

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 -

Owen Business Systems
("Owen")

- and -

Donna Lynne Davis
("Davis")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Genevieve Eden

FILE NOS.: 96/146 and 96/165

DATE OF HEARING:z May 9, 1996

DATE OF DECISION: May 16, 1996

DECISION

APPEARANCES

Donna Davis on her own behalf

Robert Owen President, Owen Business Systems

Randy Spensley General Manager, Owen Business Systems

Mary Ewen Payroll Clerk, Owen Business Systems

Ron Corrigan on behalf of the Director of Employment Standards

OVERVIEW

This matter concerns appeals by Owen Business Systems ("Owen") and Donna Davis ("Davis") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination # CDET 001250 issued by the Director of Employment Standards on February 19, 1996. The Determination requires Owen to pay Davis \$2,929.11 representing unpaid overtime hours, commissions, vacation pay, and interest.

Owen submitted an appeal on February 27, 1996, stating their records indicate that Davis, a former employee, was paid in full for overtime and commissions. Davis submitted an appeal on March 1, 1996 claiming additional compensation is owing for unpaid regular and overtime hours, and unpaid commissions, as well as a discrepancy in the hourly rate used to calculate the amounts ordered paid to her.

A hearing was held in Victoria on May 9, 1996. All witnesses gave evidence under oath or affirmation. Mary Ewen ("Ewen") was excluded until presentation of her evidence.

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

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Davis is owed compensation for regular and overtime hours worked as well as commissions during the period April 21, 1994 to November 26, 1994.

FACTS

Owen and Davis agreed that the following facts are not in dispute:

1. Davis was employed by Owen as an installer/trainer/technical support person from October 18, 1993 to November 30, 1994.
2. Davis filed a complaint under the *Act* on December 2, 1994 alleging unpaid overtime.
3. The claim encompasses the period April 21, 1994 to November 26, 1994.
4. Commissions were paid twice for the One Stop Posters Ltd. account which amounted to \$97.80.
5. Davis received compensatory time off with pay, 5 days in August and 1 day in November, as partial compensation for the additional hours worked.
6. Some overtime was paid in the amount of \$449.33
7. The employer did not keep and maintain a daily record of the hours worked.

On February 19, 1996, a delegate of the Director issued a Determination in the amount of \$2,929.11. The Reason Schedule attached to the Determination contains the following statements:

Concerning the overtime issue, I am not satisfied that overtime hours are incorporated into the commission structure as alleged by the employer and have used the records provided by the complainant in determining the amount outstanding. The regular wage has been calculated based on the bi-weekly salary plus the guaranteed monthly commission and equates to a rate of \$14.83 per hour.

Respecting the matter of unpaid commissions I am satisfied that there is no commission payable on the Snip' n' Stitch account, and that the complainant is entitled to the commissions on the amended Jaam account and the Rocky Creek Pub account since the sales had been substantially completed by the complainant.

At the hearing, it was noted that the hourly rate in the Determination reflected a typing error and was amended to \$14.38 consistent with the calculation schedule attached to the Determination which contains the following information:

AMOUNT OWED: \$2,929.11

<i>Overtime</i>	79.5 hr. x \$21.57	=	\$1,714.82
	53 hr. x \$28.76	=	\$1,524.28
<i>less overtime paid:</i>	375.83 + 73.50	=	<\$449.33>
<i>less compensatory time off:</i>	48 hr. x \$14.38	=	<\$690.24>
			<u>\$2,099.53</u>
 <i>commissions due:</i>	 <i>Rocky Creek (10% x 2,695)</i>		 \$269.50
	<i>Jaam (2% x 19,100.36)</i>		\$382.02
 <i>annual vacation pay:</i>	 4% x \$2,751.05	=	 \$110.04
 <i>accrued interest pursuant to section 88(4)</i>		=	 <u>\$68.02</u>
	 TOTAL DUE:		 \$2,929.11

In dispute are the hours of work, base salary and the overtime and commission structure Davis was employed to work under. The employer maintains that Davis was hired to work a 40 hour week, at a base salary of \$2,000.00 per month and a \$500 draw against commissions paid once per month, and that pay for extra hours was built in to the commission structure.

Davis maintains that she was hired to work a 37.5 hour week and that her regular hours of work were Monday to Friday from 8:30 to 5:00 with one hour for lunch. She also claims that she was hired at a base salary of \$2,500 per year which breaks down to \$15.38 per hour. She disputes the calculations of the Director's delegate claiming additional compensation is owing for unpaid regular and overtime hours, and unpaid commissions as well as a discrepancy in the hourly rate used to calculate the amounts ordered paid to her.

Robert Owen ("Owen") testified that, at a meeting with Randy Spensley ("Spensley") and himself, Davis entered into a contract with the company for a salary of \$2,000 per month plus a \$500 draw against commissions. She received \$460 per week or \$1,2.25 from the beginning of her employment. Now, after a year of receiving remuneration according to this contract, he maintained that Davis was trying to read another remuneration program into her payroll package.

Owen submitted a letter dated May 9, 1996 to the Tribunal at the hearing which summarizes Owen's practice with respect to compensation and overtime hours. It states that Davis was requested on several occasions to work more than a 40 hour week and that compensation for extra time worked was covered in a 10% commission in lieu of overtime on programming and installation fees. A \$500 draw against commissions was paid even if the 10% commission fell below this for the month. Overtime hours that did not include installation and programming were based on straight time with the balance in time off and overtime was only issued at the request of the management. With respect to commissions, Owen only pays commission if an account is paid in full or if a profit is made on the sale. If an employee leaves Owen, they are only entitled to 50% of commissions for work unfinished and uncollected. The letter concludes

by stating Davis agreed with the policies and procedures of the company and was eager to enter into this agreement when hired.

Attached to the above letter was a document entitled "Employment Contract re Mrs. Donna Davis" which provided additional information. It states that commissions and the \$500 draw against commissions are paid once per month and on the second pay period of the month. It delineates a commission structure which includes commissions of 10% of installation fees charged to the customer and 10% of service contracts. In addition, it provides for a 2% override on all Point of Sale Systems sold providing a 40% margin or 5% of profit is obtained. It further states that Owen will pay no overtime for a trainer/installer/programmer.

Owen affirmed that this Employment Contract had not been given to Davis during her employ but reflects the rules they had been working under during her employ. He added that overtime was paid to employees on special occasions that did not include installations such as emergency call-outs. He agreed on cross-examination that he did not have a record that Davis agreed to be paid commissions in lieu of overtime. He disputed the accuracy of the overtime sheets submitted by Davis. Regarding commissions owing, Owen maintained that Davis is owed half of her commission on the Rocky Creek Pub account which would amount to \$134.75 (5% of \$2,695).

Davis maintains that she was hired to work a 37.5 hour week and that her regular hours of work were Monday to Friday from 8:30 to 5:00 with one hour for lunch. She also claims that she was hired at a base salary of \$2,500 per year which equates to \$15.38 per hour. She submitted in evidence what she referred to as her "employment contract" consisting of rough handwritten notes given to her by Owen when she was offered employment. It includes the following:

\$2,500.00	Base
500	Credit
installs	10%
service contract	10%
all P.O.S. Retail ...	2%
8.30 - 5.00	

Davis testified that, while Owen offered her \$2,500 per month base salary, he stated that for internal reasons he wanted her pay slips to show \$2,000 salary and \$500 commission. She noted that \$2,000 per month would break down to \$923.08 bi-weekly; however all her pay stubs were calculated incorrectly at \$920 bi-weekly, although she was not claiming this difference. Further, some paystubs reflected the \$500 "commission" while other times this amount was overlooked and the Controller (who is no longer with the company) gave her a separate handwritten cheque. She stated that the Controller asked Owen on numerous occasions to include the \$500 on her salary because she was forgetting to do so.

Davis testified that inclusion of overtime in the 10% commission was never discussed when she was hired. She stated that she kept track of her overtime on a daily basis and regularly submitted overtime sheets to Spensley. While more often than not her overtime was not approved, she continued to submit it because she was advised to do so by someone from the

Employment Standards Branch. She maintained that she discussed this with Owen on numerous occasions but was told that the company does not pay overtime.

Davis also disagreed that she was only entitled to commissions if an account is paid and she submitted in evidence a pay statement which included a commission payment for Midland Hi Performance which she claimed contradicted Owen's assertion. She also maintained she was never told that she would only be entitled to 50% of commissions if she left Owen and that her sales agreements were made while she was still employed by Owen.

Davis submitted pay statements in evidence which show a bi-weekly salary of \$920; some show a \$500 "Commission" while others don't. While her hourly rate was not usually shown, the statement dated March 1, 1994 shows "extra hours" @ 12.25. Also appearing on this statement is a handwritten note "should be calculated on 15.38 not 12.25 as per Rob". Davis maintained in testimony that was uncontradicted that this note was made by Spensley after she drew to his attention the incorrect hourly rate of \$12.25. A final pay statement dated December 9, 1994 shows "extra time" at an hourly rate of \$15.34. Owen stated in re-examination that these were mistakes and that her rate was \$12.25 per hour.

In further support of her position that the \$500 was not a draw against commissions, Davis noted that her final pay statement shows 2 days of a \$500 commission as well as \$97.80 for the One Stop Poster account. Further, her March 1, 1994 pay statement showed a commission of \$59.90 paid for the Midland account. Given that she never exceeded the \$500 that Owen claimed to be a credit and that other commissions were still paid, this was further evidence that the \$500 was not a draw against commissions according to Davis.

Regarding commissions, Davis claims she was never paid commissions on the Rocky Creek Pub account, nor the 2% override on all point of sale systems sold for the Jamm Native Arts, Snip 'n Stitch, or Klitsa Manufacturing accounts. She submitted purchase orders for the Rocky Creek Pub and Jamm accounts dated June 22, 1994 and September 27, 1994 respectively, which she stated supported the amounts she was claiming.

Spensley and Ewen also testified on behalf of the company. Spensley maintained that he understood Davis was hired at a base salary of 2,000 and that the \$500 was a credit based on commissions and overtime. In cross-examination, he stated he did not have first hand knowledge of how the hourly rate of \$15.34 on the pay statement dated December 9, 1994 was arrived at. Regarding this same statement, Ewen also stated she wasn't sure how this hourly rate was arrived at and that a letter had come down from Spensley who said to pay that. At one point in evidence, Ewen stated "I thought that was your hourly rate" but later stated she did not know Davis' hourly rate. Ewen started with the company in October 1994 so that her employment overlapped with Davis only by a month. When she took over the payroll she realized that the cheques written to Davis for \$500 were not on the payroll. She testified that when the former Controller was doing the payroll there were many different versions of what Davis was paid. She thought Davis' work week was 40 hours.

Spensley testified that time worked on sites for installations could exceed 8 hours per day but that "we didn't calculate this". On special occasions such as weekends he approved overtime for Davis. Overtime paid to service people was at straight time, and time off was also given in

lieu of extra hours. He agreed on cross-examination that overtime sheets were turned in to him on a regular basis by Davis but not all were approved. Ewen also testified that they paid overtime at straight time with the balance at time off. She confirmed on cross-examination that on one occasion Owen stated Davis didn't get paid overtime.

Spensley also testified that the practice of the company is not to pay commissions until the contract is paid for.

ARGUMENTS

Davis argued that additional compensation is owing for extra hours worked including unpaid regular hours and overtime hours, and that the hourly rate to calculate the amounts owing to her is \$15.38. She also claims she is owed unpaid commissions, vacation pay and interest on the amount owing. She argued that the *Act* requires overtime payment for hours worked in excess of 8 hours a day and 40 hours per week. It doesn't say an agreement can be made to incorporate overtime into the commission structure. She noted that she produced records to substantiate what she is owed.

Owen argued that the company entered into a contract with Davis with the terms as stated in the company's evidence and that she was now trying to read another remuneration program into her payroll package. He added that Davis was a salaried not an hourly employee, and that a salaried or management position does not incur overtime. He asserted that nothing in the *Act* states that incorporation of extra time within the commission structure is not allowed. He disputed the accuracy of the overtime sheets.

The Director submitted that the evidence was more supportive of Davis' position that her base salary was \$2500 per month. He noted that no records were introduced in evidence to support that the amount of \$500 was a draw against commissions. The Director also noted that, if the normal week was 40 hours and the hourly rate was \$12.25 as Owen contended, this would amount to \$980 bi-weekly. However the evidence revealed the complainant was paid \$920 bi-weekly. A bi-weekly payment of \$920 and hourly rate of \$12.25 would approximate a 37 1/2 hour week.

With respect to overtime, the Director submitted that evidence revealed that overtime hours were worked and not paid and therefore monies are owing. He argued that payment of overtime under the *Act* is not discretionary; if it is allowed, it must be paid.

The Director further submitted that the *Act* sets minimum standards and that agreements entered into between employers and employees that do not meet the minimum standards are null and void. He noted that both the former and new *Act* require the employer to keep records that show, inter alia, the employee's wage rate, hours worked, overtime hours worked, and overtime wage rate, virtually none of which are shown on Davis' paystubs.

Based on the evidence, the Director submitted he was now satisfied the remuneration agreement was based on 37.5 hours per week and that his Determination may have to be adjusted; his calculations had been based on 40 hours per week due to lack of proof at the time that the work week was 37.5 hours.

ANALYSIS

I conclude that Davis' work week was 37.5 hours. The evidence by all parties revealed she was paid \$920 bi-weekly plus an amount of \$500. If her work week was 40 hours as argued by Owen, her hourly rate (excluding the \$500) would equate to \$11.50. However, Owen consistently maintained throughout the hearing that Davis' hourly rate was \$12.25. Earnings of \$920 bi-weekly and \$12.25 per hour would equate to a work week of 37.55 hours.

However, the hourly rate of \$12.25 does not reflect the \$500 which Owen purports to be a draw against commissions. I am not satisfied that an agreement was entered into by Owen and Davis to pay her a base salary of \$2,000. Rather, I believe the evidence is more supportive of a base rate of \$2500 as submitted by Davis. Although what she referred to as her "employment contract" consisted of a page of rough notes handwritten by Owen, "Base" is written beside the amount of \$2500.00. Moreover, there is no indication on the pay statements that the amount of \$500 is a draw against commissions, it is simply reported as "Commissions".

Further, a base of \$2500 per month and a work week of 37.5 hours would equate to \$15.38 per hour which is consistent with Spensley's handwritten note on the March 1, 1994 pay statement and an hourly rate of \$15.34 is reported on the December 9, 1994 pay statement. I conclude that Davis' hourly rate is \$15.38.

Regarding the overtime issue, I am not satisfied that there was an agreement between Davis and Owen that overtime hours be incorporated into the commission structure as alleged by the employer. There were no payroll records submitted to support this proposition and Owen agreed that the company did not have any record to show that Davis agreed to this arrangement.

Moreover, section 40 of the *Act* provides that an employer must pay overtime for hours worked in excess of 8 per day and 40 per week at 1 1/2 times or double the employee's regular wage. Section 1 of the *Act* includes in its definition of "regular wage" "(b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period". Thus to determine an employee's entitlement, the *Act* requires compensation to be converted to an hourly rate, regardless of the method of payment. Further, section 4 provides that an agreement to waive any of the requirements of the *Act* is of no effect. Finally, no distinction is made in the *Act* between an hourly or salaried employee for purposes of overtime entitlement as argued by Owen.

Owen acknowledged that Davis was requested on several occasions to work more than a 40 hour week. Although at the hearing, Owen disputed the accuracy of the overtime sheets submitted by Davis, no records were submitted by the company to show hours worked by Davis.

Section 27 requires an employer to give employees wage statements that include, inter alia, hours worked, the wage rate, overtime wage rate, hours worked at the overtime wage rate, and how wages are calculated if paid other than by the hour or by salary. Section 28 of the *Act*

requires an employer to keep payroll records for each employee to include, inter alia, the employee's wage rate, and the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis. Section 31 requires the employer to display hours of work notices where they can be read by employees. Section 40 sets out the overtime provisions. It would be I submit, contrary to the intent of the *Act* to permit an employer to avoid its statutory requirement to pay overtime wages because it has not kept daily work records.

Also relevant to this appeal is section 35 which states:

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..."

Davis was allowed to work overtime and was not paid for all overtime worked. I conclude on the basis of the evidence before me that Davis is entitled to overtime payment. In the absence of daily hours of work records kept by the employer and no other evidence to disprove the accuracy of the overtime sheets submitted by Davis, I agree with the Director that it would be appropriate to consider Davis' records in determining the amount outstanding. Davis testified that her overtime sheets reflect hours worked over and above her normal hours of work.

Regarding commissions owing, I also conclude that Davis was entitled to a commission of 10% for the Rocky Creek Pub account. Her evidence was that the sale had been substantially completed by her. There was no evidence submitted by the employer that the account had not been paid at the time Davis terminated her employment. In addition, given that the commission structure included 2% override on all point of sale systems sold, and Davis' uncontradicted evidence that she did not receive these overrides for the Jamm, Snip 'n Stitch and Klitsa Mfg. accounts, I also conclude that these overrides are owing her.

I now turn to the amounts owing Davis. I have carefully reviewed all the overtime sheets submitted by Davis and have calculated amounts owing based on s. 40 of the *Act* which provides for daily and weekly overtime. Given a 37.5 hour work week, I have calculated extra hours owing based on a 7.5 hour day. Hours worked in excess of 7.5 per day are calculated at straight time for the first half hour, at time and a half for hours worked over 8 hours and double time for hours worked over 11 hours. The following summarizes extra hours worked according to her overtime sheets for the period April 21, 1994 to November 26, 1994:

<u>Month</u>	<u>Extra Hours</u>	<u>1 x</u>	<u>1 1/2 x</u>	<u>2 x</u>
April	12.5	1.0	11.0	0.5
May	9.5	2.0	6.5	1.0
June	15.0	4.5	7.5	3.0
July	24.0	3.0	12.5	8.5
August	54.0	8.5	20.0	25.5
October	41.0	4.5	29.0	7.5
November	<u>7.5</u>	<u>1.5</u>	<u>5.5</u>	<u>0.5</u>
	163.5	25.0	92.0	46.5

Accordingly, the amount owed to Davis is as follows:

Overtime:	25 hrs. x \$15.38	=	\$ 384.50
	92 hrs. x \$23.07	=	2,122.44
	46.5 hrs. x \$30.76	=	1,430.34
less overtime paid:			- 449.33
less compensatory time off:	45 hrs. x \$15.38	=	- 692.10
commissions due:	Rocky Creek (10% x \$2,695)	=	269.50
	Jamm (2% x \$19,100.36)	=	382.01
	Snip 'n Stitch (2% x \$18,000)	=	360.00
	Klitsa Mfg. (2% x \$2,995)	=	59.90
less commissions paid twice: One Stop Posters Ltd.		=	- 97.80
annual vacation pay	4% x \$3,769.46	=	150.78
Total payable before accrued interest		=	\$3,920.24

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination # CDET 001250 be varied and that Owen pay Davis the amount of \$3,920.24 plus accrued interest pursuant to section 88(4) in an amount calculated by the Director.

“Genevieve Eden”

Genevieve Eden
Adjudicator
Employment Standards Tribunal