

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C.38

- by -

Hi-Rise Salvage Ltd
("Hi-Rise")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO.: 97/231

DATE OF HEARING: June 27, 1997

DATE OF DECISION: July 12, 1997

DECISION

APPEARANCES

John Belliveau	for Hi-Rise Salvage Ltd
Geof Simair	Counsel for Kevin Daukier and Donald McKay
Kevin Daukier	in Person
Donald McKay	in Person
Ron Corrigan	For the Director

OVERVIEW

This is an appeal by Hi-Rise Salvage Ltd (Hi-Rise) pursuant to Section 112 of *the Employment Standards Act* (the "Act") from a Determination dated March 14, 1997, bearing file No. 079-748, by the Director of Employment Standards (the "Director").

The Determination found that Hi-Rise Salvage Ltd had contravened Sections 40(1), 40(2), 40(4), 44, and 46(1) of the *Act* by not paying proper overtime on a daily and weekly basis and by not paying properly for statutory holidays in relation to three employees Donald McKay (McKay), Kevin Daukier (Daukier), and Ted Holmes (Holmes).

Hi-Rise appeals on the grounds that the Director misinterpreted the manner of payments and was wrong in accepting the evidence of McKay, Daukier, and Holmes about hours worked. Also that extra work was paid on a separate basis altogether than regular pay.

ISSUES TO BE DECIDED

The issues to be decided in this case are:

1. Did McKay work overtime on a daily basis, or otherwise, that was not accounted for and not paid ?
2. Did Daukier and Holmes work overtime that was not accounted for and not paid ?
3. Did any of the three employees work on statutory holidays for which they were not paid properly in accordance with the *Act* ?

4. Was a separate agreement to pay Saturday overtime in cash at straight time in effect to make payment of the overtime premium unnecessary ?
5. Was the Director correct in finding that statutory holiday pay was deducted from overtime pay resulting in the employees not being paid for additional hours worked ?

FACTS

The employees, McKay, Daukier and Holmes, were employed by Hi-Rise for various lengths of time. Every bi-weekly pay period they were paid by cheque for the hours worked up to 80 hours. Overtime on a bi-weekly basis was paid in cash and was not made subject to deductions of income tax, unemployment insurance premiums, or Canada Pension contributions. Hi-Rise maintains that the cash payments were at the appropriate overtime premium rate. Hi-Rise says that the rate was calculated by taking the number of hours worked and multiplying by 1.5 and then applying the base rate of pay. The employees were provided with a separate slip which showed the base pay (usually for the 80 hour pay period) paid by cheque and then another number of hours paid in cash.

The employees claim that the hours were not multiplied by 1.5 and that they were paid at their straight rate of pay. Hi-Rise no longer has the daily time sheets to refute the claims by these employees. Employees were given the opportunity to question any hours or rates until the Monday after pay day then the time sheets were destroyed. These employees were aware that the daily time sheets were destroyed and that the employer would have no means to dispute the hours claimed.

At the hearing the owner of Hi-Rise, John Belliveau (Belliveau), testified and called as witnesses his bookkeeper and three other present or former employees who all confirmed that McKay never worked overtime on a daily basis. McKay agreed that he left work every day by 4:45 pm at the latest and often by 4:30 pm.

Belliveau testified that no one worked overtime during the week and that he had a separate arrangement for Saturdays. He claimed that Saturdays were paid in cash and that it was a separate contract to the regular payroll.

McKay and Daukier attended and testified that it was not really a separate contract because they really had no option. The pay system was just the way it was done although they never complained. McKay had produced to the Director copies of calendars showing his hours worked on a daily basis.

ANALYSIS

The onus at this appeal is on the appellant, in this case the employer, Hi-Rise, to satisfy the Tribunal that the Determination is wrong.

In several previous decisions this Tribunal has found that where the employer has not kept accurate records of the hours worked the evidence of the employee should be preferred and that any partial records should be accepted unless there is substantial credible evidence to establish the facts alleged by the employer.

On hearing the evidence, I find that the evidence is overwhelming that McKay never worked more than an 8 hour day. His calendars on this point are clearly wrong and therefore unreliable. However it is also clear to me that the employees worked on Saturdays and were paid cash at straight time and not at the overtime rate as required by the *Act*. I also find on all the evidence before me that the employees were not required to work on statutory holidays and were paid for the day as required.

McKay:

I found McKay's evidence and the evidence on his calendars to be unreliable but the extra pay slips given at the time of issuing the pay cheques is a reliable record of extra hours worked. These extra pay slips are included in the bound book of materials provided at the hearing by Mr. Simair, counsel for the employees. In McKay's case there are six such slips which show extra hours worked. I find that these hours were paid at the regular hourly rate and not at the overtime premium. Overtime is payable on the basis of the hours shown on these slips but not otherwise.

I find that he can not be paid on any daily basis as his records are not trustworthy and therefore should not be paid pursuant to Section 40(1). The total extra hours should be calculated pursuant to Section 40(2).

I find that McKay was not required to work on statutory holidays, that he was given the day off with pay, and that any such pay was not deducted from overtime as found in the Determination.

Daukier:

Daukier did not keep any record of his hours worked but he kept almost all the extra pay slips he received and I find that he also was paid at a regular hourly rate and not at the premium rate for overtime as required. These hours should have been paid at the premium rate.

Likewise, as neither the Employer nor Daukier has any documentation of daily hours worked, all hours worked (as shown on the extra pay slips) in addition to the 80 hours per pay period should be calculated pursuant to Section 40(2).

I find also that Daukier was not required to work on statutory holidays, was given the day off with pay, and that any such pay was not deducted from overtime as found in the Determination.

An additional point arose during the hearing and that was that Daukier's employment was terminated on December 04 and not December 24, 1996 as in the Determination. This requires a recalculation of the 24 month period allowed by the *Act*.

Holmes:

Holmes did not keep a record of hours worked but he provided some extra pay slips which showed some hours worked over and above his regular pay. These hours were at regular rates and should have been at the premium rate for overtime. They should be calculated pursuant to Section 40(2).

I find that Holmes was not required to work statutory holidays, was given the day off with pay, and any such pay was not deducted from overtime as found in the Determination.

On the totality of the evidence before me I am satisfied that the appellant has met the onus to establish that the only overtime owing is as shown on the extra pay slips. The extra hours shown, over and above the hours paid by cheque, were only paid at the regular rate and not at the premium required for overtime. I find that it is also established that there is no statutory holiday pay owing to any of the three employees.

Hi-Rise submitted that the Saturday work was a separate arrangement and therefore not overtime work. I do not accept this proposition. The employees did the same job, at the same rate of pay, under the same terms, and at the same location. Even though these employees accepted the terms, never complained, and benefitted from the arrangement (by not paying taxes on the cash) it is not open to employers and employees to contract out of the provisions of the *Act*. It was a continuation of their weekly job and therefore should have been treated as overtime.

In answer to the five issues raised at the beginning of this decision I find as follows;

1. McKay did not work overtime on a daily basis. He did work overtime on some Saturdays as shown in the extra pay slips. He was paid regular pay for these hours but should have been paid the overtime premium as required.
2. Daukier and Holmes worked overtime as shown on the extra pay slips but not otherwise.
3. None of the three employees worked statutory holidays for which they were not paid.
4. Even if there was a separate agreement for the Saturday work it would be contrary to the *Act* and therefore not effective to avoid payment of overtime.
5. Statutory holiday pay was not deducted from other hours worked.

ORDER

I order, under Section 115 of the *Act*, that this matter should be referred back to the Director to recalculate the amounts owed to each of the employees as determined herein.

A handwritten signature in black ink, appearing to read 'John M. Orr', with a long horizontal flourish extending to the right.

John M. Orr
Adjudicator
Employment Standards Tribunal