

An appeal

- by -

Western Canada Tax Group Inc.
("Tax Group")

- 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: Cindy J. Lombard

FILE No.: 2000/858

DATE OF HEARING: April 20, 2001

DATE OF DECISION: May 18, 2001

DECISION

APPEARANCES:

The Appellant/Employer, Western Canada Tax Group Inc. (“Tax Group”) was represented by its principle owner, Tony Khunkun (“Khunkun”) and Kaz-Chester Crischuk (“Crischuk”) who acted as an advocate on behalf of the Appellant.

The Respondent/Employee, Betty Schierling (“Schierling”) appeared on her own behalf.

OVERVIEW

This is an appeal by the employer, Tax Group, pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination which was issued November 22, 2000, finding that the Respondent/Employee Schierling was entitled to overtime wages, vacation pay and interest as follows:

Overtime wages	\$3,341.00
Vacation pay	<u>\$133.65</u>
	\$3,474.65
Interest pursuant to Section 88 of the <i>Act</i>	<u>\$131.73</u>
	<u>\$3,606.38</u>

ISSUES TO BE DECIDED

Is the Respondent entitled to overtime wages on the basis that the employer required or directly or indirectly allowed Schierling to work more than 8 hours per day or 40 hours per week.

Did the Respondent Schierling actually work the amount of overtime hours, which she alleged that she did and which were confirmed by the Determination.

The onus is on the Appellant, Tax Group, to show on a balance of probabilities that the Determination was wrong.

FACTS AND ANALYSIS

1. Is the Respondent entitled to overtime wages on the basis that the employer required or directly or indirectly allowed Schierling to work more than 8 hours per day or 40 hours per week.

a) According to Khunkun:

Schierling had worked for the Tax Group for many years, first under its previous owner, Margaret Jackson, and then under its current owner Khunkun who purchased the business in January 1999. During the 2000 tax season i.e. from January 2000 until May 15, 2000, she was employed at a rate of \$13.50 per hour.

The employer, Khunkun's position is that he did not require or authorize the respondent to work overtime. Khunkun says that he was concerned about the long hours that Schierling was putting in and therefore issued a memo dated April 16, 2000, requiring that requests for overtime hours in excess of two hours be put in writing and be authorized by Khunkun in writing by return facsimile.

Khunkun admits that at the time he did not take issue with the overtime hours submitted and did pay at the regular wage for overtime hours.

Khunkun questioned why it was necessary for Schierling to work such excess overtime hours when she had not done so in the years prior to his purchasing the business.

b) According to Schierling:

Schierling says that:

- i) Khunkun was aware at all times of the overtime hours that she was working. She had daily contact with him by telephone and/or facsimile.
- ii) Schierling was the most senior tax preparer in the Westbank office (there being two other offices in Kelowna). Unlike the years when the office was owned by Margaret Jackson who had 25 years of experience herself and spent all of her time in that office working alongside of Schierling during the 2000 tax season, it was only Schierling who had the experience to do the kind of work that Jackson had done. In other words, Schierling had to do the work of two. Overtime hours were necessary as she was the only employee qualified to prepare the small business returns of which there were many in that office and Khunkun expected that she would get all the work done.
- iii) Khunkun did not question the hours submitted by Schierling and in fact paid her the requested hourly wage for those hours worked.

Section 35 of the *Act* provides:

“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....”

Section 40 of the *Act* provides that the employer must pay the employee 1 ½ times her regular wage for time over 8 hours and double time for hours exceeding 11 hours.

It is clear on the evidence before me that Khunkun either required or directly or indirectly allowed Schierling to work overtime. Furthermore, it seems reasonable given the fact that Schierling was the only employee in the office qualified to do the small business returns without the fulltime help of someone else like the previous owner and explains why she found it necessary to work overtime whereas she had not in the previous year.

2. Did the Respondent Schierling actually work the amount of overtime hours which she alleged that she did and which were confirmed by the Determination.

a) According to Khunkun:

Khunkun admits that he paid Schierling her regular wage for all overtime hours claimed; however, says that he did so only because he was under duress in so far it was the middle of the tax season and he could not afford to let her go.

Khunkun also says that by oversight he did not deduct one half hour per day for lunchtime as follows:

January 16 – 31	3.5
February 1 – 15	3.5
February 16 – 29	5.5
March 1 – 15	7.5
March 15 – 31	9.5
April 1 – 15	8.5
May 1 – 15	1.0
May 16 – 30	<u>8.0</u>
	47.0

In addition Khunkun says that Schierling’s time sheet for April 12, 13 and 14 indicates that she worked from 9:00 a.m. to 2:00 p.m. not 2:00 a.m. as she claimed, a total of 36.0 hours paid in error.

36.0
83.0 hours

b) According to Schierling:

Schierling says that she in fact worked the overtime hours for which Khunkun paid her regular hours, she did not bill for any time taken off for lunch although in fact on most days she worked through lunch and that she did work until 2:00 a.m. on April 12, 13 and 14 which was erroneously noted by her on the time sheet as 2:00 p.m.

I find Schierling's evidence to be credible and further that evidence is supported by the fact that Khunkun acknowledged those hours worked by paying her at her regular hourly wage.

In summary, the Appellant Tax Group has not discharged the onus on this appeal to show that the Determination is wrong.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of \$3,606.38 plus whatever further interest may have accrued pursuant to Section 88 of the *Act* since its issue.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal