

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 -

Cliff Roussel Construction Ltd
(Roussel)

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO.: 97/211

DATE OF DECISION: June 06, 1997

DECISION

OVERVIEW

This is an appeal by Cliff Roussel Construction Ltd. ("Roussel") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination of the Director of Employment Standards (the "Director") dated March 12, 1997.

The Determination found that Roussel had contravened sections 40 and 58 of the *Act* relating to the non-payment of overtime and holiday pay. The determination found that Todd Butler ("Butler") and Mike Kertesz ("Kertesz") were employees of Roussel and that on occasion during the time of their employment they worked overtime. Roussel agreed but claims that there was a specific agreement that all hours would be at "straight time". Roussel also claims that holiday pay was built into the hourly rate. The Director determined that the agreement was not enforceable and found in favour of the employees.

Roussel appealed and alleged that the Director was in error in finding that overtime was payable as there was a signed contract that all hours would be at "straight time". Roussel also appealed on the basis that the Director used incorrect hourly rates in calculating the amount owing to Butler.

FACTS

The facts are fairly straight forward. Roussel employed Butler commencing June 17, 1996 and he worked until September 09, 1997. The terms of Butler's employment were written in an employment agreement. The agreement was that Butler would be paid \$10.00 per hour in June, \$11.00 per hour in July, and \$12.00 per hour in August and September. All overtime was to be paid at "straight time". Kertesz was employed from May 31, 1996 until September 17, 1996 at \$15.00 per hour. Kertesz signed a similar written employment contract that overtime would only be paid as "straight time". There was a bonus payable to Kertesz for exceptional performance which was not paid. Both Butler and Kertesz worked between 3 and 7 hours overtime most weeks but were only paid straight time for the overtime. Holiday pay would be calculated on the total wages owing over the time of employment.

The Director calculated that Butler is owed \$800.38 (plus interest) and Kertesz is owed \$1,115.88 (plus interest). The Director calculated Butler's hourly rate throughout at \$12.00.

ISSUES TO BE DECIDED

The issue to be decided is whether overtime is payable where there is an express agreement between the employer and the employees that all time would be "straight time". Secondly whether the Director miscalculated the wages payable to Butler by applying an incorrect hourly rate.

ANALYSIS

There is no issue in this case about the employment status of Butler and Kertesz. They were employees and therefore covered by and protected by the provisions of the *Act*. The *Act* is very specific about the effect of any agreement to pay less than the minimum required in the legislation.

Section 4 of the *Act* provides that the requirements of the *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 (provisions relating to collective agreements)

This provision applies to the payment of overtime wages unless the employees are on a flexible work schedule pursuant to S.37 of the *Act*. However in this case no such flexible work schedule had been applied for pursuant to the procedures in the *Regulation*. An employer may also apply for a variance of the provisions of S.40 (overtime wages for employees not on a flexible work schedule) but again in this case no variance had been applied for.

I have reviewed the materials supplied by Roussel which included the written Employment Agreements, a company memo stating that overtime was optional but would be paid at straight time, pay sheets, and written submission. I can find no reason to find that the legislation would not apply to these two employees. Section 4 of the *Act* applies to render any such agreement of no effect.

I also find that the bonus provision for Kertesz is unenforceable for uncertainty as to the circumstances that would give rise to such a bonus being payable.

However it is clear from the documentation that Butler's wage was \$10.00 per hour for June, \$11.00 per hour for July, and \$12.00 per hour thereafter.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination dated March 12, 1997 be varied to re-calculate the overtime and vacation pay payable to Butler on the basis that his hourly rate was \$10.00 in June, \$11.00 in July, and \$12.00 thereafter. In all other respects the determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal