

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

- by -

Jennifer Leigh Neufeld
(" Neufeld ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 96/100

DATE OF DECISION: April 4, 1996

DECISION

OVERVIEW

This is an appeal by Neufeld pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 000602 issued by the Director on December 29, 1995. In this appeal Neufeld claims that she is entitled to overtime wages based on the pay stubs provided by the employer .

Consideration of this appeal falls under the transitional provisions of the Act. Section 128(3) of the Act states:

If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director, or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including Section 80 of this Act, as a complaint under this Act.

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

FACTS

Neufeld was employed by the Delta Lion Pub (1987) Ltd. (“the Pub”) from May 18, 1995 until August 17, 1995. Neufeld filed a complaint with the Employment Standards Branch (“Branch”) September 7, 1995 alleging that she was owed overtime wages and vacation pay.

The Director investigated Neufeld’s complaint and determined that vacation pay in the amount of \$43.29 was outstanding. The Director did not accept Neufeld’s claim for overtime wages based on her records due to “the numerous discrepancies found in them.” In addition, the Pub did not have any of the daily payroll records as they had “thrown” them out. Subsequently, determination # CDET 000602 was issued for the unpaid vacation pay in the amount of \$43.29.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Neufeld is owed wages for overtime worked.

ARGUMENTS

Neufeld contends that the Director should have calculated overtime wages owing on the basis of the pay stubs provided by the employer which clearly indicate that overtime was worked and not paid.

The Director contends that because no credible record of the daily hours worked exists, it is not possible to calculate any overtime wages owing.

ANALYSIS

In the absence of daily hours of work records being kept by the employer and with no credible record of hours provided by the employee, it would be appropriate to consider the pay stubs issued by the employer for the purpose of determining if overtime was indeed worked. It would be I submit, contrary to the intent of the *Act* to permit an employer to avoid their statutory requirement to pay overtime wages simply because they have either not kept daily work records or destroyed those records.

Based on the pay stubs, it is clear that the Pub paid wages on a semi-monthly basis, that is for the period ending on the 15th of the month and again for the period ending on the last day of the month.

Neufeld's complaint form to the Branch indicates that her normal days worked each week were Monday, Tuesday, Wednesday, Friday and Saturday, with Sunday and Thursday of each week as days off.

Section 1 of the *Act* defines "week" as:

- "week" means a period of 7 consecutive days beginning,*
(a) for the purpose of calculating overtime, on Sunday and
(b) for any other purpose, on any day;
(emphasis added)

By applying the definition of the week for the purpose of calculating overtime to the hours paid by the Pub as indicated on the pay stubs and by considering the normal days of work as stated by Neufeld, it is possible to reconstruct, albeit in a rudimentary fashion, payroll records.

As the Pub was on a semi-monthly pay period, it follows that in some of those periods it is possible to work in excess of 80 hours without attracting any overtime. I will only consider the period from June 15 to August 17, 1995 as that is the period for which the Director determined that Neufeld was not a manager.

I have collated the information from the pay stubs and assigned 8 hours to each day normally worked as claimed by Neufeld in each pay period. With no daily records available to establish when the excess hours were worked, I have determined that the excess hours would be calculated

at the lesser rate of 1 1/2 times regular rate. (As straight time rate of pay has already been paid, only the 1/2 time rate is owing)

Period ending	Straight time hours paid	Overtime hours paid	Maximum Straight time hours possible / period	Excess hrs.	Hours owing at 1/2 time
June 30	80.6	0	80.6	0	0
July 15	101	12.5	88	13	13
July 31	90.25	0	88	2.25	2.25
Aug. 22 **	90	7	96	1	(-6)
TOTAL					9.25

** The pay stub for this period indicated that it was produced on Aug. 22, 1995 for all work up to and including the last day of work, August 17, 1995.

Note: I have also calculated the above on the basis that Neufeld did not work on the July 1 and B.C. day Statutory Holiday but was entitled to be paid for these holidays.

I conclude that based on the uncontested evidence of the pay stubs provided by the Pub, Neufeld is entitled to overtime wages pursuant to sections 35 and 40 of the *Act* which state:

“Maximum hours of work

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*

(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.

Overtime wages for employees not on a flexible work schedule

40. *(1) An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38*

(a) 1 1/2 times the employee’s regular wage for the time over 8 hours, and

(b) double the employee’s regular wage for any time over 11 hours.

(2) An employer must pay an employee who works over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38

(a) 1 1/2 times the employee’s regular wage for any time over 40 hours, and

(b) double the employee’s regular wage for any time over 48 hours.

(3) *For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.*

(4) *If a week contains a statutory holiday that is given to an employee in accordance with Part 5,*

(a) the reference to hours in subsection (2) (a) and (b) are reduced by 8 hours for each statutory holiday in the week, and

(b) the hours the employee works on the statutory holiday are not counted when calculating when calculating the employee's overtime for that week."

Neufeld's total earnings (including the overtime as noted above) for her entire period of employment is therefore calculated as:

Gross earnings	\$6878.70
4% Vacation Pay	<u>\$ 275.15</u>
Total	\$7153.85
less amount paid	<u>\$7052.84</u>
Balance owing	<u>\$ 101.01</u>

ORDER

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 000602 be varied to the amount of \$101.01

Hans Suhr
Adjudicator
Employment Standards Tribunal

 April 4, 1996
Date

:jel