

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 -

G. King Photo-Colour Ltd
("Photo-Colour")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 1998/742

DATE OF DECISION: March 30, 1999

DECISION

OVERVIEW

This is an appeal by the employer G. King Photo-Colour Ltd. ("Photo-Colour) of a Determination dated November 4, 1998 wherein the Delegate found that the employee was entitled to the sum of \$501.19 as compensation for overtime pay. The employer appealed on the basis of arithmetic errors. As a result of submissions made in this proceeding the Delegate issued an amended decision correcting calculation errors and determining that the amount due and owing is \$302.07.

ISSUE TO BE DECIDED

What is the overtime entitlement of the employee?

FACTS

The employee worked for the employer between February 1, 1998 and April 1, 1998 as a full time employee. The employee was paid monthly, initially \$2,100 per month, and then \$2,300 per month after March 1, 1998. The employee was terminated by the employer, after the employee raised an overtime complaint. The employee complained to the Employment Standards Branch that he was not paid for working overtime, and that he was dismissed for making a complaint to the employer concerning overtime. Ultimately the Delegate found that the employee was not dismissed for making an overtime complaint, and that portion of the Determination has not been appealed. The portion of the Determination appealed relates to a finding that overtime wages were due and owing to the employee.

During the course of the investigation, the Delegate made a demand for records including information related to hours worked each day and daily pay. The employer acknowledged receipt of the demand for information, and failed to produce the information requested.

The Delegate was unable to review the employer's records because the employer failed to produce the records. The employer apparently did not record the hours worked each day, because at the time of hiring it was hoped that Mr. King would become a management employee. The employer kept its records in a different manner for managers, recording only deviations from full attendance.

The employer relied on the records of the employee and made certain calculations of the overtime payable. In the Determination dated November 4, 1998, the Delegate calculated the amount owing, inclusive of interest as \$501.19. After reviewing submissions made by the employer, the Delegate revised the calculations. I have set out the revised calculations below, and underlined the amended portions of the calculation.

Rate 2,100/month
2300/month from March 1, 1998

Hours 1) Monday - Friday 7:30 am to 5:00 pm = 9.5 hours
less .5 hr lunch = 9 hours/day x 5 days/week = 45 hrs/week
x 52 = 2340 hrs/year
/12 = 195 hrs/month

+ Hours : 2 x Saturdays/mo = 8 hr/month
= 203 hours/month

1) \$2100.00/month /203 hours/month = \$10.34 hour
2) \$2300.00/month /203 hours/month = \$ 11.33 hour

Wages which ought to have been paid

| | | |
|-----------------------------|---|------------|
| 160 Regular Hours x \$10.34 | = | \$1654.40 |
| 30.75 1.5 hours x \$15.51 | = | \$ 476.93 |
| 184 Regular Hours x \$11.33 | = | \$ 2084.72 |
| 33.75 1.5 x hours x 16.99 | = | \$4789.46 |

Annual Vacation pay

\$4789.46 x .04 = 191.58 = \$4,981.03

Less Wages & Vacation pay
already paid - \$4690.40 = 290.64

Plus interest - \$11.43 = 302.07

ANALYSIS

In this proceeding the burden rests with the employer to demonstrate that there has been an error in the Determination such that I should cancel or vary the Determination.

The employer raised an argument concerning the method of calculation, and suggested that one count the actual days, and use that for the purposes of calculating the overtime. The Delegate followed the method set out in the *Act*. In the absence of records produced by the employer the Delegate is entitled to use the employee's records, and the methods of calculation set out in the *Act*. I see no error in the methodology used to calculate the overtime entitlement.

The employer raised some valid arithmetic errors. The employer argued that the Determination ought to be entirely set aside because of arithmetic errors. I have considered the Director's amended calculations and these appear to accurately set out the amount due and owing. These errors have been corrected and therefore I confirm the amended amounts as set out above.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination made is varied to provide that G. King Photo-Colour Ltd. pay to Alexander King the sum of \$302.07 , together with such further interest as may be due and owing pursuant to Section 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal