an employer to keep certain records. The relevant portions of Section 28 are:

28. (1) For each employee, an employer must keep records of the following information;

.....

(c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;.....

(h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;

(i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;

The payroll records provided do not indicate that vacation pay was paid to Yao.

Vancouver East Automotive contends that Yao was clearly aware that the commission rate included vacation pay.

Yao contends that he was never informed nor did he understand that his commission rate included the vacation pay.

In the absence of any payroll records which would prove that vacation pay was paid, I conclude that Vancouver East Automotive owes vacation pay to Yao.

With respect to the amount owing to Yao for the vacation pay and the statutory holiday pay, I am satisfied that the Director's calculations as set forth in the Determination are proper and correct.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated October 1, 1997 be confirmed in the amount of **\$687.16** together with whatever further interest that may have accrued, in accordance with Section 88 of the *Act*, since the date of issue.

Hans Suhr
Adjudicator
Employment Standards Tribunal