

An appeal

- by -

554764 B.C. Ltd. operating as Larson Manor
("Larson Manor")

- 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

ADJUDICATOR: M. Gwendolynne Taylor

FILE No.: 2001/89

DATE OF DECISION: May 1, 2001

DECISION

SUBMISSIONS

Sandy Seleznik on behalf of Larson Manor

Rhona Beck on behalf of the Director

OVERVIEW

This is an appeal by Larson Manor pursuant to section 112 of the *Employment Standards Act* (“*the Act*”) from the Director’s determination dated February 19, 2001 (#ER 103995). The Director found that Larson Manor owed Heather Joy Nilsson (“Nilsson”) for overtime, statutory holiday pay and vacation pay in the amount of \$1,023.53, plus interest. The overtime award was based on a finding that Nilsson worked 11 hours per day, five days per week and was not paid overtime.

Larson Manor acknowledged that statutory holiday pay and some vacation pay were owed, and forwarded a cheque for \$208.10 to the Director.

ISSUE

Is Nilsson entitled to overtime pay and, if yes, on what basis should it be calculated?

THE FACTS AND SUBMISSIONS

Nilsson was employed by Larson Manor as a cook, commencing June 11, 2000 until October 20, 2000, at a flat rate of \$100.00 per day for an 11 hour shift. Larson Manor submitted that the original contract was for \$80.00 per day. However, they determined that the salary did not comply with minimum wage and advised Nilsson that it would be increased to \$100.00 per day effective July 1, 2000. On occasion, Nilsson worked four or five hour shifts and was paid \$10.00 per hour.

Larson Manor submitted that the wage of \$100.00 per day included regular and overtime hours. The rate negotiated for the four and five hour shifts was separate and indicative of an incentive for her to work the extra shifts.

The Director found that there was nothing in writing to support Larson Manor’s contention that overtime was included in the wage. Accordingly, the Director found that the wages paid were regular wages.

The Director referred to section 35 of the *Act*, which requires an employer to pay overtime if an employee works more than 8 hours per week or 40 hours per week. The Director based the calculation of overtime on the wages paid in the pay period, divided by the number of hours. The Director also calculated vacation pay on the overtime and the vacation pay and statutory holiday pay owing.

DETERMINATION

Larson Manor has not persuaded me that the Director erred. On the face of the agreement, there is no provision for overtime. The evidence does not disclose, nor has there been any suggestion, that the parties negotiated a regular hourly rate and an overtime rate. I find it is reasonable to conclude that overtime was not negotiated and not paid.

Section 35 clearly imposes a requirement for an employer to pay overtime. Section 35 applies in this case.

I find that the Director correctly calculated the overtime owing.

ORDER

I confirm the Director's Determination and dismiss the appeal.

M. GWENDOLYNNE TAYLOR

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal