

**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 -

Petroglyph Animal Hospital Ltd.  
("Petroglyph")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** James Wolfgang

**FILE No.:** 2000/055

**DATE OF HEARING:** May 12, 2000

**DATE OF DECISION:** June 6, 2000

## DECISION

### APPEARANCES

Bettina Bobslen representing Petroglyph Animal Hospital  
Alana Buchanan representing herself

### OVERVIEW

This is an appeal by Petroglyph Animal Hospital Ltd. (“Petroglyph”) or (the “employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards on January 06, 2000. The Determination found Petroglyph had violated Part 3, Section 28 of the *Act* and ordered them to pay Alana Buchanan (“Buchanan”) \$677.76 in wages for overtime worked, annual vacation pay plus interest. A penalty of \$0.00 was also assessed.

Petroglyph is seeking to have the award set aside as they claim they have paid Buchanan in excess of her claim and no money is owed.

A hearing was held on May 12, 2000 and I took evidence from the parties.

Mediation was offered but was rejected by both parties.

### ISSUE TO BE DECIDED

Does Petroglyph owe Buchanan wages for overtime worked in 1997?

### FACTS

Petroglyph is an animal hospital operated by Drs. Keith Yonge (“Yonge”), Bettina Bobslen, and Sylvia Hall Andrews. They employed both salaried and hourly paid staff. Salaries were reviewed on an annual basis in an informal way and bonuses were paid to all employees at Christmas. According to the employer, the hourly paid staff was expected to complete timesheets that were provided. The salaried staff could complete timesheets but were not required to do so. Yonge was selected by the partners to be the spokesperson dealing with staff questions but was not the supervisor.

Buchanan was employed as a salaried Animal Health Technologist from September 1, 1992 until April 5, 1999. No written contract of employment was signed between Buchanan and Petroglyph. She received a salary increase from \$2,750.00 per month to \$3,000.00 per month in November 1998. She claimed the salaried employees were full time staff and hourly employees were part time staff.

Petroglyph admit they did not keep records of hours worked by salaried employees and, as a result, acknowledge they were in contravention of Section 28 of the *Act*.

Petroglyph went through a period of financial difficulty that began in 1997 and reached a point in 1998 when action had to be taken. This resulted in a reduction of staff, reduced hours and some change in duties for those who remained.

On November 24, 1998 Yonge told Buchanan her hours of work were to be reduced from 40 to 30 effective December 1, 1998. Buchanan claims Yonge said she would be paid on an hourly basis but later changed to paying 75% of her previous salary. On March 5, 1998 Buchanan indicates Yonge informed her of a change in duties. She would be required to do part-time receptionist work and some work of a veterinary assistant. Buchanan claimed Yonge ordered that she ensure her hours did not exceed 30 per week, but still expected her to do her duties and be available for emergencies.

In the original complaint, Buchanan claimed her hours had been reduced and her duties changed substantially which amounted to constructive dismissal. During the investigation she was convinced by the delegate these changes, while substantial, did not constitute a claim for constructive dismissal. These points were raised at the hearing as Buchanan still feels the delegate did not properly address them. The employer took the position the Determination only dealt with the matter of overtime and they were unprepared and unwilling to explore those matters at the hearing. If the issue of constructive dismissal were to be considered they would request an adjournment to prepare a defence. Buchanan reluctantly agreed to proceed with the hearing dealing only with the claim for overtime.

The hospital had a heavier than normal caseload from April to November in 1997. Buchanan claims she was required to work additional hours during that period. The Determination states Yonge told the delegate he was not aware Buchanan had worked any overtime. He advised she was instructed to take time off for any overtime worked. As no record of hours worked existed the employer was unable to confirm Buchanan had worked extra hours or had taken time off to compensate for the overtime.

In their written submission to the Tribunal, the employer now claim they were well aware Buchanan had worked extra hours and the bonuses given her reflect that.

Buchanan kept a calendar at work in which she recorded all of the extra hours worked, normally at the end of each day. She did not present the calendar to the employer or make any claim for overtime while she was employed. She claimed Yonge told her they did not pay overtime and “she just bought into the system”. She is now claiming overtime for the 26.5 hours worked.

Petroglyph maintain they paid Buchanan for the extra time she worked in 1997 in the form of two bonus cheques. One cheque, in the amount of \$750.00 was issued to Buchanan for the period April to September 1997 and a second cheque, in the amount of \$450.00 for the period October to December 1997. Buchanan claimed the bonus payments she received were not directly related to the overtime she worked, as the employer had no record of the hours worked by her.

The employer argued the cheques were issued in consideration of the extra time worked as a card accompanying the first cheque stated: “Thank you for all your extra time and efforts”, further the dates the cheques were issued coincide directly with the period of overtime. Petroglyph claims no other employees received bonus cheques in that form. The only bonuses issued were the cheques at Christmas. Finally, they claim this is precisely twice what Buchanan is claiming for overtime.

From the written submissions of both parties there was evidence of a serious problem between Yonge and Buchanan that ultimately led to Buchanan’s quitting.

## ANALYSIS

During the investigation by the delegate Yonge stated Buchanan had not, to his knowledge, worked any overtime. In accordance with the policy of the employer if she had worked she would have taken time off to compensate for the time worked. That point is important to this case. According to Buchanan, Company policy for salaried employees was they did not pay overtime. She did not make any reference to being told to take time off. We have no evidence in any of the employer's submissions of overtime being paid to any salaried employees. I have no reason to believe the delegate would not record accurately the results of his interview with Yonge. I accept the evidence of the delegate that, at the time of the investigation, Yonge did not believe Buchanan had worked any overtime, and if she had, time had been taken off to compensate. If correct, this would clearly establish the money received by Buchanan in the two bonus cheques was not for overtime.

In my opinion, when Petroglyph received the Determination they then sought to offset the obligation to pay for the overtime worked by Buchanan by claiming the bonus payments were payments for overtime.

Petroglyph maintain they paid Buchanan twice what her overtime claim is, however that would be a coincidence as they admit they did not know the exact number of hours worked, only that she had worked extra hours and, according to Yonge, believed she had taken time off to compensate.

The Determination indicated the calculation of the wages owed was attached as Item B however the Tribunal copy of the Determination does not have Item B included therefore we do not know how the overtime calculation was made. I do not believe the delegate included the amount of money paid to Buchanan in the bonus cheques as wages for the calculation of the rate to be paid as overtime. As the Determination found the bonus money was not payment for the extra hours worked we must conclude it was not related to hours of work, production or efficiency. It was money paid at the discretion of the employer.

In a letter dated 31 January 2000 to: "To Whom It May Concern" and signed by the three partners they state, in part:

Ms. Buchanan falsely alleged that she had not been paid for the overtime in question. While it is true she failed to complete the timesheets provided, and also failed to draw to our attention concern she may have about compensation, she was generously compensated for the additional time she claims.

As employers committed to fairness, we regularly assess the efforts and performance of staff, and have always taken the initiative to reward generously when employees go the extra mile, as is frequently required in Veterinary practice. The need for flexibility in work hours was discussed, acknowledged and agreed upon annually by both parties. This claim is in breach of her contract with us.

Contrary to that stated in the Determination, we were well aware that extra time had been given by Ms. Buchanan during the brief period in question when Medical caseload exceeded normal levels. Recognizing this effort and the fact she was paid a salary rather than an hourly wage (her preference) she was issued on our initiative: 1) a bonus cheque for \$750 for the period April to September 1997 during which she claims about 20 hours, and 2) a bonus cheque for \$450 for the period October to December 1997 during which she claims about 7 hours. These voluntary payments coincided with and were

compensation for her extra work, an amount to precisely double that to which she now subsequently claims. The card accompanying the first cheque stated “Thank you for all your extra time and efforts”, and we submit this is a clear indication of the intent of the bonus payments (contrary to her position in the Determination). (emphasis added)

I accept the \$1200.00 received by Buchanan in 1997 may have been in recognition of extra effort. These were clearly discretionary payments by Petroglyph’s own evidence. I am not suggesting Petroglyph was not a generous employer but only that they failed to meet their obligation under the *Act* to properly pay for overtime. If the employer was aware Buchanan was working extra time they did nothing to control or keep records of the hours as required by Section 28 of the *Act*. It may be unfortunate that Petroglyph did not have better control on the time worked by their staff however an employee should not be penalized as the result of an employer failing to maintain proper records.

Section 35 of the *Act* states:

*An employer must pay overtime wages in accordance with section 40 or 41 if the employer requires or, directly or indirectly, allows an employee to work*

(a) *over 8 hours a day or 40 hours a week, or*

(b) *.....*

The Determination found Buchanan is entitled to \$677.76 for wages, vacation pay and interest. The employer has failed to convince me the Determination is in error and therefore it stands as awarded.

**ORDER**

In accordance with Section 115 of the *Act* I confirm the Determination dated January 6, 2000. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

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**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**