

**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-

Cedar City Shake Ltd.  
(the “Employer”)

-of a Determination issued by-

The Director of Employment Standards  
(the “Director”)

**ADJUDICATOR:** E. Casey McCabe

**FILE NO.:** 96/752

**DATE OF HEARING:** April 3, 1997

**DATE OF DECISION:** May 13, 1997

**DECISION**

**APPEARANCES**

Allen Kruchowski                    on behalf of Cedar City Shake Ltd.  
Marie Liakopoulos                on her own behalf  
Joanne Kembel                    on behalf of the Director of Employment Standards

**OVERVIEW**

This is an appeal by Cedar City Shake Ltd. (the “Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against Determination dated December 11, 1996. Under the Determination dated December 11, 1996 the Director’s delegate determined that the Employer contravened Section 40(1) of the *Act* by failing to pay overtime for hours worked in excess of eight (8) per day.

**ISSUE TO BE DECIDED**

Is the employer liable to pay overtime for hours worked in excess of eight (8) hours per day as required by Section 40(1) of the *Act* ?

**FACTS**

At the commencement of the hearing Mr. Kruchowski applied for an adjournment. He applied on the basis that he understood that he would have the opportunity to cross-examine the Director’s delegate who wrote the Determination. However, from the time of writing the Determination until the time of the hearing the Director’s delegate retired. He was not available to appear at the hearing. Mr. Kruchowski was concerned that he would not be able to challenge the facts or the procedure used during the investigation which produced this Determination. It should be noted that Mr. Kruchowski appeared at the hearing with witnesses prepared to testify on the merits of the employer’s appeal. A brief adjournment was granted while Mr. Kruchowski consulted legal counsel. I reconvened the hearing. I did not grant the adjournment. I made this ruling on the basis that Mr. Kruchowski was present with witnesses who were prepared to give evidence on the merits. The complainant wished to proceed. Over eleven months had passed since her termination. I ruled that Mr. Kruchowski would be entitled to call witnesses, lead evidence, cross-examine the complainant and make submissions on all matters in issue. At Mr. Kruchowski’s request I granted an order for exclusion of witnesses.

The employer operates a cedar mill which manufactures ridge caps and builders' shims. The number of people employed varies, having been as high as twenty-six, but at the time of this hearing there were thirteen employees. The mill operates on a five (5) day week Monday to Friday inclusive. The regular hours are 7:30 a.m. to 4:00 p.m. with a one half hour lunch and two fifteen minute breaks. At the relevant time the office staff consisted of two or three persons with the remainder of the work force working in production in the yard. The complainant, Marie Liakopoulos, worked in the office.

The complainant commenced employment on November 15, 1995 and worked until April 26, 1996. She was hired at the same time as a second office person due to the fact that the employer's previous office employee had left on short notice. The complainant was responsible for payroll. This included entering time, calculating wages, preparing pay stubs and other documentation associated with payroll. The complainant kept her own time records. The employer is the sole signing authority at the work place and signed employees' pay cheques.

The complainant testified that at the time of hire the regular hours of work were discussed. She testified that she asked how much work was there to be done and that Mr. Kruchowski replied that it would take approximately three months to log onto the computer for year end. The complainant testified that she then asked if there would be long hours to get it tidied up and that Mr. Kruchowski replied it would be greatly appreciated if she could do that. The hours of work were discussed but there was no mention of any overtime. The complainant responded that she didn't always take a lunch; however, it was not made clear that she intended to work through the lunch period nor that she was required to take the unpaid break. It should be noted at this point that the complainant did not have keys to the premises nor access to the security code and therefore would not have worked beyond 4:00 p.m. on any day.

Mr. Kruchowski testified that the issue of long hours and the complainant working through lunch were not discussed at the point of hire. He testified that he was the sole signing authority for the employer and that all time slips were done by the complainant and brought forward to him. He would sign pay cheques, including the complainant's, based on those time slips. He testified that he often saw the complainant eating at her desk. He testified that he did not notice that the complainant's pay cheques included payment for work through the lunch hour until it was brought to his attention by a new employee hired on March 4, 1996. That person informed the employer that the complainant was claiming wages for time worked during the lunch break. It should be noted that the complainant was claiming the hours at a straight time rate and not at time and one-half.

Both the complainant and Mr. Kruchowski agree that there was a discussion between the two once Mr. Kruchowski realized that the complainant was being paid for work through lunch. However, it is not clear when that discussion occurred. It obviously occurred sometime after March 4, 1996 because that is the date that the new office person was hired. The time records show that the eight and one-half hour days were not worked during the week of March 18, 1996 and although some eight and one-half hour days were worked in subsequent weeks the frequency was much less than the period prior to March 15, 1996.

## **ANALYSIS**

Section 40 of the *Act* reads:

- 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 ½ 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.*

The employer argues that the complainant should not be allowed to claim additional overtime pay for the one half hour worked during lunch periods. The employer views the matter as a breach of trust. I am unable to agree with the employer on that point. The employer testified that he is a “hands on” employer. The time slips were brought to him for scrutiny. He signed the pay cheques. He was aware that the complainant was making mistakes with respect to the payroll of other employees yet he did not question her pay cheque. I am satisfied that the complainant had no intention of overpaying herself. She paid herself at straight time rates because she believed that the employer did not pay overtime. I am satisfied that she in fact worked through her lunch period on the days that her time cards show that she worked eight and one half hours. However, I am also satisfied that by no later than March 15, 1996 it was made clear to her by Mr. Kruchowski that she was not to work through her lunch. The time cards show that there were at least ten other occasions between March 15, 1996 and prior to her termination that she was paid for eight and one half hour days. The employer should not be responsible to pay for overtime for those shifts.

The *Act* uses the word “must” and I am obliged to construe that word in its mandatory sense. The *Act* does not anticipate that an employer must authorize overtime. If the overtime is worked the *Act* requires that the overtime premium be paid. There is no element of discretion involved in the administration or interpretation of the *Act* under this Section. However, as stated previously, I am persuaded that by no later than March 15, 1996 the employer had made it clear to the complainant that she was not to work through her lunch break. The employer is not obliged to pay the overtime where the complainant worked contrary to the direct instruction from her employer.

In summary, I find that the complainant did in fact work through her lunch break on the days that she claimed eight and one half hours' pay. I find that the employer's policy was not made clear to the complainant at her point of hire. The employer received the benefit of her work during the lunch periods. I also find that the complainant received straight time pay for the half hour worked in excess of eight hours per day up to March 15, 1996. The Determination dated December 11, 1996 should be varied to order payment for the overtime premium at one half hour straight time to March 15, 1996 for days where the extra half hour was worked.

**ORDER**

I order pursuant to Section 115 of the *Act* that the Determination dated December 11, 1996 be varied.

E. Casey McCabe  
Adjudicator  
Employment Standards Tribunal