

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 -

Avondale and Associates Protective Services Ltd.
("Avondale")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE No.: 97/328

DATE OF DECISION: June 11, 1997

DECISION

OVERVIEW

This is an appeal pursuant to Section 115 of the *Employment Standards Act* (the “*Act*”) by Avondale and Associates Protective Services Ltd. (“Avondale”) from a Determination of a delegate of the Director of Employment Standards (the “Director”) dated April 8, 1997. The Director concluded Avondale had contravened Sections 18, 40 and 58 of the *Act* in respect of the employment of Brian Lee and ordered it to pay an amount of \$3442.16. This amount represented unpaid wages (including overtime pay), annual vacation pay and interest. Avondale disputes the conclusion of the Director that it contravened Section 40 of the *Act*. Avondale also contends that certain of its rights under the *Act* were violated by the Employment Standards Branch.

I have reviewed the written submissions and have determined this appeal can be decided without the requirement of a hearing.

ISSUE TO BE DECIDED

The issue is whether Avondale contravened Section 40 of the *Act* in respect of the employment of Brian Lee.

FACTS

Brian Lee was employed by Avondale as an Alarm Monitor/Security Patroller from May 15, 1996 to August 15, 1996. While employed he worked a shift rotation described by Avondale as a 4x4 schedule, which is to say he worked 4 consecutive days, 12 hours a day, and was off for 4 consecutive days. As a result of the shift rotation, Lee worked in excess of 8 hours in a day and often in excess of 40 hours in a week. No overtime, either daily or weekly, was paid.

Avondale made no application under Section 37 of the *Act* for approval of a flexible work schedule for Brian Lee or any other employee.

Lee delivered his complaint to an office of the Employment Standards Branch on November 5, 1996

On February 24, 1996, the delegate of the Director investigating the complaint of Brian Lee forwarded to Avondale a letter outlining the results of his investigation and attaching an overtime calculation report. In the letter the delegate clearly notifies Avondale of the basis for the claims. The correspondence also requests them to review some aspects of the report and either forward the amount of the claim set out or details of any areas of dispute with the claim or the calculations.

The overtime calculation report was prepared from records provided by Avondale.

ANALYSIS

Section 35 of the *Act* establishes the standard work day and standard work week as 8 hours a day and 40 hours a week, respectively, and requires payment of wages at overtime rates for any hours the Employer requires or allows an employee to work in excess of the standard day or week. Section 40 of the *Act* fixes the rate at which overtime must be paid.

An Employer may seek to vary the standard work day and week through Section 37 of the *Act*. The obligation to comply with the substantive and procedural requirements of that section belongs to the Employer, in this case, Avondale, and those requirements were not met. Unless a flexible work schedule is adopted in accordance with the requirements of the *Act*, Avondale is required by the *Act* to pay overtime wages for hours worked in excess of 8 in a day and 40 in a week.

Avondale argues Lee has contravened Section 37 and Section 72 of the *Act*. The effect of this contravention, they say, should be to deny a remedy to Lee personally. I reject this argument. Lee has not contravened the *Act*. The *Act* does not place any obligation on the employee to satisfy the statutory requirements by which a flexible work schedule may be implemented.

I also reject the argument Lee has contravened Section 2 of the *Act*. That section identifies the purposes of the *Act*. It contains no substantive rights or obligations that can be contravened.

There is no basis in fact for the assertion the complaint should have been rejected by the Director because it was not filed within the time limits prescribed by Section 74 of the *Act* or the *Act* did not apply to Lee.

There is no basis for setting aside or varying the Determination of the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated April 8, 1997, be confirmed.

**David Stevenson
Adjudicator
Employment Standards Tribunal**