

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 -

Douglas Slade
("Slade or employee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE No: 1999/544

DATE OF HEARING: November 29, 1999

DATE OF DECISION: January 14, 2000

DECISION

APPEARANCES:

Doug Slade

Rick Stolle for Golden Crown Restaurants Inc.

Robert Morrison for the Director

OVERVIEW

This is an appeal by Douglas Slade of a Determination dated on August 20, 1999. Mr. Slade claims that at the time of termination he was entitled to be paid for time banked, for work performed during his regularly scheduled days off. The employer voluntarily paid for a portion of the bank during the course of the investigation, and the Director's delegate was not persuaded that Mr. Slade had any greater entitlement. In the absence of any clear demonstration of error by the appellant, I confirmed the Determination.

ISSUE TO BE DECIDED

Did the Delegate err in determining that Mr. Slade was not entitled to compensation for time alleged to have been banked by the employee?

FACTS

Mr. Slade was an assistant manager at the Courtenay franchise of Burger King of Canada Ltd. in 1997. On or about March 1, 1999 the franchise store was sold to Golden Crown Restaurants Inc.

Prior to the sale of the franchise, Mr. Slade received time off in lieu of pay when he was required to work his regularly scheduled days off. At the time of the sale, Mr. Slade received 5 days pay to compensate him for his banked time.

Mr. Slade was terminated by the employer.

Employee's Argument:

The only issue in this case is whether Mr. Slade was at the time of termination entitled to an additional 37.25 hours of pay for extra time worked on March 14th, April 19, April 25th and April 26th, 1999. His claim is for the sum of \$593.76, which represents 37.25 hours at his hourly rate of \$15.94 per hour. Mr. Slade says that these hours are primarily for promotional events which he says occurred on days that were his regularly scheduled work days, since the date of the transition in ownership. He says that since this was recognized at the time of the transition in ownership, the "bank" should be recognized at the time of termination.

During the course of the investigation, the employer voluntarily paid Mr. Slade for 9.75 hours of work. The Delegate found that based on the evidence presented Mr. Slade was not entitled to additional wages.

Employer's Argument:

With regard to Mr. Slade's claim, the employer says that Mr. Slade would have known of these events long before they occurred, and he should have scheduled his days off so that the promotional event fell on a working day. The employer points to the written contract between Mr. Slade and Burger King which provides that:

As a salaried manager you will be required to work a variety of shifts including evenings, nights and weekends. Should you be required to work over the regular work week you are not eligible for overtime pay.

The Delegate found as a fact that the contract between Mr. Slade and Burger King did not permit the payment of overtime on regularly scheduled days of work, but that a practice arose of banking time when Mr. Slade worked on a regular day off.

Mr. Slade says that his claim relates to time worked on his regularly scheduled days off. The Delegate does not appear to have been persuaded by Mr. Slade that his claim did relate to banked time worked on regularly scheduled days off.

ANALYSIS

It is open to the parties to agree in writing, that an employee may bank overtime, as set out in s. 42 of the *Act*. If such an agreement were made between Mr. Slade and Burger King, then Golden Crown would also be subject to this arrangement unless this arrangement was terminated. Golden Crown is the successor employer pursuant to s. 97 of the *Act*, and previously negotiated terms of employment would continue.

In an appeal under the *Act*, the appellant must demonstrate an error such that I should vary or cancel a determination. If an the appellant cannot clearly demonstrate an error then the Adjudicator should confirm the determination. I do not have a sufficient factual basis before me to conclude that the Delegate erred in this case. The Delegate determined on a balance of probabilities, that with the exception of the 9.75 hours, the claim as presented appeared to be a claim for overtime on Mr. Slade's usual days of work, and that as a manager he was not entitled to pay at an overtime rate. The Delegate indicated in his oral evidence that he was unclear whether the claim by Mr. Slade was for hours worked on days which were his days off, or hours worked on days that he was regularly scheduled to work. He indicated that there were a lack of records kept by both the parties and this hindered his investigation. I am not able to make a finding on this point as I did not have all the evidence before me including the work schedules and time sheets of Mr. Slade.

The appellant did not present a sufficient factual basis for me to conclude that the Delegate erred.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination of the Delegate made August 20, 1999.

Paul E. Love
Adjudicator
Employment Standards Tribunal