

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

471976 B.C. Ltd.
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Richard S. Longpre

FILE NO.: 96/624

DATE OF DECISION: December 24, 1996

DECISION

OVERVIEW

This is an appeal of No. CDET 004233 (the "Determination"). The Determination found that the Employer contravened Sections 40, 45 and 46 of the *Employment Standards Act* (the "*Act*"). The Employer was found obligated to pay the Complainant, Gordon Jang, for overtime and statutory holiday hours worked and for statutory holiday pay. The Employer appeals that Determination.

The Employer argues that the Complainant asked to work extra hours. He agreed to work those hours at his straight time hourly wage rate. On that basis, he was permitted to work extra hours.

ISSUE TO BE DECIDED

The issue is whether the Determination was incorrect in concluding that the Employer owed the Complainant overtime and statutory holiday wages and statutory holiday pay.

FACTS

The Employer operates a construction company. The Complainant was hired as a temporary labourer. The Employer says that the Complainant requested the Employer to allow him to work extra hours. The Employer complied with that request on the understanding that the overtime and statutory holiday hours worked would be paid at his straight time hourly wage rate. The Complainant agreed and he was permitted to work extra hours.

The Determination found that overtime hours worked were paid at the Complainant's straight time wage rate of \$9.00 per hour: his overtime rate under the *Act* was \$13.50 per hour. The same applied to hours worked on statutory holidays. Further, the Determination found that the Complainant had not been properly compensated for statutory holidays on which he did not work. The Determination found that the Employer contravened the *Act* and owed the Complainant a total of \$950.37.

ANALYSIS

The Employer's argument is straight forward. The Complainant apparently asked the Employer to allow him to work extra hours. He was allowed to work those extra hours at his straight time hourly wage rate. He worked those hours on that basis. The Employer argues he should be paid on that basis.

Section 40 of the *Act* required the Employer to pay the Complainant overtime wage rates after 8 hours worked in a day. Section 45 of the *Act* required the Employer to pay the equivalent of a regular day's wages on a statutory holiday. Section 46 required the Employer to pay overtime rates for hours worked on a statutory holiday. Were the Employer and Complainant allowed to ignore these sections of the *Act*?

An employer and an employee are not permitted to waive terms of the *Act*. Section 35(a) of the *Act* is specific on this point. An employer must pay an employee overtime wage rates for overtime hours that the employer "requires" or "allows" the employee to work. It reads:

35. An employer must pay overtime wages in accordance with section 40 or 41 if the employer requires or, directly or indirectly, allows an employee to work

The Employer's appeal is based on an agreement that Section 35 of the *Act* does not permit. The Employer allowed the Complainant to work overtime and statutory holidays at straight time wages. They were not entitled to opt out of the *Act*. The Employer remained obliged to compensate the Complainant in accordance with the *Act*.

The Employer's application is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, Determination No. CDET 004233 is confirmed.

Richard S. Longpre
Adjudicator
Employment Standards Tribunal

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