

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 -

Gain Suns Enterprises Ltd.
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Mark Thompson

FILE NO.: 1999/148

DATE OF HEARING: June 24, 1999

DATE OF DECISION: July 13 ,1999

DECISION

APPEARANCES

Edmund Lam	On behalf of Gain Suns Enterprises Ltd.
Jai Cheng Li	On behalf of himself
Diane H. Maclean	On behalf of the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Gain Suns Enterprises Ltd. (the "Employer") against a Determination issued on February 16, 1999 by a delegate of the Director of Employment Standards (the "Director"). In the Determination, the delegate found that the Employer had violated Sections 35, 40 and 58 of the *Act* by failing to pay overtime wages and vacation pay to the complainant, Jai Cheng Li ("Li"). The Determination ordered the Employer to pay Li \$267.26 and imposed a zero dollar penalty on the Employer.

The Employer argued that it had offered Li employment based on a normal workweek of 45 hours and a monthly salary. Therefore, Li's salary incorporated overtime payment. In addition, the Employer maintained that it had adhered to the 45-hour workweek, not the 46 hours on which the Determination was based. The Employer did not appeal the part of the Determination concerning vacation pay.

The hearing in this case took place with the assistance of an interpreter.

ISSUES TO BE DECIDED

The issues to be decided in this case were whether the Employer was entitled to incorporate overtime payments in a monthly salary and what was Li's normal workweek.

FACTS

Both parties acknowledged that Li worked for the Employer as a driver from June 8, 1998 until July 28, 1998 at a monthly wage of \$1600. Li worked 8 hours per day from Monday to Friday and either 5 or 6 hours on Saturday. The Employer's offer of employment to Li stipulated that he would work 45 hours per week, i.e., 5 hours on Saturdays. In his complaint, Li stated that he worked 6 hours per day on Saturdays.

In her Determination, the delegate noted that the Employer's pay stubs were based on a 46-hour week and that Li's final pay stub was calculated on a straight time hourly rate. The Employer maintained that Li had worked 45 hours per week, but stated that the hours shown on the pay stub were incorrect, due to an accounting error. The pay stub showed 92 hours worked, which the Employer interpreted as 80 hours of straight time and 8 hours of overtime. In fact, according to the Employer, the correct figure should have been 95 hours, calculated as 80 hours at straight time and 10 hours at overtime.

Edmund Lam ("Lam") testified on behalf of the Employer that the normal work schedule was 9:00 a.m. to 6:00 p.m. Monday through Friday, with a one-hour unpaid lunch break. On Saturdays, the schedule was 9:30 to 3:30. According to Lam, the exact hours worked varied somewhat from day to day, depending on the volume of deliveries assigned to a driver. On some days, a driver might finish early, and others after the normal end of the workday. In his opinion, there was no need for overtime in such circumstances, and Li had not asked for overtime prior to his termination. Lam did not speak to Li about his hours of work or pay. His testimony was based on the Employer's policies for all of its drivers.

Li testified that he never recorded the hours he worked for the Employer. On occasion, the volume of work assigned to him prevented him from finishing on time. Li stated that he did ask about overtime, and his supervisor told him that the Employer did not pay overtime. He was unsuccessful in reaching anyone in higher authority in the Employer. Moreover, he seldom had a lunch break of an hour. Normally, after 30 to 40 minutes, his supervisor told him it was time to resume working. The Determination did not address any hours Li may have worked beyond 46 per week.

Neither party produced any records of hours worked. The delegate had access to the Employer's pay stubs, which she found did not meet the requirements of the *Act*. Li's final pay stub was based on an hourly rate of \$8.03 for 16 hours. That did not correspond to the Employer's stated method for calculating wages.

ANALYSIS

Section 35 of the *Act* require an employer to pay overtime for hours worked in excess of 40 hours per week. According to Section 40 of the *Act* states that overtime is "1 ½ times the employee's regular wage for the time over 40 hours." In Section 1(1)(d) of the *Act*, "regular wage is defined as:

If the employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the produce of 52 times the lesser of the employee's normal or average weekly hours of work.

The Employer's arrangement did not conform to this standard. As the Determination pointed out, the Employer could have contracted with its employees to work 40 hours per week at \$7.77 and 5 hours per week on Saturday at a rate of \$11.66, for a total of \$1600

per month. In such a case, hours per week over 45 would be compensated at the overtime rate. The Employer did not assert that such a contract existed. Moreover, the Employer's payroll records did not conform to Section 27 of the *Act*. The pay stubs provided to the delegate reported the hours worked during the pay period and the gross amount (\$1600) paid. These documents did not provide any means of determining Li's hourly rate of pay, either straight time or overtime. However, Li's final pay stub indicated that the Employer had paid for all hours at a straight time rate. Therefore, I conclude that Li was not compensated for overtime as required by Section 40 of the *Act*.

Li claimed that he worked 46 hours per week. While Lam testified forthrightly, he could only cite the Employer's normal policy regarding work on Saturdays to support his argument that the workweek was 45 hours. He did not present any evidence, except for the admitted error in the pay stubs, to contradict the delegate's conclusion that Li had worked 46 hours per week. Li testified without contradiction that he seldom received a one-hour lunch break.

The Employer argued that Li should not receive overtime because he had not complained during his employment. Apart from the conflicting evidence on this point, the *Act* anticipates that employees may choose not to complain about violations until after their employment ends. Thus Section 74(3) of the *Act* permits former employees to file complaints within six months of their last date of employment.

On the balance of probabilities, I conclude that Li worked 46 hours per week and should be compensated accordingly.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, I order the Determination dated February 16, 1999 be confirmed in the amount of \$267.26, plus any interest accrued since the date of the Determination pursuant to Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal