

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1996, C. 38

- by -

Kathy Bolenback
("Bolenback")

- of a Determination issued by -

The Director Employment Standards
(the "Director")

ADJUDICATOR: Alfred C. Kempf

FILE NO: 96/221

DATE OF HEARING: June 21, 1996

DATE OF DECISION: June 28, 1996

DECISION

OVERVIEW

This is an appeal by Bolenback, pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination of the Director of Employment Standards (the "Director") issued on March 6, 1996. In this appeal the employee claims that overtime wages are owed to her by Stanmar Property Management Ltd. ("Stanmar") pursuant to Section 40 of the Act.

Kathy Bolenback appeared on her own behalf, Stanley Thomas Andrews appeared on behalf of Stanmar and Donna Miller appeared for the Director. An oral hearing was held on June 21, 1996 in Penticton, British Columbia. Malcolm Scott and Gary Richardson also gave evidence on behalf of Stanmar.

The issue is whether Bolenback is entitled to overtime pay for hours she says were worked but which Stanmar says were not authorized.

FACTS

Bolenback had been employed by Stanmar for some time when in September of 1994 she was moved to a property management division of the company. During September, October, November, December of 1994 and part of January, 1995 she worked under the direction of Frans Andrews in the property management business. Stanley Andrews and Malcolm Scott owned Stanmar but neither was directly responsible for Bolenback's supervision during this period.

Bolenback worked extended hours for the months of September, October, November and December in 1994. It seems that the reason for this was that the financial records of the property management division were a "mess".

Bolenback continued to work overtime in January to July of 1995 while under the direction of Stanley Andrews, however, she was paid for all or most of this overtime.

The focus of the appeal is on the months of September to December of 1994 in which Bolenback says that she worked 552 hours of overtime over and above her normal work week which was based on 40 hours per week. Bolenback has not been paid for these hours. There is no dispute that Frans Andrews was responsible for directing Bolenback during this period of time. Stanmar takes the position that this overtime was not authorized.

Frans Andrews did not give evidence but he provided a letter witnessed by a solicitor dated June 18, 1996. In this letter he concedes that Bolenback "put in some overtime". He says he did not

authorize overtime as is claimed by Bolenback. He states that he assumed that Bolenback was making the "extra efforts" as an investment in the company.

No original records of the precise number of hours worked was presented in evidence. Bolenback said that a record was kept on a calendar in the office but this calendar was no longer available to her. Stanmar said that it kept no record of the precise number of hours worked by Bolenback during the period in question.

Bolenback testified that Frans Andrews and Malcolm Scott said to her that she should perhaps bring a bed to the office. This comment was made in light of the extensive hours that she was working to try and resolve the difficulties with the financial records.

The first calculation of overtime submitted by Bolenback to Stanmar was in November of 1994. In December of 1994 she issued an "invoice" for overtime.

Bolenback was not able to provide substantiating evidence for the full extent of the hours she says she put in for September to December of 1994. A review of those hours show that they are excessive indicating that on certain days she worked more than 17 hours in total.

Stanmar, however, was not able to provide any direct evidence that Bolenback did not work the hours claimed by her.

I generally found the witnesses to be sincere in their evidence.

As I advised Stanmar during the hearing, I can place very little weight on the letter from Frans Andrews to the extent that it bolsters Stanmar's case. In any event, his letter only offers the "defence" of a lack of authorization.

In January of 1995 Bolenback was promised by Stanley Andrews on behalf of Stanmar that her overtime would be repaid at the initial rate of \$500.00 every two weeks. That rate of repayment was subsequently reduced so that during the course of her employment in 1995 she received \$5,500.00 towards her overtime.

Stanley Andrews gave evidence that he intended to pay only for the overtime that was worked during the period of his direct supervision from January to July of 1995. He says that he had no intention of paying for the overtime in September to December of 1994.

Bolenback says that she carried on in the employ of Stanmar even though overtime was owed to her because she believed that eventually her overtime would be paid. At the time of the termination of her employment it had not been paid and she proceeded with this complaint.

ISSUE TO BE DECIDED

The issue is whether Bolenback was entitled to overtime pay for hours she says were worked but which Stanmar says were not authorized.

ANALYSIS

The following provisions of the Act are applicable:

- "35. 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, ..." (emphasis added)
- "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."

While Stanmar's witnesses repeatedly at the hearing referred to "authorized" overtime, S. 35 also requires overtime wages to be paid where an employer directly or indirectly allows an employee to work overtime hours.

I have no doubt that the full extent of Bolenback's overtime was not authorized by Stanmar. However, I am satisfied that it directly or indirectly allowed Bolenback to work the hours that she claimed.

Bolenback testified under oath that she worked the hours set out in the documents provided to the Branch. There was no evidence from the employer to seriously contradict her assertion of hours worked.

I must find that Bolenback's claim for overtime must be allowed based upon the hours presented by her to Branch. Naturally, to be deducted from any such calculation is the \$5,500.00 the employer has paid toward the overtime claim to date.

ORDER

In summary, I order under Section 115 of the Act, the Determination #001469 be cancelled and that the matter be referred back to the Director for calculation of overtime as set out above.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal

:cef