Employment Standards TRIBUNAL

An appeal

- by -

Michael J. Gorenstein operating as Moule
(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.: 2001/552

DATE OF HEARING: October 5, 2001

DATE OF DECISION: November 2, 2001

DECISION

APPEARANCES:

Mr. Michael Gorenstein	on behalf of the Employer
Ms. Patricia Ridley	on behalf of herself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on July 5, 2001. The Determination concluded that a former employee, Ridley, was owed $4,090.84 by the Employer on account of compensation for length of service and wages for work on Saturdays and Sundays. The Delegate dismissed a claim for commission earnings and for regular wages in November 2000.

The background facts may be gleaned from the Determination. The Employer operates a clothing manufacturing business for whole sale and retail sales out of Vancouver, British Columbia. Ridley was employed as a sales representative from July 1999 to November 2000 and was paid a monthly salary of $2,500. She worked out of Vancouver and conducted trade shows outside B.C., including in the United States. In November 2000, Ridley was terminated by the Employer.

The Delegate found that Ridley worked many weekends. He was of the view that the agreement between Ridley and the Employer was that her salary was compensation for work during the week, *i.e.*, Monday-Friday, and that she could take days off with pay to compensate for weekend work, *i.e.*, Saturday-Sunday. The Delegate concluded that she was not entitled to overtime wages because she was a "commercial traveller" (Section 34(1)(l) of the *Employment Standards Regulation*). The Delegate reviewed records supplied by the Employer and Ridley and largely preferred Ridley's records. Based on that, he determined that Ridley had worked 49 days and only taken 18 days off with pay. In the result, the Employer was liable for the balance, 31 days @ $115.38, plus statutory vacation pay.

ISSUES

The Employer appeals the determination and takes issue with the award on account of wages awarded for Saturday and Sunday work and says that the Delegate erred in at least three respects: (1) Ridley's salary included compensation for the weekend work and there was no agreement that she be given days of with pay; (2) the calculations are incorrect; and (3) he was deprived of an opportunity to respond because a scheduled fact-finding meeting was cancelled.

FACTS AND ANALYSIS

As the appellant, it has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am generally not persuaded that the Delegate erred. However, based on my review of the evidence, I am prepared to vary the amount awarded in the Determination.

A hearing was held at the Tribunal's offices on October 5, 2001. Gorenstein and Ridley attended and provided evidence under oath or affirmation.

Gorenstein says that Ridley knew from the outset what the job entailed. Principally, her job entailed attending trade shows in Canada and the U.S. to sell product. To that end, weekend work was a requirement. This was an independent position and Ridley was responsible for her own schedule and made her own travel arrangements. Except for a few meetings with him, she was "on her own." As well, he says that Ridley's salary was "to do the job, regardless of time." On the other hand, Gorenstein also candidly admits that he "will not say that he never discussed that Ridley would be given days off when she worked weekends." He says, as well, they did not discuss that "every weekend worked would provide time off." When "possible [time off] was OK--but [there was] no agreement."

Ridley testifies that there was an agreement from the time she started her employment. She does not dispute Gorenstein's assertions that she generally operated fairly independently in her job and that weekend work was anticipated and contemplated. She says, however, that she agreed to a "low salary" because she could take time off in lieu of that weekend work "when appropriate." She says that she would not have agreed to work for the Employer otherwise. The problem, from her standpoint, was in actually getting the time off. Her testimony is that she worked weeks without break. In January 2000, for example, she worked three weeks straight. Ridley explains that on many occasions she would fly all night and go straight to the office or the trade show. I accept that she was, by all accounts, a hard-working and dedicated employee.

In the circumstances, having considered the evidence and submissions, I am of the view that there was an agreement that Ridley be given time off in lieu of weekend work. As such, I am not persuaded on the balance of probabilities that the Delegate erred in his determination.

That does not end the matter. I now turn to the question of days worked and days off with pay.

I deal first with days worked. Gorenstein does not take issue with the daily rate of $115.38 found by the Delegate. The Employer's position on the facts is not entirely clear to me. At the hearing he stated, at one point, that Ridley worked 46 weekend days. In a written summary, also presented at the hearing, he says that she worked 48 days. Gorenstein says that, based on his view of Ridley's records, she worked a total of 47 weekend days. As noted above, the Delegate found 49 such days worked. Those days were set out in a schedule attached to the Determination. At the hearing, Gorenstein listed the days he agreed to as worked based on her records and the Delegate's Schedule "C." While Gorenstein also takes issue with other days--which I propose to deal with below, the only two days he appeared not to agree to (on the

Delegate's Schedule "C") were August 28 and September 4, 1999. On those two days, Ridley's calendar, on which she recorded her work on daily basis, indicates that she was travelling. Gorenstein's evidence is that the travel on these days involved relatively short trips to Las Vegas. Ridley, on the other hand says that it would be improper to simply consider the flight time. She points to the time in getting to the airport, waiting there, getting ready for the trade shows (including steaming garments), etc. There was, as well, in my view, no real dispute that this was considered time worked during her employment. In the circumstances, I accept that those days count as days worked. I am not satisfied that the Delegate erred in his determination of weekend days worked.

I now turn to the question of days off. Gorenstein takes issue with the Delegate's findings with respect to the number of "days off" with pay. In a schedule attached to the Determination (Schedule "A"), the Delegate noted that, based on the Employer's records, Ridley had 37 days of with pay. The Employer's records, according to the Determination, consisted of a calendar compiled using travel records, trade show schedules and records from the Employer's alarm system (from December 1999). The Employer's calendar, as noted by the Delegate, included various statutory holidays as days off with pay. The Delegate accepted Ridley's documentation showing that she had 18 days off. He noted that this documentation was compiled while she was working. I generally agree with the Delegate. In my view, the contemporary records provide a better indication of the days actually worked.

I appreciate the Employer's attempt to show when Ridley worked by travel records--numerous itineraries placed before me without much explanation--and records from the Employer security system showing when the alarm was shut off on certain days. The alarm records, the Employer says, indicates when Ridley was "in town" because she--and this is not in dispute--worked in an office behind the retail store. Gorenstein explains that Ridley was the "almost always" the first in the store when she was in town and, therefore, the person most likely to have turned off the alarm system. The store's opening hours were 10:00 a.m. and if a retail staff turned it off, it would have been between 9:15 and 9:45 a.m. Ridley generally, according to the Employer, started her work between 7:30 and 8:00 when she was in town. While Gorenstein testifies that there is a code specific to an employee, he is not able to say whether any of the codes in the document is Ridley's. She testified that she did not have any "set time" that she arrived at work. She agreed that she was often the first person to be at the store but that her arrival time "fluctuated" and was "not consistent." In the circumstances, I am not convinced that the records introduced by the Employer, which has a certain general intuitive appeal, is persuasive in light of the issue before me, namely whether the Delegate erred when he determined that certain *specific* days were worked or not. It is precisely therefore the *Act* requires an employer to keep records. In the circumstances, I prefer Ridley's documentation.

At the hearing, the Employer sought to show that there were additional days, mostly travel days--but also a few other days, generally indicated as "days off" on Ridley's calendar--that should be counted in his favour. He largely based this argument on Ridley's calendar.

I deal first with "travel days." Gorenstein explains that on August 28, 1999, the calendar says "off--flew to Vegas." On January 24, 2000, the calendar states "fly to Dallas." On February 12, 2000, the calendar similarly states "fly to Vegas." On May 10, the calendar notes that Ridley flew in from Toronto and, nevertheless, still went to the office for some time. On the September 1, 2000, the calendar indicates: "day off in Vegas but flew home." Gorenstein mentioned other dates--including March 28 and April 4, 2000--for a total of eight days "travelling."

The Delegate did not include these day in his calculations as days of with pay. Gorenstein acknowledged at the hearing that these travel days was not in "issue" at the time of Ridley's employment. At that time he "didn't consider it time off." As well, I agree with Ridley's point that it would be improper to simply consider the flight time. Fundamentally, Gorenstein's argument ignores the fact that the travel and transit time is intrinsically connected to the work done by Ridley. If he had wanted to her to travel at different times, or take different flights, he could have instructed her in that regard. He did not do that. In the circumstances, I am not prepared to accept these travel days as days off with pay.

Gorenstein also says that there were days, where Ridley's calendar shows that she did not work, and for which he was not given credit by the Delegate. At the hearing, Ridley explained that the notation "day off" (or words to that effect) likely reflected that she considered it time off. On October 19 and 20, 1999, Ridley's calendar states "day off in Dallas" and "day off in Chicago." As well, for March 15, 2000, the calendar states "wkd off" (the Employer was given credit for that day), for March 16 and 17, the notation of "off." At the hearing, Ridley explained that the notation "day off" (or words to that effect) likely reflected that she considered it time off. In the context of the evidence before me, with respect to the March days, in the absence of any explanation to the contrary from Ridley, I accept that she took these days off from work. There is no dispute that Ridley had taken March 9, 10, 13 and 14 off from work (and this was accepted by the Delegate). Having reviewed the calendar, I am prepared to allow the appeal with respect to the October 19 and 20, 1999 and March 16 and 17, 2000. It is not clear to me why these days were not credited to the Employer as days off with pay. I am prepared to give the Employer credit for those four days @ $115.38 with the appropriate adjustment for vacation pay and interest. I refer the calculation of the specific amount back to the Director.

At the hearing, and in submissions to the Tribunal, the Employer also appeared to advance the position that Ridley was a manager under the *Act*. It does not appear that the Employer took this position before the Delegate, *i.e.*, it does not appear that this was an issue at the investigatory stage. In the result, I am not prepared to allow the Employer to raise it here. In any event, even if I am wrong in that regard, I would still dismiss the argument. The basis for the Employer's argument was that Ridley ran her own department and worked independently. This evidence falls far short of the definition of "manager" in the *Employment Standards Regulation* (see Section 1).

As mentioned, the Employer also says that the Delegate erred in his calculation. In my view, the Employer is wrong. There is a simple clerical error, which is of no consequence, in the

Calculation Schedule. The Delegate wrote that days worked are set out in Schedule "A"--they are, in fact, in Schedule "C." The Employer's real dispute is with the merits of the Delegate's findings and conclusions. Other than what is indicated above, I am not satisfied that the Delegate erred.

Gorenstein says that he was deprived of an opportunity to respond because a fact-finding meeting in March 2001 was cancelled. The material facts are not in dispute. The meeting was cancelled because Ridley had car trouble and could not make the meeting in time. After waiting some time Gorenstein left. As noted by the Delegate's submission to the Tribunal, dated August 2, 2001, he wrote to Gorenstein on several occasions after the March date and provided him opportunity to respond to information and documentation brought forward by Ridley. While it is unfortunate that the meeting was not held, I agree with the Delegate that the Employer was afforded ample opportunity to respond to the issues before the Delegate prior to the issuance of the Determination.

In short, other than my conclusions with respect to days off with pay, as set out above, I am not persuaded that the delegate erred in his conclusions.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 15, 2001, be varied as follows: the amount owed by the Employer is reduced by $461.52 (115.35 x 4) plus the appropriate adjustment for vacation pay and interest. I refer the calculation of the specific amount back to the Director.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal