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 -

Kwik-Van Express Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 1999/753

DATE OF HEARING: March 24, 2000

DATE OF DECISION: April 6, 2000

DECISION

APPEARANCES:

Lee Kempf and	
Jim Lavich	On behalf of Kwik-Van Express Ltd
Steve Flynn	On his own behalf
Gerry Omstead	Delegate for the Director

OVERVIEW

This is an appeal by Kwik-Van Express Ltd.("Kwik-Van") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination numbered ER# 091004 dated November 23, 1999 by the Director of Employment Standards (the "Director").

The Director determined that a complainant, Steve Flynn ("Flynn") was an employee and was entitled to wages in the amount of $1,576.09, including vacation pay and interest, in relation to overtime and statutory holiday pay. Kwik-Van claimed that during the time that the Director determined overtime was payable that Flynn was on a monthly salary and had received days-off in lieu of overtime and that no further wages were owing.

FACTS

In the Fall of 1998 Kwik-Van hired Flynn as a driver for their busy delivery business. The principals of Kwik-Van and Flynn were friends at the time. When Flynn started work he was paid an hourly wage of $12.00 per hour. By November of that year it was apparent that the job was going to involve considerable overtime work. The parties agreed that it would be better if Flynn worked on the basis of a monthly salary. Kwik-Van claims that it was also agreed that any "overtime" would be taken as time-off in lieu and not as wages. On hearing the evidence and reviewing the manner of wage payment and the number of "days-off with pay" taken by Flynn, I conclude as a finding of fact that there was an agreement that Flynn would get days-off in lieu of overtime for any extra overtime hours worked.

Kwik-Van adduced evidence that the monthly salary of $2,400.00 was calculated on the basis of 160 hours per month @ the same $12.00 per hour with a built-in paid overtime allowance of 26 hours per month @ $18.00 per hour which worked-out to the $2,400.00.

Flynn worked in October and November at the agreed upon rate and was paid @ $12.00 per hour. From December through June of 1999 Flynn was paid the $2,400.00 per month salary. In July and August, until he left his employment, Flynn went back onto the hourly rate system and was paid $12.00 per hour and was paid on the basis of that rate for all his overtime.

Kwik-Van led evidence that Flynn received 132 hours of time-off with pay. I accept this evidence as it complies with the records made at the time by Kwik-Van and the log sheets submitted by Flynn. Flynn testified that he had actually worked on some of those days but the only evidence he had to support his position was a calendar with handwritten numbers on it. There was no way to assess the accuracy or contemporaneousness of these numbers. The Company log sheets were actually filled out by Flynn in his own handwriting and in my opinion form the most reliable record of the days worked, or not worked, by Flynn.

The hours worked per day and weekly are well documented by the Director's delegate and are attached to the Determination. There is no dispute about the hours worked. The real time-frame in issue in this case is from December 1998 to the end of June 1999 when Flynn was paid a monthly salary.

The problem in this case relates to the calculation of the "regular wage" for the purpose of calculating the appropriate overtime rate and how to assess the days-off with pay in relation to overtime entitlement.

ISSUES

The main issue in this case is the interpretation and calculation of the "regular wage" for the purpose of calculating overtime where an employee is on a monthly salary. A secondary issue relates to the time-off in lieu of paid overtime.

ANALYSIS

The relevant sections of the *Act* are as follows:

> *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.*
>
> *(2) An employer must pay an employee who works over 40 hours a week 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 40 hours, and*
>
> *(b) double the employee's regular wage for any time over 48 hours.*
>
> (underlining added)

"Regular wage" is defined in section 1 of the *Act* as follows:

> ***"Regular wage"** means*

> *(a) if an employee is paid by the hour, the hourly wage,*
>
> *(d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work,*

The *Act* also provides specifically for the banking of overtime and the crediting of such overtime towards time-off with pay.

> ***42.****(1) At the written request of an employee, an employer may establish a time bank and credit the employee's overtime wages to the time bank instead of paying them to the employee within the time required by section 17.*
>
> *(2) Overtime wages must be credited to a time bank at the rates required under section 40 or 41.*
>
> *(3) If a time bank is established, the employee may at any time request the employer to do one or more of the following:*
>
> *(a) pay the employee all or part of the overtime wages credited to the time bank;*
> *(b) allow the employee to use the credited overtime wages to take time off with pay at a time agreed by the employee and the employer;*
> *(c) close the time bank.*
>
> (underlining added)

I will deal firstly with the issue of the time-off in lieu of overtime. While I find as a fact that the employee and the employer in this case agreed to an informal arrangement for time-off in lieu of overtime, the agreement did not meet the requirements of section 42. There was not a "request" by the employee and it was not in writing. In this case the overtime bank was an idea requested by the employer and complied in by the employee. It did not conform to the *Act* and therefore can not be relied upon by the employer.

In calculating the regular wage for employees paid monthly, the Director's practice has been to apply the formula set out in the definition on a monthly basis. If a normal or typical monthly workplace is one where most employees work a standard 35, 37.5 or 40 hour week the formula set-out in the *Act* works well to calculate the normal or average hourly rate. However the formula does not work so well, if it is applied monthly, where an employee's hours vary considerably from week to week or month to month.

In this case there is no doubt that the parties intended the regular hourly rate to be $12.00 per hour even after Flynn went on a monthly salary. He was paid $12.00 before the salary and $12.00 after the salary. There is no evidence that there was any intent to alter that basic formula when Flynn went on salary.

However, when the Director's delegate applied the formula in the *Act* he calculated the regular

wage, at various times over the 7 months involved, to be $11.20, $14.96, $13.12, $16.91, $12.29, $13.30, or $13.54 per hour.

There is a fundamental flaw in the definition as drafted in that it requires a finding of what were the normal or average weekly hours of work. But, it does not indicate over what period of time the average should be calculated or a "normal" considered. The Director has adopted a practice of calculating the average every month which can result in the anomalies found in this case where the regular wage varied from $11.20 per hour to $16.91 per hour. In fact, hourly rates were found to have been different within the same week where a month end occurred during the week. I can not see how such irregular rates could be considered to represent a "regular wage". I do not think that this could have been the intention of the Legislature.

In my opinion, where such anomalies arise, it is necessary to look at the whole relationship over the whole period of time involved in establishing what is the normal or average weekly hours of work.

In this case, the total hours worked (during the salaried period) as calculated by the delegate were 1279 hours. However, the delegate did not include in that calculation the 132 hours for which the employee received paid time-off. Those hours should have been included for the purpose of calculating the average or normal hours so that the total hours worked should have been 1411. The total number of weeks was 30.35 which means that the average hours per week equalled 46.49.

The delegate found that the weekly wage was $553.84 and if this is divided by the average hours the regular wage is found to equal $11.91 or almost exactly what the parties intended. Allowing for the vagaries of "normal" and "average" I can see no reason to depart from the clear intentions of the parties that the regular wage was $12.00 per hour.

In recalculating the wages on an hourly basis using $12.00 per hour as the regular wage and using the hours of work determined by the Director I find that the wages owing have been over-calculated by almost exactly the same amount as found to be owing. In other words, when the wages are calculated using $12.00 per hour as the regular wage, Mr Flynn has been paid in full.

I am satisfied that the appellant, Kwik-Van, has met the onus of establishing that there was an error in the Determination in the method used in applying the definition of "regular wage". I am satisfied that nothing would be served by referring the matter back to the Director and that the appropriate remedy is to cancel the Determination.

ORDER

I order, under section 115 of the *Act*, that the Determination is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal