# 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 -

Harrison Doig & Associates
("Doig")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

**ADJUDICATOR:** David B. Stevenson

**FILE No.:** 1999/618

**DATE OF DECISION:** January 14, 2000

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Harrison Doig & Associates ("Doig") of a Determination which was issued on September 23, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Doig had contravened Sections 35, 40 and 58 of the *Act* in respect of the employment of Linda Cosco ("Cosco"), ordered Doig to cease contravening and to comply with the *Act* and ordered Doig to pay $1,043.55.

Doig has appealed only that part of the Determination relating to overtime hours worked and the consequential overtime entitlement.

The Tribunal has concluded that an oral hearing is not necessary in this case.

### ISSUES TO BE DECIDED

The issue in this case is whether Doig has shown that the Determination is wrong in fact or in law. The burden in this appeal is on Doig to show an error has been made.

### FACTS

Cosco was employed as a legal secretary for Doig from July 24, 1997 to January 30, 1999. As it relates to this appeal, Cosco claimed she worked 13 hours on both January 26th and 27th, 1999 and that she had worked 8 hours on both January 29th and 30th, 1999, but was only paid for 7 hours work on each of those days. The Determination accepted that Cosco did work the hours she claimed on those dates and that Doig had indirectly allowed her to work those hours. The Determination concluded that Cosco was entitled to wages for the 14 hours that were not paid. Some of these hours were required to be paid at straight time and the balance at overtime rates, some at 1½ times Cosco's regular wage and some at double her regular wage. The appeal challenges the decision of the Director that Cosco was entitled to overtime pay under the *Act* and sets out three reasons for the appeal:

1. The reasons for this appeal are based on the fact that the determination is wrong as it is based on an err in law and findings of fact in that it concludes that there was no evidence provided that the Complainant did not work the overtime for which she claimed.

2. Further, there is no evidence that the Employer indirectly allowed her to work the hours alleged.

3. Further and other grounds as the Employer may advise.

**ANALYSIS**

Basically, the appeal challenges the Director's *factual* conclusions that Cosco worked the overtime hours claimed and that Doig indirectly allowed Cosco to work the overtime hours claimed. There are two questions that need to be considered. First, whether there is any basis for changing the conclusion that Cosco worked the overtime hours she claimed and, second, whether there is any basis for not giving Cosco the minimum statutory overtime benefit contained in the *Act*.

Doig argues the conclusion that there was no evidence showing Cosco did not work the hours claimed is wrong. It is unclear from the appeal whether Doig is simply challenging the conclusion that there was no evidence contradicting Cosco's claim that she had worked the overtime she claimed for or whether Doig is challenging the decision of the Director to accept the statement of overtime hours prepared by Cosco. In the final analysis, however, it does not matter as no basis in fact or in law for either challenge has been established.

The Director accepted Cosco's statement of overtime hours worked. There is nothing in the material on file to indicate that Doig provided any specific material or evidence during the investigation that challenged or contradicted the statement that was submitted by Cosco. Doig provided Cosco's pay records, but those do not address in any direct or relevant way the overtime claim made by Cosco.

If Doig is simply challenging the statement in the Determination that there was no evidence showing Cosco did not work the overtime hours claimed, then Doig must at least identify what evidence showed that Cosco did not work the overtime hours she claimed. There is nothing in the appeal identifying any such evidence.

Even if Doig had identified some evidence that was provided to the Director and which was relevant to whether Cosco worked the overtime hours she claimed, Doig would also be required to show that the Director should have accepted such evidence in preference to Cosco's statement of overtime hours worked. In *Mykonos Taverna operating as the Achillion Restaurant*, BC EST #D576/98, the Tribunal stated that the Director has considerable latitude in deciding what information will be received and relied on when reaching a conclusion of fact in the context of an investigation. The Tribunal also noted that if such a conclusion is sought to be challenged on appeal, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could have been made. I see nothing in the appeal or in the material on file showing it was wrong (in the sense described above) for the Director to rely on the statement of hours provided by Cosco as a correct summary of overtime worked.

If Doig is challenging the decision of the Director to accept the statement of overtime hours prepared by Cosco, no good reason has been provided by Doig to say why this decision was wrong. The Tribunal has previously concluded that the Director is entitled to rely on overtime records provided by the employee in the absence of evidence to the contrary provided by the employer (see *Total Credit Recovery (BC) Ltd.*, BC EST #D307/96). In this case, no records were provided by Doig relating to the overtime hours claimed by Cosco and consequently there

appears to be no basis for concluding that the Director was wrong to receive and rely on the statement of overtime hours prepared by Cosco.

Doig also says there was no evidence supporting the conclusion that Cosco was indirectly allowed to work overtime. The Determination notes that the position taken by Doig during the investigation was that "none of the overtime which was claimed was either authorized or requested". The Director found no support for that position during the investigation and concluded, on the facts, that Doig had at least indirectly allowed Cosco to work the overtime claimed and that it was payable as such under the *Act*. In reaching this conclusion, the Director took a common sense approach to a legal secretary's duties and responsibilities in a small law office and took into account the absence of any directive prohibiting overtime work unless it was previously authorized or allowed and that Cosco had on prior occasions worked overtime without any pre-authorization or specific permission.

I also note that Cosco, in her reply to the appeal, stated:

> I worked overtime prior to the dates in question and never had pre-authorization as it was said to me by Mr. Harrison Doig in my interview on July 24, 1997 that whatever I felt was necessary to keep him organized to work the overtime. He never asked me what work I did when I worked overtime . . . prior to the dates in question . . .

Cosco's reply was delivered by the Tribunal to Doig on or about November 10, 1999 and Doig was offered the opportunity to reply, but no reply was ever received.

Once it has been established that Cosco worked overtime, the question becomes whether there is any basis for not applying the minimum standards established in the *Act* to that work. The *Act* is remedial legislation and should be given as large and liberal an interpretation as will best ensure the attainment of its purposes and objects. As noted in the Determination, the circumstances of this case fall within Section 35 of the *Act*, which states:

> *35. An employer must pay overtime wages in accordance with section 40 if the employer requires or, directly or indirectly, allows an employee to work*
>
> *(a) over 8 hours a day or 40 hours a week, or*
>
> *(b) if the employee is on a flexible work schedule adopted under section 37 or 38, an average over the employee's shift cycle of over 8 hours a day or 40 hours a week.*

I agree with the Director that the facts justify a conclusion that Doig had, at least, indirectly allowed Cosco to work the overtime hours claimed. Certainly there is nothing in the appeal that justifies a different conclusion.

The burden that is on Doig in this appeal has not been satisfied and the appeal is dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated September 23, 1999 be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

**David B. Stevenson**
**Adjudicator**
**Employment Standards Tribunal**