

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 -

Regional Security Services Ltd.
("Regional")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 97/128

DATE OF DECISION: May 9, 1997

DECISION

OVERVIEW

This is an appeal by Regional Security Services Ltd. (“Regional”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 6, 1997. In this appeal, Regional claims that the delegate of the Director incorrectly determined that overtime wages in the amount of \$3,518.60 plus interest were owed to the complainant, Arnold H. Doerksen (“Doerksen”).

Regional submits that no overtime wages are payable as the complainant participated in formulating his shift schedule to avoid any reduction in hours when Regional’s contract hours were amended by its client.

Doerksen submits that in addition to the overtime wages determined by the delegate of the Director, he is also owed statutory holiday pay.

ISSUES TO BE DECIDED

1. Does Regional owe wages for overtime work to Doerksen ?
2. Does Regional owes statutory holiday pay to Doerksen ?

FACTS

Doerksen was employed by Regional as a site attendant at a local waste transfer station from May 9, 1994 to April 30, 1996.

Doerksen worked 7 1/2 hours per day, 5 days per week from May 9, 1994 until approximately January 15, 1995 at which time Regional and Doerksen agreed on a new weekly shift schedule consisting of:

- 1 shift @ 9.5 hours
- 2 shifts @ 12.5 hours
- 1 shift @ 6.25 hours

The parties agree that Doerksen did work the hours provided to the delegate of the Director and no overtime rates of pay were paid, only straight time rates for all hours worked.

There was no variance applied for nor in place to permit this type of shift schedule to be worked without the payment of overtime wages.

The delegate of the Director determined that overtime wages were owing to Doerksen, however, no statutory holiday pay was owing.

ANALYSIS

Section 4 of the *Act* sets forth that:

Requirements of this Act cannot be waived

4. *The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*

Any agreement between Regional and Doerksen with respect to agreeing to work for straight time wages for all hours worked is, pursuant to Section 4, void.

Regional and its employees are permitted to agree to a flexible work schedule under the provisions of Section 37 of the *Act*. However, any such schedule must be one of the schedules prescribed in Section 19 and Appendix 1 of the *Employment Standards Regulation*.

There is no dispute with respect to the accuracy of the payroll information provided to the delegate of the Director by both Regional and Doerksen and that information formed the basis of the overtime calculations performed by the delegate.

A review of the overtime calculations provided by the delegate of the Director reveals errors in the calculation of the overtime wages for work performed on some of the statutory holidays during the period in question and, as well, did not include any statutory holiday pay for B.C. Day or Labour Day in 1995.

I have recalculated the wages owing to include the appropriate overtime rates for performing work on some of the statutory holidays and to include statutory holiday pay for B.C. Day and Labour Day, 1995.

The recalculation is as follows:

Total wages earned	=	\$36,136.67
+ 4% vacation pay	=	<u>\$ 1,445.47</u>
subtotal	=	\$37,582.14
less wages paid	=	<u>\$33,651.45</u>
Total Wages Owing	=	\$ 3,930.69

I conclude therefore that Regional owes overtime wages and statutory holiday pay to Doerkson.

The appeal by Regional is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated February 6, 1997 be varied to be in the amount of **\$3,930.69** plus interest pursuant to Section 88.

Hans Suhr
Adjudicator
Employment Standards Tribunal