

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Relco Investment Corp.
("Relco")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 95/012

DATE OF DECISION: May 3, 2001

DECISION

OVERVIEW

This is an appeal by Relco Investment Corp. ("Relco") pursuant to Section 112 of the Employment Standards Act ("the Act") against Determination No. CDET 000131 issued by the Director on November 21, 1995. The Determination was issued following a complaint by Stephanie Petko ("Petko"), a former employee of Relco. In this appeal Relco claims Petko is not entitled to be paid four hours of wages.

I have completed my review of the written submission made by Relco, and the information provided by the Director.

FACTS

Petko was employed by Relco as a Word Processor from September 21, 1993 to August 3, 1995. Her rate of pay was \$1,765.00 per month. She normally worked 40 hours per week from Monday to Friday. Petko submitted a complaint to the Employment Standards Branch on August 29, 1995 concerning the non-payment of wages for four hours of work on Saturday, July 29, 1995. On November 21, 1995 a delegate of the Director issued a Determination in the amount of \$63.52. The calculation schedule attached to the Determination contains the following information:

Employee was not paid for her last day of work, Saturday, July 29, 1995

CALCULATIONS

Hourly wage:

$\$1,765.00 \text{ per mo. } \times 12 \text{ mos. } = \$21,180.00 \div 52 = \$407.31 \text{ per wk } \div 40 \text{ hrs. } =$
 $\$10.18 \text{ per hr.}$

<i>July 29, 1995 4 hrs. @ time and one-half =</i>	<i>\$15.27 x 4 hrs.</i>	<i>\$ 61.08</i>
<i>4% vacation pay</i>		<u><i>2.44</i></u>

Total wages outstanding

\$63.52

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Petko is entitled to the wages as calculated by the Director.

ARGUMENTS

In her complaint submitted to the Employment Standards Branch, Petko states that she was scheduled to work for four hours on Saturday, July 29, 1995 from 9:00 a.m. to 1:00 p.m. Lawyers Mike Vannier (“Vannier”) and Dave McDougall (“McDougall”) were also scheduled to work this shift. Petko’s job was to assist the two lawyers by processing dictation.

Petko claims she did not receive any work from Vannier and McDougall on July 29, 1995. Vannier had his young son with him for the entire shift and was not capable of accomplishing much work as he held the baby most of the time, and McDougall did not come into the office until much later than 9:00 a.m. Petko further claims she was asked to look after the daughter of Carolyn Oien (“Oien”), another lawyer on site, which she did, but she was still available for work if a lawyer approached her and wanted some work done. It is argued that since Petko was scheduled for work, and available for work for four hours, she is entitled to be paid the amount calculated by the Director.

In its appeal submitted to the Tribunal on December 6, 1995, Relco states the reason for the appeal is that:

Stephanie came to work on July 29, 1995 “hung over”. She didn’t do any work and was observed sleeping in the lunchroom on more than one occasion.

In a submission dated January 23, 1996, Vannier states that when he arrived at work at approximately 9:00 a.m. on July 29, 1995, he and Petko entered the building together and took the same elevator to their work site on the 7th floor. During the ride Petko commented to another woman in the elevator that she was hung over.

Vannier states that sometime between 10:00 a.m. and 11:00 a.m. he found Petko sleeping in the lunchroom. He did not wake her up and she continued to sleep. He said that Petko had

not been taking care of Oien's daughter or his son up to that point. His son arrived around 11:30 a.m. and he cared for him until the end of the shift, which was at 1 p.m. He also stated that Oien, who no longer works for his firm, advised him that she asked Brenda Smith ("Smith") if it was okay for her daughter to sit near her while she attended to a client. Smith agreed and continued to work while Oien's daughter sat nearby. This took place on the 6th floor which is where Oien and Smith worked. Sometime after that, Petko came along from her work site on the 7th floor and started watching Oien's daughter.

Vannier states that Petko knew that if there was no work coming from the lawyers scheduled to work on Saturday, then there was dictation elsewhere for her to do. She knew full well there was other dictation available, but she chose not to fulfill her work obligations. He states that he suspects that since this was Petko's last Saturday to work and because she was hung over she simply chose not to do the work that was required of her. He also states: "As Stephanie's employer, I was disturbed that I found her sleeping while she was supposed to be working and by the fact that she did not do any work at all during the 4 hours that she was at the office". Accordingly, he decided that she was not entitled to be paid anything for attending at the office on July 29, 1995

ANALYSIS

There is no dispute that Petko was as at her place of work for a four hour shift on July 29, 1995, as previously scheduled by her employer.

From the information provided to this Tribunal, there is no indication that Petko was given any dictation or processed any dictation during the shift. As well, there is no indication that Relco advised Petko to leave the work site prior to the end of the shift.

Section 1 of the *Act* defines work as the labour or services an employee performs for an employer, and an employee is deemed to be at work while on call at a location designated by the employer unless the location is the employee's residence.

Under Section 34 of the *Act*, if an employee reports for work on any day as required by the employer, then the employee is entitled to at least 4 hours' pay once work has begun unless work is suspended for reasons beyond the control of the employer.

Section 21 of the *Act* prohibits an employer from withholding wages from an employee for any reason, except for income tax, CPP, UIC and a court order to garnishee an employee's wages.

Based on the evidence before me and the requirements of the *Act*, I find that Petko was performing work for four hours on July 29, 1995.

Relco required Petko to be at the worksite and available for work on that day. Relco permitted Petko to remain at the work site for four hours. Petko was required to be available for work, but no actual job related work was provided by Relco to Petko.

Although Vannier claims that Petko knew that if there was no work coming from the lawyers scheduled to work on Saturday, then there was dictation elsewhere for her to do, I am not satisfied that any dictation was available or that Petko knew there was dictation work to do. There is no indication Petko was given any actual dictation. There is no evidence that Petko was advised by any person on July 29, 1995 that there was dictation or some other job related work available. If work was available for Petko, then I would have expected Vannier to object to her allegedly sleeping on the job, but there is no evidence he raised any objection to her conduct at the time. Rather, he let her continue sleeping in the lunchroom.

Even though no regular work was given to Petko or actually performed by her, the time she spent at the work site being available for work is work within the meaning of the *Act* and therefore wages have to be paid for this time. Relco cannot withhold these wages from Petko except for the reasons outlined above.

For the above reasons, I conclude that Relco owes wages to Petko in the amount calculated by the Director.

ORDER

Pursuant to Section 115 of the *Act* I order that Determination No. CDET 000131 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal

May 3, 2001
Date

EST #D008/96

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