

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.: 1999/147

DATE OF HEARING: June 24, 1999

DATE OF DECISION: July 13, 1999

DECISION

APPEARANCES

Edmund Lam	On behalf of Gain Suns Enterprises Ltd.
Douglas W. Wong	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 40 and 46 of the *Act* by failing to pay overtime wages and statutory holiday pay to the complainant, Douglas W. Wong ("Wong"). The Determination ordered the Employer to pay Wong \$4,712.77.

The Employer argued that it had offered Wong employment based on a normal workweek of 45 hours and a monthly salary. Therefore, Wong'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 argued that Wong's final day of employment was January 3, 1998, not January 6, 1998 as stated in the Determination. Finally, the Employer maintained that Wong was a manager and thus not entitled to any overtime pay.

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; whether Wong was a manager; whether Wong received statutory holiday pay and the date on which Wong's employment was terminated.

FACTS

Wong worked for the Employer from November 29, 1995 until January 1998. At the time of his termination, Wong's salary was \$2100 per month. The Employer provided a summary of wages paid during the period of January 6, 1996 until January 3, 1998. The records showed the days worked or the hours worked per pay period, in addition to the amount paid to Wong. Wong provided the delegate with detailed records of hours worked for the period November 1, 1997 through January 6, 1998.

According to the Employer, Wong's duties were:

- assist the warehouse manager
- arrange delivery routes for drivers
- pick up goods for deliveries
- schedule shifts for drivers
- accept deliveries from suppliers.

The Employer operates 7 days per week except for Christmas day. Management policy is to grant an alternate day off when employees work on statutory holidays.

The Employer stated that it decided to terminate Wong's employment effective January 3, 1998. According to Edmund Lam ("Lam"), who represented the Employer, Wong did not appear to work until 5:00 p.m. that day, too late for management to carry out its plan. Therefore, Wong was instructed to meet with the sales manager of January 6, his next scheduled working day. According to Wong, he made his normal deliveries on January 3 and returned to the work site at 4:30 p.m. In its appeal, the Employer stated that it terminated Wong immediately after he reported to work on January 6. Wong's Record of Employment indicated that his last day of work was January 8.

The Employer argued that Wong was a manager or supervisor. He scheduled work, placed orders with suppliers and came to meetings to discuss policy matters. Wong described his position as a driver. He had two supervisors above him and normally drove his truck 6 hours per day. He had no authority to hire other employees. Nor did he have the authority to fire employees or recommend terminations. He did orient new drivers; principally telling them at which locations customers wanted food delivered.

The Employer stated that Wong's normal hours of work were 9:00 a.m. to 6:00 p.m. on weekdays, with an hour for lunch. If Wong took less than an hour for lunch, he did so voluntarily. Wong testified that he normally took 30 minutes for lunch. According to Lam, the exact hours worked varied somewhat from day to day, depending on the volume of deliveries assigned to a driver. Some days, a driver might finish early, and others after the normal end of the workday. No deductions were made for days on which an employee worked fewer than 8 hours; nor was overtime paid for days on which an employee worked longer than the normal day. On Saturdays, the Employer stated that Wong worked 5 hours, while Wong stated that he worked between 7 and 8 hours per day.

The Determination noted that the Employer's pay stubs were based on a 46-hour week, i.e., 92 hours per pay period, for an average of \$10.54 per hour, with a monthly salary of \$2100. Lam acknowledged that the pay stubs were incorrect and should have been based on a 45-hour week. The delegate also found that that Wong's final pay stub was calculated on an hourly rate of \$10.54 for all hours worked. She calculated the overtime owed to Wong at a straight time rate of \$10.54 for a 46-hour week for the period prior to November 1, 1997, after which she used Wong's records of hours worked.

ANALYSIS

The first issue to be decided is whether Wong was a manager. Section 1 of the Employment Standards Regulation defines a manager as follows:

a person whose primary employment duties consist of supervising and directing other employees, or

a person employed in an executive capacity;

Even if I accept the Employer's statement of Wong's duties, he would not fall under either of these definitions. He was not an executive, and his primary duties were the delivery of goods to customers, not supervision of other employees, although he did exercise some supervisory functions. Therefore, I conclude that Wong was an employee under the *Act*.

The next issue is the calculation of Wong's overtime pay. The Employer acknowledged that Wong worked overtime, but it argued that overtime was included in his monthly salary, so he could not claim additional compensation. This issue was discussed in another decision involving the same Employer and a different complainant, *Re Gain Suns Enterprises Ltd.*, BC EST #D281/99. On this point, the fact pattern in the present case is the same as the earlier decision, and the analysis is also the same.

Stated briefly, the Employer's arrangement violated the requirements of Section 40 of the *Act*, which requires overtime pay for hours worked above 40 in a week. Overtime pay is based on the employee's "regular" wage, and the Employer's method of calculation did not conform to the *Act's* definition of regular wage.

Wong claimed that he worked 50 hours per week, and the Employer said that the workweek was 45 hours. 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. The Determination accepted the Employer's evidence on the number of hours worked, i.e., 46 per week, until November 1, 1997, after which it relied on Wong's records.

On the balance of probabilities, I conclude that Wong worked 46 hours per week until November 1, 1997 and his records of hours worked should be accepted from that date until his termination.

The Employer stated that Wong and other employees worked on statutory holidays and were compensated with an alternate day off. Section 48 of the *Act* permits such an arrangement with the agreement of a majority of the employees affected. No evidence of such an agreement was presented. Where an agreement does not exist, an employee is entitled to overtime pay for work on a statutory holiday, pursuant to Section 46(1)(a) of the *Act*. Lacking any records of time worked, the delegate concluded that Wong worked half of the statutory holidays during the two years prior to his termination. The Employer did not present any evidence to challenge that conclusion. Since the appellant before the

Tribunal bears the onus of demonstrating that the determination under appeal is incorrect, I must conclude that the delegate's calculation of holiday pay was correct.

The date of Wong's termination was at issue. The Employer stated that his last day was January 3, 1998, while Wong stated that he worked on January 6. The Determination was based on four hours' minimum pay for January 6. On the balance of probabilities, I conclude that Wong at least reported for work that day, so the minimum pay required by Section 34(2) of the *Act* is due to him.

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 \$4,712.77, plus any interest accrued since the date of the Determination pursuant to Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal