

An appeal

- by -

Nu-Fashion Garment Manufacturing Ltd.  
("Nu-Fashion")

- 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:** Carol L. Roberts

**FILE No.:** 2002/088

**DATE OF HEARING:** May 29, 2002

**DATE OF DECISION:** June 6, 2002

## DECISION

### APPEARANCES:

Patrick Wong	On behalf of Nu-Fashion Garment Manufacturing Ltd
Zhi Qiang Xu	On his own behalf

### OVERVIEW

This is an appeal by Nu-Fashion Garment Manufacturing Ltd. ("Nu-Fashion"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued January 31, 2002. The Director's delegate found that Nu-Fashion had contravened section 40 (1)(a) and (b) of the *Act* in failing to pay Mr. Xu overtime wages. Nu-Fashion was ordered to pay the Director \$2401.09 on Mr. Xu's behalf.

### ISSUE TO BE DECIDED

At issue is whether the Director erred in determining that Mr. Xu was not paid overtime wages. Nu-Fashion submits that the delegate misunderstood the basis of Mr. Xu's compensation.

### FACTS

Mr. Xu worked in the packing department of Nu-Fashion from November 1, 2000 to September 20, 2001. He was paid \$7.60 per hour to December 31, 2000, and \$7.80 per hour thereafter.

Mr. Xu alleged that he was paid on an hourly basis, and that he was not allowed to punch his time card after regular hours. He claimed that his overtime hours were maintained separately by his supervisor. He alleged that his overtime hours were paid at straight time and shown as an incentive on his pay stubs.

Nu-Fashion advised the delegate that the incentive payment was the difference between the hourly rate and the piece rate, and that if an employee's production exceeded his hourly wage, the difference would be paid as an incentive. Nu-Fashion produced Mr. Xu's time cards to show that he did not work overtime.

The Delegate reviewed Mr. Xu's own records of his hours of work as well as the records provided by Nu-Fashion. She concluded that Mr. Xu was owed overtime pay, since Nu-Fashion was unable to illustrate how the incentive payment was calculated. She also found Mr. Xu's records of his hours of work to be credible.

The delegate also accepted Mr. Xu's evidence that he was not allowed to punch time cards after regular hours after two former employees confirmed his statements.

Nu-Fashion argued that the delegate misunderstood the basis of the incentive payment. Mr. Wong submitted that Mr. Xu was not paid on a piece rate basis, but on the number of boxes he packed within a pay period. The incentive payment was calculated on the basis of \$1.00 or \$1.20 per box. If the incentive payment was greater than the total wages based on an hourly rate, Mr. Xu received the greater amount.

The pay stub showed the incentive payment as the difference between the hourly wage and the total payment, in effect as a "top up". Mr. Wong acknowledged that the delegate was provided with information on how the incentive payment was calculated only after the Determination was issued.

Nu-Fashion also contended that Mr. Xu's record of his own hours should not be relied upon as being more accurate than its own, since Mr. Xu punched a time card daily. Nu-Fashion also contended that the witnesses contacted by the delegate were not objective as they were friends of Mr. Xu, and that their evidence was not credible.

Mr. Xu contended that, when he was initially hired, he was told only that he would be paid \$7.60 per hour. He says that he was never told about an incentive, or per carton, basis of payment. He states that he discovered that for the first time when Nu-Fashion filed its appeal of the determination. Mr. Xu stated that, for the first three months of his employment, he packed boxes with another part time worker. After that, he packed boxes mainly on his own, but when he got behind, an employee from another department would be brought in to assist him. He also stated that, although a manager did appear to count the boxes packed, they were not counted on a daily basis.

Mr. Xu stated that it was always his practise to maintain a record of the hours he worked on a daily basis.

## **ANALYSIS**

The burden of establishing that the Determination is incorrect rests with an Appellant. In my view, Nu-Fashion has failed to discharge this burden.

Although Nu-Fashion has submitted a basis for calculating the incentive payment, that was not provided to the delegate. I accept that the delegate was provided with all of Nu-Fashion's information, but was not given an explanation for determining the wages until after she issued the determination.

However, Mr. Wong could not advise me why the incentive payment was either \$1.00 or \$1.20. There appeared to be no rational explanation for the distinction, other than different goods went into different boxes. Furthermore, although Mr. Wong contended that the boxes were counted by a manager, Mr. Xu's evidence is that a manager was not on site on a regular basis. Furthermore, Mr. Xu contended that he often packed boxes with other employees. It is not clear to me how the boxes that were identified as forming part of the incentive payment were determined to be packed by Mr. Xu as opposed to any other employee. Since Mr. Wong acted simply as Nu-Fashion's agent for the appeal hearing, he could not dispute or clarify this matter.

Finally, Nu-Fashion called no evidence to persuade me that the delegate erred in relying on the evidence of witnesses corroborating Mr. Xu's allegations that employees were told not to punch time cards after normal hours. Mr. Wong simply contended that the witnesses were unreliable. Mere assertions that evidence is not credible is insufficient to discharge the burden of proof. Nu-Fashion must provide credible and compelling evidence to dispute Mr. Xu's allegations that he was told not to record his overtime hours. It did not.

The appeal is dismissed.

**ORDER**

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated January 31, 2002, be confirmed, along with whatever interest might have accrued since that date.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**