

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 -

Nechako Enterprises Ltd.
("Nechako")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 97/919

DATE OF DECISION: February 11, 1998

DECISION

OVERVIEW

This is an appeal by Nechako Enterprises Ltd. (“Nechako”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination which was issued by a delegate of the Director of Employment Standards on December 11, 1997.

The Director’s delegate determined that Nechako owed wages in the amount of \$647.92 plus interest to a former employee, Emma Webber (“Webber”), for failure to pay minimum daily pay under Section 34(2) of the *Act*.

This appeal was decided by way of written submissions.

The burden is on the Appellant, Nechako, to show that the Determination should be cancelled or varied.

ISSUE TO BE DECIDED

Is Webber entitled to minimum daily pay?

FACTS

Webber was employed by Nechako as a concession worker from December 5, 1996 to March 31, 1997. She was paid \$21.00 per night, which is the equivalent of 3 hours pay at minimum wage. Webber filed a complaint with the Employment Standards Branch that she was paid less than the minimum guarantee of 4 hours pay each day.

Nechako was granted a variance respecting minimum daily pay by the Director of Employment Standards during the period September 25, 1995 to April 30, 1996. The variance reduced the minimum daily pay requirements from 4 hours to 3 hours per day. The Director refused to extend this variance.

The Director’s delegate found that as no variance was in effect at the time Webber was employed by Nechako, she was entitled to an adjustment to her wages in the amount of \$647.92. This figure was derived directly from Nechako’s accountant who provided the delegate with a “breakdown of additional pay owed to Emma Webber” based on a 4 hour day.

In its reasons for appeal, Nechako stated that Webber agreed to the flat rate of \$21.00 and understood and agreed that she would rarely work more than 3 hours per night, often less. Nechako also stated that it did not realize its variance had expired and as soon as it did it tried to reapply but with no success. Further, Nechako said it was advised by a delegate of

the Director in a letter dated March 24, 1997 that one way to deal with the minimum daily pay situation was to schedule employees for 4 hours and then have them voluntarily sign-out before 4 hours and it decided to take this option. Nechako enclosed Webber's sign-in and sign-out sheets which indicate she worked less than 4 hours per day. Finally, Nechako argues that the minimum daily pay provisions of the *Act* are unfair given its narrow profit margin and the actual hours worked by Webber. Nechako enclosed various letters including one from its accountant dated October 10, 1997 which advised Nechako that its variance had expired and therefore it was required to pay a minimum of 4 hours pay and they needed to calculate "short-paid to Emma". A December 16, 1997 letter to the delegate was also enclosed which reads "...I disagree with...the Calculation Sheet figures that you say are from my accountant are not the same as he sent to me." No other information respecting the issue of quantum was provided by Nechako.

Webber's position is that she was told by Nechako that she would be paid \$21.00 per night even if she worked for four hours as it was "piece work". She said she normally worked 4 hours per night but was told by her employer to mark down less than 4 hours on her sign-in and sign-out sheets.

ANALYSIS

It is undisputed that no variance of minimum daily pay was in effect at the time Webber was employed by Nechako. Therefore, the only issue is whether Webber is entitled to 4 hours pay as per Section 34(2) of the *Act*.

Section 34 (2) of the *Act* states:

An employee is entitled to be paid for a minimum of

- a) 4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or
- b) 2 hours at the regular wage, in any other case unless the employee is unfit to work or fails to comply with the Industrial Health and Safety Regulation of the Workers' Compensation Board.

Nechako claims Webber worked less than 4 hours per day. Webber claims she normally worked 4 hours each shift. However, regardless of whether Webber worked 4 hours or less than 4 hours, Nechako is obligated to pay her 4 hours pay.

Section 4 of the *Act* states that the requirements of the *Act* are minimum requirements and any agreement to waive them are of no effect. Consequently, any alleged agreement by Webber to be paid less than 4 hours pay per day is null and void. Section 34(2) of the *Act* states that the only circumstance under which an employer is not required to pay a minimum

of 4 hours pay to an employee who has started work is when the work is suspended for a reason completely beyond the employer's control.

Even if I accept that Webber actually worked less than 4 hours per day, having her "voluntarily" sign-out before 4 hours does not constitute a circumstance beyond the control of Nechako. This circumstance causing a suspension of work was clearly within Nechako's control. Nechako provided no other information which would cause me to conclude that the reason Webber received less than 4 hours pay per day was for a reason beyond its control.

For the above reasons I am satisfied that the delegate did not err in finding that Webber is entitled to 4 hours minimum daily pay. I am further satisfied that the delegate's calculations are accurate. No evidence or documents were provided by Nechako to support its apparent disagreement with the calculations or to refute the records and calculations provided by its own accountant to the delegate.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated December 11, 1997 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal

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