

**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-

Patricia Turchenek  
(the “Appellant”)

-of a Determination issued by-

The Director of Employment Standards  
(the “Director”)

**ADJUDICATOR:** E. Casey McCabe

**FILE NO.:** 98/4

**DATE OF HEARING:** April 2, 1998

**DATE OF DECISION:** April 16, 1998

**DECISION**

**APPEARANCES**

Patricia Turchenek	for herself
Carmen Berry	for the employer, Cur-Quin Enterprises Ltd.
Quinn Berry	for the employer, Cur-Quin Enterprises Ltd.

**OVERVIEW**

This is an appeal pursuant to Section 112 of the Employment Standards Act (the “Act”) by Patricia Turchenek of a Determination dated December 9, 1997 dismissing her claim for overtime pay for hours worked in excess of eight in a day and for working through her lunch break.

**ISSUE(S) TO BE DECIDED**

Is the complainant entitled to overtime pay for work in excess of eight hours per day and for work performed during her lunch break.

**FACTS**

The employer operates a delivery service with its offices located in Fort Langley, B.C. The complainant was one of five office staff at that location. She was hired as a data entry clerk. She commenced employment on July 22, 1996 and terminated her employment on June 13, 1997.

The complainant’s claim for overtime pay has two prongs. Firstly, the complainant claims that she worked overtime in excess of eight hours per day but was only paid at straight time rates. She claims the premium for those overtime hours. Secondly, the complainant claims that she consistently worked through her lunch period and claims overtime at time and one half for her regular half-hour lunch break for each day worked. The complainant worked a regular Monday to Friday day shift with a half-hour lunch break. The complainant claims the overtime payment for lunch periods from the time of her hire until March 15, 1997. At that time the employer instituted a policy that required all employees to take lunch breaks away from their respective desks.

In her appeal the complainant alleges that the determination was wrong because the company failed to provide accurate information. In particular the complainant alleges that the company failed to provide an accurate computer printout of hours worked, rate of pay, gross pay, deductions and net pay. Secondly, the complainant argues that an accurate record would substantiate her claim of not having been paid time and one half of her regular pay even for the hours the company has stated that it has paid her. Thirdly, the complainant argues that the company has relied on a "Summary of Calculations" which is not accurate regarding the hours she worked and her rate of pay. Fourthly, the complainant argues that the Director's Delegate did not pursue information that would have supported the complainant's claim that she worked through her lunch breaks. In particular, the complainant states that had the Director's Delegate inspected the dispatch cards that are completed for each and every call during the day it would be evident that the complainant had worked through her lunch break. The complainant argues that the dispatch cards would show that there was not a single day in which there was more than one half-hour between calls that were fielded by her. In essence the complainant argues that the "Summary of Calculations", a calculation report prepared by the employer and her pay stubs are not in accord with each other which supports her claim that she was not paid time and one half of her regular pay for overtime.

To substantiate her allegation that the employer provided inaccurate records the complainant pointed to five occasions where the number of hours reported on a calculation report differed from the number of hours that were shown on her pay stub. In the pay period ending January 17, 1997 the calculation report showed 79 ½ hours while the pay stub showed 80 hours at her regular rate of pay. For the pay period ending February 15, 1997 the calculation report showed 81 hours while the pay stub showed 80 hours. The extra hour shown on the calculation report was paid at 1 ½ times her regular rate. The point in this example was that the calculation reports and the pay cheque did not show the same amounts. For the pay period ending March 1, 1997 the calculation report showed 72 hours while the pay stub showed 80 hours and paid her for 80 hours. The complainant also alleged that during this period the company records showed 0 hours for the pay period February 28, 1997 when in fact she did work for 80 hours during that two week period. I will return to this point later. For the pay period ending April 26, 1997 the complainant states that the calculation report shows 80 hours at an incorrect rate of pay. Similarly, for the pay period ending May 10, 1997 the complainant alleges that although the gross pay is correct the method of calculating that pay including her hourly rate is incorrect. The complainant alleges that due to these inaccuracies none of what the employer says in its defense should be accepted.

In its defense the employer admits that it did not keep accurate payroll records as required by the Act. For that offence the employer was assessed a \$500.00 penalty which it paid. In defense of its position the employer showed that it had made four payments totaling \$700.00 to the complainant for overtime worked from January 6, 1997 to May 22, 1997. Furthermore, the employer states that it made unrecorded cash payments totaling approximately \$500.00 to the complainant in recognition of extra effort which, the employer says, included acknowledgment of overtime work. Finally, in its defense, the employer provided a Summary for the complainant which showed that where there was a

discrepancy in certain pay periods between gross pay and the calculation reports that the discrepancy was made up in the subsequent pay period. The employer argues that once the numbers are totaled on the Summary of Calculations it is evident that the employer overpaid the complainant by \$175.70. It should be noted that the Summary of Calculations which were referred to in this hearing was a summary that was compiled by the Director's Delegate.

With regard to the point that was raised regarding the calculation reports showing 0 hours worked for the pay period ending March 1, 1997 the employer states that this occurred because the complainant was paid out her holiday pay even though she had not yet completed a year of service. The employer states that in pay periods where holiday pay is paid out the employer's records would show 0 hours worked for that period. It should be noted that the complainant did not dispute that she was paid her holiday pay nor that she was improperly paid for her hours during that period aside from the allegation that was raised and discussed above for the period ending March 1, 1997.

## **ANALYSIS**

This case is complicated by certain factors. Firstly, the employer did not keep proper payroll records for which it was penalized under the Act. Secondly, the payments that were made to the complainant were not particularized. I am referring to the four cheques totaling \$700.00 and the cash payments. It should be noted at this point that the complainant disputed the amount of the cash payments claiming they totaled \$300.00 not \$500.00. Thirdly, the dispatch cards which the complainant referred to do exist but the problem is that it would require a person to peruse approximately 10,000 separate documents in an effort to determine if, during a period from 11:30 a.m. to 1:00 p.m. on any given day, there was more than one half hour between calls recorded by the complainant. That would be a formidable task. I do not agree that the onus of performing that task fell upon the Director's Delegate. It was the complainant who raised that allegation and sought to rely on the information recorded on those documents. Finally, the complainant presented, at the hearing, six letters from co-workers in support of her allegation that she worked through every lunch break from the time of her hire until March 15, 1997.

The letters from the co-workers present two problems. Firstly, they are entered as new evidence on appeal. Secondly, the authors of the letters were not present to testify at the hearing. I am bound by Board policy as expressed in *Tri-West Tractor* BC EST #D268/96 to exclude evidence that is raised for the first time on appeal but which was available at the investigative stage. Regardless, due to the hearsay nature of the evidence in the letters and the fact that the authors could not be subjected to cross-examination I give the letters no weight in my deliberations.

The fundamental problem with the complainant's appeal is the lack of detailed records defining the actual hours worked by the complainant. The complainant states that the employer told her not to mark the overtime that she worked on her time sheets. However, the complainant acknowledged that certain occasions where she was asked to stay and work overtime were marked on her time sheets and were paid at the proper overtime rate. The dispute is for those extra minutes after quitting time when she stayed to complete a call and for the time worked during lunch breaks. It is the complainant's position as I understand it that she worked for the entire half hour lunch break each and every day fielding telephone calls while eating at her desk.

In its defense the employer acknowledges that there were times when the complainant stayed after the finish of her regular shift to answer calls or finish a particular task. The employer also acknowledges that there were occasions during lunch breaks when the complainant would answer a call. However, the employer disputes that she was required to eat her lunch at her desk and to answer all calls during that time. The employer points out that the complainant worked as a data entry clerk and that there was a regular telephone receptionist/call taker. Furthermore, the employer states that the four cheques and the cash payment were in recognition of all overtime work not just the extra minutes at the end of the shift.

The complainant appeals the determination of the Director's Delegate. A reading of that determination shows that the Director's Delegate found that the complainant did not show the dates or the amount of time that she may have worked.

Similarly on appeal the complainant maintained her broad general claim to having worked her entire lunch period each and every day of her employment. Based on the evidence before me I find that I agree with the Director's Delegate. There is no particularization of the dates and times worked by the complainant but there is a recognition that she received cheques in the amount of \$700.00 and various cash payments on account of overtime. I recognize that the complainant disputes the sufficiency of these payments; however, I find that she has not discharged the onus on the appeal to show that the Determination dated December 9, 1997 is wrong.

## **ORDER**

I confirm the Determination dated December 9, 1997.

**E. Casey McCabe**  
**Adjudicator**  
**Employment Standards Tribunal**