Employment Standards TRIBUNAL

An appeal

- by -

Crown Group Security Ltd.
("Crown")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
*Employment Standards Act* R.S.B.C. 1996, C.113

**TRIBUNAL MEMBER:** Ian Lawson

**FILE No.:** 2004A/142

**DATE OF DECISION:** November 3, 2004

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Greta Sharp | On behalf of Crown Group Security Ltd. |
| Erwin Schultz | On behalf of the Director of Employment Standards |
| Tammy McRae | On her own behalf |

## OVERVIEW

This is an appeal by Crown Group Security Ltd. ("Crown") pursuant to section 112 of the *Act*. The appeal is from Determination ER#126-461 issued by Erwin Schultz, a delegate of the Director of Employment Standards on August 10, 2004. The Determination required Crown to pay overtime, vacation pay and interest to Tammy McRae ("McRae") in the total amount of $433.97, together with an administrative penalty in the amount of $500.00.

Crown filed its appeal on August 17, 2004. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

## FACTS

Crown operates a security patrol business and employed McRae as a patrol person from November 20, 2002 to April 7, 2004. McRae conducted mobile patrols of pre-assigned areas, specified on a "run sheet." She typically worked a shift rotation of four or five days on, and two days off. Each shift was scheduled to be eight hours, commencing at 7:30 or 8:30 PM and ending at 3:30 to 4:30 AM. Her arrival and departure times at each pre-assigned area were recorded on the run sheet, and the times were verified by radio call to Crown's dispatcher.

McRae filed a complaint with the Director that Crown failed to pay regular wages for the shift she worked on January 25, 2004, and that Crown failed to pay overtime wages for hours worked between January 11 and March 21, 2004. The delegate elected to conduct a complaint hearing on the matter, which was held on July 20, 2004, and at which the delegate received copies of McRae's shift schedules and run sheets. After hearing McRae and Crown's general manager Doug Cochrane, the delegate concluded McRae had been paid properly for January 25, but she was owed overtime wages for several shifts in which she was required to remain at customer sites for various reasons beyond her regular eight hours (such as waiting for customers or police to attend insecure sites). Crown argued that it had an overtime policy which restricted overtime entitlement only to shifts on which there had been two or more alarm calls, and further, that no management person had authorized McRae's overtime hours.

In deciding the overtime issue, the delegate referred to section 35(1) of the *Act* and stated:

> The responsibility rests with the employer to control when an employee works and to record all hours worked. It is not sufficient to simply schedule the employee; the employer must actively supervise the workforce and record their hours to ensure that no overtime is worked.

> In this case, Crown Security had an overtime policy that limited payment of overtime wages to certain occurrences, such as two alarm calls during a shift. The employer seeks to rely on this policy, and the scheduled hours of work shown on the Run sheet, to limit its liability to pay overtime wages.
>
> This approach to overtime is incorrect and not in compliance with the Employment Standards Act. In both Sections 1 and 35, the Act requires payment of overtime where the employer "directly or indirectly allows an employee to work." Crown Security was aware, or should have been aware, that the complainant was working overtime hours....

Crown's Appeal Form alleges that in this Determination the Director erred in law and failed to observe the principles of natural justice in making the Determination. The only submission made in support of the appeal includes the following:

> We believe that Erwin Schultz prevented the Employees [*sic*] burden of proof when Mr. Cochrane attempted to shed light to discipline for returning Company vehicle and extending her hours worked past required shift completion. Our appeal is based on Mr. Erwin Schultz declining to allow Company Representative to fair questioning surrounding excess work hrs commented as overtime. Mr. Schultz breached a fair trial process and we will proceed to next level of Appeal.

The delegate's response to the appeal includes the following submission:

> As stated in the Determination, Doug Cochrane gave evidence for the employer that no one from management was present at the end of the complainant's shift, when she dropped off her patrol car. He stated that the employer took no action against her when she dropped off the car late; it was an inconvenience to her co-workers, not to the employer.

## ISSUES

1. Whether the Determination contains any error of law respecting the award of overtime hours.

2. Whether the delegate failed to observe the principles of natural justice by restricting Crown's ability to cross-examine or otherwise be heard at the complaint hearing.

## ANALYSIS

### 1) The Overtime Issue

Section 35(1) of the *Act* reads as follows:

> 35 (1) An employer must pay an employee overtime wages in accordance with section 40 if the employer requires, or directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week.

This provision requires that employers control and direct employees' hours of work. If the employer does not wish an employee to work overtime hours, the employer has the responsibility of controlling the employee, regardless of any stated overtime policy (see *International Energy Systems Corp.*, BC EST #D189/97; *Re Small Town Press Ltd.*, BC EST #RD016/04). The delegate accepted McRae's explanation for hours she worked beyond her scheduled eight-hour shifts, and Crown's only defence to her complaint

was that she did not comply with its overtime policy or seek prior approval before working the overtime hours. If Crown did not want McRae to work any hours beyond the scheduled eight, the *Act* requires that Crown ensure her duties come to an end at the required time. If Crown "directly or indirectly" allows her to remain on duty beyond the eight hours, it is liable to pay overtime wages. The employer controls the workplace, and it cannot hide behind the words of an overtime policy if its employees are allowed to remain at work beyond scheduled shifts.

I therefore find no error in law in how the delegate addressed McRae's overtime complaint.

**2) The Natural Justice Issue**

Crown makes no submission on this point, other than alleging Doug Cochrane was somehow restricted in his cross-examination of McRae at the complaint hearing. As there is no record of the evidence heard at the complaint hearing, the Tribunal is limited in its ability to review how the complaint hearing was conducted. Without a record, therefore, the appellant bears the burden of proving some fact or circumstance that demonstrates unfairness on at least a *prima facie* or threshold basis. The Tribunal has described the burden resting on appellants generally as the "risk of non-persuasion":

> Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L.Rev. 34 puts it, "the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy". *In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion.* Considerations of fairness suggest also that the party seeking change should bear the risk of non-persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of "burden of proof" is only of significance where the tribunal has not been persuaded. [*Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96), emphasis added]

In the absence of *some* proof or argument that unfairness occurred at the complaint hearing, therefore, Crown will fail to persuade me to exercise my authority under section 115 of the *Act* to cancel or vary the Determination, or refer it back to the Director. Looking again at the only submission by Crown which addresses the natural justice issue, I find it has failed to meet the burden resting upon it, even on a threshold basis. Crown presents nothing to support its contention that Doug Cochrane was not allowed to cross-examine McRae as fully as he wanted to. Had there been a record of the complaint hearing, I might nevertheless have been able to address this issue directly. However, in the absence of a record, and in the further absence of even a suggestion of the nature of the unfairness alleged, I find Crown's appeal on the natural justice issue must be dismissed.

**ORDER**

Pursuant to section 115(1) of the Act, the appeal is dismissed and Determination ER#126-461 issued on August 10, 2004 is confirmed, with interest pursuant to section 88.

**Ian Lawson**
**Member**
**Employment Standards Tribunal**