

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-

International Energy Systems Corp.  
("I.E.S.")

of a Determination issued by -

The Director Of Employment Standards  
( the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE No.: 96 / 785

DATE OF HEARING: Apri130, 1997

DATE OF DECISION: May 6,1997

DECISION

APPEARANCES

<b>Ian Plurnbley</b>	for International Energy Systems Corp.
Elizabeth A. Henriques	on her own behalf
Diane MacLean	for the Director of Employment Standards

OVERVIEW

This is an appeal under Section 112 of the *Employment Standards Act* ("the Act") against Determination No.004814 which was issued by a delegate of the Director of Employment Standards on November 28, 1996. The Determination required International Energy Systems Corp. ("I.E.S.") to pay \$1,941.25 to a former employee, Elizabeth A. Henriques, on account of unpaid overtime wages and interest. I.E.S.'s appeal disputes certain findings which were made by the Director's delegate and argues that no overtime wages are owed to Mrs. Henriques.

A hearing was held at the Tribunal's offices on April 30, 1997 at which time sworn testimony was given by Elizabeth Henriques and Ian Plurnbley.

ISSUE TO BE DECIDED

Is Mrs. Henriques entitled to the payment of overtime wages and interest as set out in the Determination?

FACTS

*Undisputed facts*

Elizabeth Henriques was employed by I.E.S. as a secretary / receptionist from February 27, 1995 to January 10, 1996. She was interviewed by and reported to Wayne Ryan, the former President of I.E.S. who left I.E.S. in November, 1995. There were certain times during her employment with I.E.S. that Mrs. Henriques worked more than 8 hours per day or 40 hours per week. She completed a time sheet each week and was paid overtime wages accordingly. Mrs. Henriques submitted a complaint dated February 9, 1996 in which she alleged that she had worked and had not been paid for overtime hours (in addition to those recorded on her timesheets). She provided her personal "daytimer" to the Director's delegate as part of the investigation of her complaint. The overtime hours in the "daytimer" exceeded those recorded on the timesheets. Prior to November, 1995 I.E.S. did not have a written policy concerning pre-authorization of overtime hours.

I.E.S. had an unwritten policy of paying regular wages to employees who were granted sick leave.

*Determination*

The Determination sets out the case made by Mrs. Henriques and by I.E.S. in the following terms:

Arguments of Complainant

The complainant says she did not submit all of her overtime at the time it was worked because she knew the employer could not afford to pay these extra wages. It was a small company; she often had to phone customers with outstanding accounts in order that there would be enough money to meet the payroll. She also had to contact the directors on many occasions to get their assistance in meeting the payroll. The complainant also says the employer knew she was working a lot of overtime. For example, when she worked late in the evenings, they would call her with additional instructions.

Arguments of Employer

The employer states that we should accept their time sheets as the accurate ones. In addition, they point out that the company's policy was that overtime was only payable if done with prior approval. Further, they point out that the complainant never talked to them about unpaid overtime. Finally, the employer argues that if overtime is found to be payable, then the employees sick days should be deducted from the wages found to be owing.

In making her Determination, the Director's delegate relied in part on statements made by Larry Johnson, a former accountant / book-keeper employed by I.E.S. who confirmed that Mrs. Henriques was required to work overtime hours.

The Director's delegate concluded, based on the analysis set out in the Determination, that Mrs. Henriques was entitled to be paid overtime wages plus interest totalling \$1,941.25. She made that determination, in part for the following reasons:

Section 35 of the *Act* requires the employer to pay overtime wages if the complainant worked more than 8 hours in a day or more than 40 hours in a week. In order to calculate the amount of overtime owing, there must be an accurate record of the number of hours worked. Here there are two records of the number of hours worked. Each record was maintained by the complainant, and the question is which record is to be preferred?

In the absence of the evidence provided by the company's accountant, I would have preferred the time sheets provided by the employer. These time sheets show a lower amount of overtime worked. However, the evidence of the company's accountant convinces me, on a balance of probabilities, that the daytimer of the complainant is to be preferred.

