Employment Standards TRIBUNAL

An appeal

- by -

Small Town Press Ltd. operating as The Similkameen Spotlight

- 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: John M. Orr

FILE No.: 2003A/153

DATE OF DECISION: September 2, 2003

DECISION

OVERVIEW

This is an appeal by Small Town Press Ltd. ("Small Town Press" or "the employer") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination dated December 11, 2002 by the Director of Employment Standards (the "Director").

In the exercise of its authority under section 107 of the *Act* the Tribunal concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

A delegate of the Director determined that Small Town Press employed Katherine Wills ("Wills") as a reporter/editor of a local newspaper. When the employment ended, Wills made a number of claims to the Director. Some of the issues were resolved but there remained an issue of unpaid wages for overtime. The delegate determined that Small Town Press owed Wills $4,461.38 in unpaid overtime.

Small Town Press filed an extensive appeal alleging bias by the Director's delegate and many factual issues that were disputed. Wills filed a reply in detail to the various allegations. The delegate alleged that most of the facts alleged in the appeal are "new evidence" that should not be admitted on the appeal because they were not previously raised with the delegate. When this matter first came before me I referred the matter back to the Director to address the issue of the presence of an overtime policy alleged by the employer. The Director's delegate has since reported back and the parties have had an opportunity to make submissions.

The fundamental issue remains whether the employer approved the overtime worked or acquiesced in the overtime worked by Wills.

ANALYSIS

The foundation for the claim and the determination is that Wills worked overtime that was not paid by the employer. However, the delegate noted in the original determination that the employer had a policy that overtime could not be worked without prior approval. The delegate noted, in setting out the complainant's position, that she claims that she was unaware of the policy. Nevertheless the delegate did not address the employer's evidence on this issue.

In referring the matter back to the Director I noted that the Tribunal has held that an employee cannot create a liability for the employer to pay overtime by working hours that are not authorised or knowingly acquiesced in by the employer, *Re: Schutt (cob Abco Building Maintenance)* BCEST #D287/97; applied in *Abco Building Maintenance Ltd.* BCEST #D454/02; see also *Re: McKeen* BCEST #D082/96 and *Re: Egerdeen* BCEST #D080/99. I noted that it appeared that Wills did not submit a claim for overtime until her employment was terminated so it appeared that this overtime was not pre-approved or knowingly acquiesced in by the employer. I noted that an employee cannot unilaterally choose to work overtime and then at some date subsequent to termination make a claim for payment of overtime not authorised or approved by the employer. An employer has the inherent right to manage its workforce and to control the hours worked by employees. If overtime is authorised or knowingly acquiesced in by the employer then

the legislation requires payment for that overtime but there is no obligation for an employer to pay overtime that is not authorised.

The delegate has now made a further submission and it is evident to me that the delegate has made substantial errors in law in her analysis of the issues before her. The delegate confirms that there was an overtime policy in place at Small Town Press that stated:

> *All overtime must be approved by the Publisher in advance and must be claimed during the pay period in which it is worked.*

Having acknowledged the existence of the policy the delegate proceeds to discount its effectiveness by looking at instances where it was not enforced strictly. The delegate also asserts that Wills did not have knowledge of the policy. In regard to the latter point the delegate states that there was "no evidence" that Wills was aware of the policy. This completely disregards all of the evidence presented by the employer. To state that there was no such evidence is a significant error in law.

The delegate has also made a significant error in law in reversing the onus of proof by requiring the proof of an overtime policy and knowledge by the employee. As stated in the previous decisions of the Tribunal noted above, an employee is not entitled to unilaterally create an overtime liability without the pre-approval of the employer or without the informed acquiescence of the employer. Thus the existence of a policy is not an essential element to be established. Even in the total absence of an overtime policy, the employee cannot unilaterally work overtime without approval or acquiescence.

The delegate simply chose to ignore the evidence of the employer on this fundamental principle and this is both an error in law and contrary to the principles of natural justice. It is clear on Wills's own evidence that she never asked for pre-approval of the claimed overtime and it is also clear that the employer did not acquiesce in these hours worked because the hours were never submitted or claimed during the course of her employment.

It is abundantly clear to any fair minded reader of the submissions that Wills was aware that she simply could not set her own hours without the knowledge and consent of her superiors. She knew her authorized hours of work were 40 hours per week. This is not to say that she didn't, in fact, embark upon working some additional hours on her own initiative. However, she does not assert that she sought-out and received approval for those additional hours. It is not the obligation of the employer to keep track of unauthorized overtime as asserted by Wills and to some extent accepted by the delegate. It is more than evident that Wills did not submit her claim for such overtime during the course of her employment and only claimed it many months after her employment was terminated.

I am satisfied that the submissions of the employer are not "new evidence". All of the employer's submissions were known to the delegate during the investigation stage although they may have been fleshed out in the course of the appeal. The fact that the delegate chose to ignore or not address the employer's position during the investigation does not therefore make those submissions inadmissible on appeal. I should also note that while some overtime was apparently paid to Wills this was paid as part of a settlement arrangement and should not have been considered, as such negotiations should be considered without prejudice.

Overall the employer has met the onus of establishing that the delegate made substantial errors in law and did not properly comply with the principles of natural justice in issuing the determination herein. Accordingly the determination is cancelled

ORDER

I order, under section 115 of the *Act,* that the Determination dated December 11, 2002 is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal