

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 -

Total Credit Recovery (BC) Ltd.
("TCR")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

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| ADJUDICATOR: | David Stevenson |
| FILE NO.: | 96/497 |
| DATE OF HEARING: | October 18, 1996 |
| DATE OF DECISION: | October 23, 1996 |

Appearances:

| | |
|------------------------------|---------------|
| for the Appellant: | Gary McDonald |
| for the claimant/respondent: | Kevin Rawle |
| for the director: | Michael Fu |

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Total Credit Recovery (BC) Ltd. (“TCR”) from a Determination, No. CDET 003443, dated July 24, 1996 of the Director of the Employment Standards Branch (the “director”). That Determination found TCR liable to pay to the complainant, Kevin Rawle (“Rawle”), the amount of \$838.33 representing 48 hours of overtime pay accrued by Rawle during his term of employment with TCR. TCR says the Determination should be cancelled for two reasons: first because the records supporting the claim are unsubstantiated and suspect; and second because TCR has an overtime policy and Rawle was never required by TCR to work overtime in a manner consistent with that policy.

ISSUE TO BE DECIDED

The sole issue here is whether the claimant has proven entitlement to overtime pay during his employment with TCR.

FACTS

TCR is a debt collection company employing approximately thirty people in British Columbia. Mr. McDonald is the senior Manager of those employees. All employees report to him and, basically, receive all their day to day instruction from him. Rawle was hired by TCR on January 2, 1996. He ended his employment April 17, 1996. While employed, he worked as a “collector”. These persons represent the majority of employees at TCR.

Collectors are persons given the task of contacting debtors of the clients of TCR and attempting to persuade the debtor to pay to TCR, on behalf of their client, the monies owing to the client. Each day the collectors are given a list of computer generated debtors to contact. Collectors work exclusively on the telephone. Collectors are given some discretion about the order in which the contacts are made.

Collectors are paid salary and commission. The commission is related to their success in recovery of debts for their clients. The collection business is a competitive one and from time to time Mr. McDonald will ask his employees to work overtime as part of a competitive collection "drive" for a major client. During the relevant time TCR kept no records of overtime worked by employees. Mr. McDonald says if the employees were asked to work overtime they were always paid for it. He also says employees asked to work overtime were provided pizza and pop. Mr. McDonald says Rawle was never asked to work overtime. Rawle says he was asked to work overtime hours on one or two occasions. He specifically remembers receiving pizza and pop ordered in by Mr. McDonald for he and the other employees who were working late.

Rawle struggled with the job during his employment. TCR was not satisfied with the quality or the quantity of his work. It appeared to Rawle the requirements of the position and the expectations TCR had of him were being changed by TCR without adequate explanation. He felt discriminated against. He was asked to collect the difficult accounts, those which other collectors had already unsuccessfully tried to collect. His total debt recovery amounts were low and his commission was non-existent. He attempted to improve his performance, sometimes staying after regular working hours to complete his workload. On April 15, 1996 Rawle was given an unflattering performance report. He discussed the report with Mr. McDonald and decided to tender his resignation. He did so on April 17, 1996.

Rawle kept his own record of extra hours he worked. He made no claim for overtime nor did he raise the question of overtime with Mr. McDonald because he understood from the outset of his employment it was not the policy of TCR to pay overtime. Mr. McDonald knew Rawle was working additional hours. He never advised Rawle not to work the additional hours.

ANALYSIS

Section 35 of the *Act* states:

35. An employer must pay overtime wages in accordance with Section 40 if the employer requires or, directly or indirectly, allows an employee to work

(a) over 8 hours a day or 40 hours a week, or

(b) if the employee is on a flexible work schedule adopted under Section 37 or 38, an average over the employee's shift cycle of over 8 hours a day or 40 hours a week.

The *Act* says overtime must be paid in two circumstances: first, where the employer requires the employee to work overtime; and, second where the employer **allows** the employee to work overtime. The latter is the circumstance in this case for all but the one or two occasions where overtime work was requested by TCR to be done by Rawle. Mr. McDonald was aware of extra hours being worked by Rawle. He allowed him to work the extra hours. TCR is statutorily obligated to compensate Rawle for overtime hours he was required and allowed to work.

TCR did not keep any record of overtime hours worked by employees. Notwithstanding, Mr. McDonald says we should not accept the record of hours kept by Rawle. He argues the record is unsubstantiated and unreliable based on other factual inaccuracies in the complaint made by Rawle. I do not find either argument compelling. TCR has not shown the record kept by Rawle to be unworthy of acceptance as a basis for his overtime claim. The discrepancies upon which Mr. McDonald based his argument of unreliability were adequately explained by Rawle. It was acknowledged by Mr. McDonald Rawle worked some overtime hours. He has not demonstrated the 48 overtime hours claimed by Rawle could not have been worked by him. Apparently, TCR could extrapolate a record from the computer record of the times of the telephone calls made by Rawle for the days during which Rawle claims overtime, but it has not attempted to do so. The record kept by Rawle is not the best evidence, but, as the delegate correctly argued, it is the second best evidence. In the absence of some cogent reason for refusing to accept it, I can find no error in the delegate's acceptance of the record as a valid indicator of the overtime claim.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, Determination No. CDET 003443, dated July 24, 1996 is confirmed.

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David Stevenson
Adjudicator
Employment Standards Tribunal