

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 -

Goldsmith Enterprises Ltd.
("GEL")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Hans Suhr

File No.: 96/614

Date of Hearing: January 21, 1997

Date of Decision: January 22, 1997

DECISION

APPEARANCES

Joanne Goldsmith	for Goldsmith Enterprises Ltd.
Ryan Goldsmith	for Goldsmith Enterprises Ltd.
Brian Jungwirth	on his own behalf
Cal Mitten	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Goldsmith Enterprises Ltd. (“GEL”) pursuant to Section 112 of the Employment Standards Act (the “Act”) against Determination No. CDET 004135 issued by the Director of Employment Standards (the “Director”) on September 30, 1996.

The Director determined that GEL had contravened Sections 17(1), 18(2), 27(1) and 40(1) of the Act and owed its former employee Brian Jungwirth (“Jungwirth”) the sum of \$2,362.18 representing unpaid wages for overtime hours worked plus the appropriate vacation pay.

GEL has appealed the Determination alleging that the Director has erred in determining that Jungwirth was owed wages.

An appeal hearing was held in Quesnel, B.C. on January 21, 1997. Ms. Joanne Goldsmith (“Goldsmith”) appeared as the authorized representative of GEL and was its sole witness. Jungwirth testified as the sole witness called on his own behalf. Mr. Cal Mitten provided information on behalf of the Director.

Goldsmith states that a verbal agreement was made between GEL and Jungwirth that the hourly rate of \$25.00 would include all overtime. Goldsmith further states that Jungwirth never raised the issue of overtime pay during his period of employment. Goldsmith further states that as GEL paid Jungwirth for lunch breaks and waiting time, the rate of pay was more than fair as the “union” rate for a journeyman concrete finisher is only \$21.00 per hour. Goldsmith finally states that if overtime is to be applied, the appropriate rate of pay to be used for the calculation should be \$19.00 per hour and not \$25.00 per hour.

Jungwirth states that there was no verbal agreement that the \$25.00 per hour would include overtime.

ISSUES TO BE DECIDED

1. Is Jungwirth entitled to overtime wages ?
2. Was Jungwirth paid in accordance with Section 17 of the *Act* ?
3. Was Jungwirth paid all wages upon termination of employment ?
4. Was Jungwirth provided with wage statements as required by Section 27 of the *Act* ?
5. What is the correct rate of pay for Jungwirth ?

FACTS

The parties are in agreement on a number of the key facts in this matter as follows:

- Jungwirth was employed by GEL as a concrete finisher for a total of 18 days during September and October of 1995.
- Jungwirth was paid at the rate of \$25.00 per hour for all work except for 12 hours on September 28 for which the rate was \$20.00 per hour.
- The hours of work by Jungwirth as submitted are correct except for September 25 which should be 16 hours;
- Jungwirth worked in excess of 8 hours per day on a number of occasions;
- Jungwirth was paid his normal rate of pay for all hours worked;
- GEL paid Jungwirth at the end of September for all work performed in September;
- GEL paid Jungwirth at the end of October for all work performed in October;
- GEL paid Jungwirth all wages and vacation pay at the time of his lay off at the end of October;
- GEL provided Jungwirth with a wage statement showing all hours worked with each pay cheque.

ANALYSIS

The requirement to pay overtime rates of pay for work in excess of 8 hours per day is found in Section 40 (1) of the *Act* which states:

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.

Section 4 of the *Act* provides that an agreement to waive any requirement of the *Act* is without effect. Section 4 states:

Requirements of this Act cannot be waived

4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

It is therefore not necessary to determine if there was in fact an agreement that the \$25.00 per hour rate was to include overtime as any such agreement would be, pursuant to Section 4 of the *Act*, of no effect.

I conclude that Jungwirth is entitled to be paid overtime rates of pay for the overtime hours worked.

Section 17 (1) of the *Act* states:

Paydays

17. (1) At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

The evidence was that GEL only paid wages once per month. I therefore conclude that GEL contravened Section 17 (1) of the *Act*.

Section 18 of the *Act* states:

If employment is terminated

18. (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.
- (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

The evidence was that GEL did not pay Jungwirth the appropriate overtime rates of pay for the overtime hours worked. I therefore conclude that GEL contravened Section 18 (1) of the *Act*.

Section 27 (1) sets forth the information which must be contained on a wage statement provided by the employer. Section 27 (1) states:

Wage statements

27. (1) On every payday, an employer must give each employee a written wage statement for the pay period stating
- (a) the employer's name and address
 - (b) the hours worked by the employee
 - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis,
 - (d) the employee's overtime wage rate,
 - (e) the hours worked by the employee at the overtime wage rate,
 - (f) any money, allowance or other payment the employee is entitled to,
 - (g) the amount of each deduction from the employee's wages and the purpose of each deduction,
 - (h) if the employee is paid other than by the hour or by salary, how the wages were calculated for the work the employee is paid for,
 - (i) the employee's gross and net wages, and
 - (j) how much money the employee has taken from the employee's time bank and how much remains.

The wage statement provided by GEL to Jungwirth does not contain the information as required by Section 27 (1) of the *Act*. I therefore conclude that GEL contravened Section 27 (1) of the *Act*.

The evidence was that Jungwirth's rate of pay was set at \$25.00 per hour by GEL and there is no reason to retroactively reduce the hourly rate of pay simply because GEL now faces the payment of overtime rates. I therefore conclude that the appropriate rate of pay for calculating overtime wages owed to Jungwirth is \$25.00 per hour.

The parties agreed that Jungwirth's hours for September 25 should be reduced by 4 therefore it is necessary to recalculate the wages owing.

The amount of wages owing to Jungwirth for his 240.5 hours of work is calculated as follows:

wages earned	=	\$7,858.75
+ vacation pay	-	<u>=</u> \$ 314.35
total wages earned	=	\$8,173.10
less wages paid	=	<u>=</u> \$6,012.50
wages owing	=	= \$2,160.60

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 004135 be varied to be in the amount of **\$2,160.60** together with interest calculated pursuant to Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal

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