*Disputed facts*

Mrs. Henriques testified at the hearing that she worked many overtime hours which were approved by Wayne Ryan (or his replacement, Doug Cullen) and which were not recorded on the I.E.S. time sheets. Most often, her overtime hours were caused by her assisting Wayne Ryan and Doug Cullen in the preparation of contract proposals or "bids." She would also receive telephone calls during the evening from I.E.S. agents or customers in Texas, Hong Kong and Taiwan for example.

According to Mrs. Henriques , Wayne Ryan told her several times that there was "...no money for overtime" and instructed her to "...re-do the time sheet." She also testified that Wayne Ryan would check with Larry Johnson to determine the state of I.E.S.'s bank account balance and if there were sufficient funds she would be allowed to record overtime hours on the timesheet. Otherwise, she testified, Wayne Ryan told her not to record overtime hours. In short, she testified that "... Wayne decided what could be paid or not" and the timesheets would be amended accordingly. Mrs. Henriques acknowledged that she had been paid for all overtime hours which were recorded on the timesheets, but reiterated that not all hours worked by her were recorded for the reasons given above.

Ian Plumbley (Corporate Secretary, I.E.S.) testified that Mrs. Henriques had been paid for any hours (regular and overtime) which she had worked while employed by I.E.S. He also gave evidence that all overtime hours which are recorded on I.E.S. timesheets had been paid to Mrs. Henriques and that she had not requested payment for any other overtime wages during her period of employment. He denied that Mrs. Henriques was required to work overtime without payment.

Mr. Plumbley testified that I.E.S. was a new, small business which took reasonable steps to manage its payroll costs and did not want employees to work any overtime "...unless absolutely necessary ." He also gave evidence which contradicted the allegations attributed to Mrs. Henriques as set out above in the excerpt from the Determination. He testified, further, that the only reliable record of how many hours Mrs. Henriques worked are the timesheets which she prepared and submitted each week. Mr .Plumbley also testified that Larry Johnson was a part-time employee who did not work in the evening or on week-ends and, therefore, he could not corroborate Mrs. Henriques' hours of work.

## ANALYSIS

Section 35 of the *Act* requires an employer to pay overtime wages if "...the employer **requires or, directly or indirectly, allows** an employee to work" more than 8 hours a day or 40 hours a week (emphasis added). Thus, in deciding Mrs. Henriques' entitlement to overtime wages under the *Act*, I am required to consider what hours I.E.S. directly or indirectly allowed her to work.

I agree with the Director's delegate that the *Act* "...does not state that unauthorized overtime creates an exception to the requirement to pay overtime." I also agree that Section 35 places on the employer an onus to control and direct its employees hours of work. That is, if an employer does not wish its employees to work overtime it must not only order them not to work but must ensure that they do not work any hours not scheduled by the employer .

A central issue in deciding this appeal is the credibility of the evidence given by Mrs. Henriques. A number of factors must be considered in assessing the credibility of a witness: demeanor; opportunities for knowledge; powers of observation; judgment and memory; ability to describe clearly what has been seen and heard; the probability of the event happening in the manner suggested [*Farnya v. Chorny* (1952) 2 DLR 354 (BCCA)].

On balance, I find it more probable that events occurred as Mrs. Henriques described them. Her memory of key dates and events was consistent throughout her written submission and her oral evidence. Her evidence was not shaken under cross- examination. She was candid and forthright in answering any questions which were put to her. I accept Mrs. Henriques' evidence that Mr .Plumbley was generally unaware of her hours of work.

During most of her employment with I.E.S., Mrs. Henriques reported to Wayne Ryan and Doug Cullen. However, the Tribunal did not hear evidence from either Mr. Ryan or Mr. Cullen. Mr. Plumbley's evidence does not establish that he, Wayne Ryan or Doug Cullen told Mrs. Henriques not to work overtime prior to December 19, 1995. Thereafter, Mrs. Henriques did not work overtime.

I concur with the analysis made by Director's delegate concerning the payment of wages to employees who are granted sick leave with pay.

**ORDER**

I order, under Section 115 of the *Act*, that Determination No. CDET 004814 be confirmed.

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Geoffrey Crampton, Chair  
Employment Standards Tribunal