

**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-

Timothy P. Egerdeen

(“Egerdeen”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 98/794

**DATE OF HEARING:** February 22, 1999

**DATE OF DECISION:** March 5, 1999

**DECISION**

**APPEARANCES**

Timothy P. Egerdeen                    on his own behalf  
Don Nickel                                for Eagle Promotions Ltd.  
No appearance                        for the Director of Employment Standards

**OVERVIEW**

This is an appeal brought by Timothy P. Egerdeen (“Egerdeen”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 24th, 1998 under file number ER 027-403 (the “Determination”).

The Director’s delegate determined that Egerdeen’s former employer, Eagle Promotions Ltd. (“Eagle” or the “employer”), did not owe Egerdeen any monies on account of unpaid wages.

The appeal was heard in Abbotsford, B.C. on February 20th, 1998 at which time I heard evidence from the appellant and his witness, Ms. Patricia LaRose, and from Mr. Don Nickel (“Nickel”), an Eagle officer, director and shareholder.

**ISSUE TO BE DECIDED**

Egerdeen claims that he was not paid all of the wages to which he was entitled under the *Act* for the months of March, April, June and July 1998; the shortfall claimed is \$616.62. The employer takes the position that it has fully met its obligation to Egerdeen under the *Act*.

**FACTS**

Eagle publishes a monthly magazine called “Easy Living Lifestyle Magazine”; Egerdeen commenced his employment with Eagle in October 1997 and was terminated--allegedly for, *inter alia*, insubordination--in early August 1998. Egerdeen was hired as an advertising sales representative and, during the times material to this appeal, was paid a monthly salary of \$1,000 or a commission representing 20% of sales, whichever was higher. It is conceded that Egerdeen’s commission earnings in March, April and July, 1998 did not exceed the \$1,000 threshold and thus he was paid \$1,000 for each of those months; Egerdeen was paid commissions totalling \$1,299 for June 1998.

However, Egerdeen says that the wages paid to him for the four months in question did not meet the minimum hourly wage as provided for in section 16 of the *Act* and section 15 of the *Employment Standards Regulation* (i.e., \$7 per hour for March 1998 and \$7.15 per hour thereafter). Further, Egerdeen says that on some days he worked more than 8 hours and thus was entitled to overtime pay for those days (see section 40 of the *Act*).

Egerdeen claims to have worked 175.5 hours in March; 160 hours in April; and 176 hours in each of June and July. The Director's delegate did not find Egerdeen's record of hours worked to be credible and accordingly dismissed his complaint.

Egerdeen's evidence before me consisted of his *viva voce* testimony that he worked, on a typical day, from 8:30 A.M. to 4:30 P.M. with a 30-minute lunch break. This latter testimony was "corroborated" by notations in a monthly calendar in which Egerdeen recorded his daily hours--the notations commonly read "8:30-4:30 1/2 hr L". Ms. LaRose, who was appeared as a witness on behalf of Egerdeen, testified that she was employed in a similar sales capacity from mid-May to mid-July 1998 and that her normal working hours were from 8:30 A.M. to 4:30 P.M. or, occasionally, later. Ms. LaRose was unable to verify Egerdeen's working hours for the period in question.

Nickel testified that Egerdeen never worked a 40-hour week and that, from the moment he was hired, it was understood that he would not do so. Nickel's recollection is that Egerdeen typically took a much longer lunch than 30 minutes; often as long as 90 minutes to 2 hours. Egerdeen rarely was in the office past 4:00 P.M. Nickel says that Egerdeen never raised the matter of his not having been paid at least the minimum hourly wage until after Egerdeen's employment ended and he filed a complaint with the Employment Standards Branch. I might parenthetically add that Egerdeen admits to never having raised his minimum wage claim with Nickel during the course of his employment but says that he refrained from raising the matter out of a concern for his job.

Nickel testified that Egerdeen rarely arrived at work by 8:30 A.M.; indeed, on those mornings when sales meetings were scheduled, Egerdeen almost always arrived late. Nickel stated that, at best, Egerdeen worked a 5 or 6 hour day. Finally, Nickel submitted that Egerdeen's sales performance--or more accurately, the lack of same--was indicative of his lack of work effort. For example, for the four months in question, of the three or four sales representatives on staff, Egerdeen always had the lowest monthly sales. Egerdeen's March sales were \$4,900; \$2,400 in April; \$5,600 in June and \$2,000 in July--these sales are to be contrasted with the \$10,000 to \$20,000 monthly sales of the highest performer. Further, Nickel constantly asked Egerdeen to file "sales call" reports which Egerdeen refused to do; this behaviour was a contributing factor to his termination.

**ANALYSIS**

On the basis of the evidence before me, I cannot conclude that Egerdeen was required “directly or indirectly” (see section 35) to work *any* overtime hours. I do not accept Egerdeen’s submission that he was “on assignment” as a photographer at the “Juno Awards” on March 22nd; I accept the employer’s position that Egerdeen was issued a “press pass” simply because he wanted to attend the event and would otherwise have been unable to do so. Among other inconsistencies on this point, if Egerdeen was sent as a photographer, why would he have personally paid for the film he shot that evening and for the developing costs of that film?--the negatives were never turned over to the employer. Nor do I accept that Egerdeen was “working” for the employer when he attended two complimentary day-long excursions at Whistler, B.C. (a river raft tour and an ATV tour) in June 1998; again, these were “perks” that made available to members of the media and Egerdeen’s attendance at these two events was in no way, shape or form mandated by the employer.

Similarly, there simply is an insufficient evidentiary basis to prove that Egerdeen worked more hours than the 5 or 6 per day acknowledged by the employer. As the appellant, Egerdeen bears the burden of proving that he worked not less than 143 regular hours in March ( $\$1,000 \div \$7$ ); 140 regular hours in April and July ( $\$1,000 \div \$7.15$ ); and 182 regular hours in June 1998 ( $\$1,299 \div \$7.15$ ). For June 1998, Egerdeen concedes that he worked less than 182 hours--Egerdeen claims to have worked 176 hours that month--and with respect to the other months, there is simply no evidence to show that Egerdeen worked any more than 125 to 130 hours in each of those months. While it is true, as Egerdeen asserts, that his rather sorry sales performance does not prove that he was not working diligently, in my view, his sales performance is more consistent with a light, rather than a heavy, workload. I also note that Egerdeen has not presented any evidence--such as records of sales calls etc.--from which I could infer that he was a very hardworking employee.

Egerdeen does not strike me as a person who is the slightest bit reticent about asserting his rights as he perceives them; indeed, he admitted during the appeal hearing that he could be very aggressive in defending his rights. The fact that his claim for unpaid wages was only advanced after he was terminated suggests to me that this claim is more in the nature of a retaliatory, rather than a *bona fide*, claim.

Egerdeen testified that he commenced recording his daily hours in his monthly planner in March 1998 because “I sensed trouble” and “knew I was going to be challenged on my hours”. If that is so, I cannot fathom why there are no detailed records before me setting out Egerdeen’s daily activities including sales calls, meetings, presentations to clients etc. I would have thought that a prudent person, concerned that his hours might be challenged as to their veracity, would make a very concerted effort to document all of their working time so that any challenged working hours could be readily accounted for; in short, a simple notation in a monthly planner showing daily start and finish times does not seem to me to be an adequate documentary response to such a stated concern.

The appeal is dismissed.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

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**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**