

**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 -

Wildstone Engineering Ltd.  
("Wildstone" or "employer")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Paul E. Love

**FILE No.:** 2000/298

**DATE OF DECISION:** August 4, 2000

## DECISION

### OVERVIEW

This is an appeal by Wildstone Engineering Ltd. (“Wildstone” or the “employer”) of a Determination dated April 3, 2000, that relates to calculation of overtime pay, for a salaried employee. The employer disputed the Delegate’s method of calculating overtime, but overtime was calculated in accordance with the *Act*.

### ISSUES TO BE DECIDED

Did the Delegate err in the calculation of the overtime entitlement, by not taking into account the fact that Ms. Delwisch’s salary was based on a 50-hour workweek?

### FACTS

Ms. Delwisch was employed as a forester with Wildstone Engineering Ltd. She worked for the employer from May 26, to November 19, 1999. After her resignation, she filed a complaint alleging that she was not paid overtime in accordance with the *Act*. At the time of her resignation she was earning \$42,000 per year, for a workweek which was agreed by the parties to be a 50 hours per week.

Ms. Delwisch filed a complaint on the basis that she worked overtime in excess of the 50-hour workweek. She says that she worked 100 hours of uncompensated overtime. Ms. Delwisch commenced keeping separate records following the first day of employment, when she was reprimanded for showing 14 hours on her time sheet. The employer instructed her that she must only show 10 hours per day.

The position taken by the employer at the time of the investigation was that no money was owing, and that the salary was full compensation for all hours worked by Ms. Delwisch.

The overtime calculation by the Delegate was made on the basis of the regular wage method set out in s. 1 of the *Act*. This calculation resulted in an hourly rate of \$14.61 per hour, for the period May 23, 1999 to August 28, 1999. Thereafter the calculation was made on the basis of \$16.15 per hour. For weekly hours in excess of 8 hours per day or 40 hours per week the Delegate applied a time and a half rate. For weekly hours in excess of 11 per day or 48 hours per week the Delegate applied a double time rate.

According to this method of calculation the Delegate found an entitlement to overtime in the amount of \$3,169.88, plus interest of \$75.88.

## ANALYSIS

In an appeal before the Tribunal, the burden is on the appellant to demonstrate an error such that I should vary or cancel the Determination. The appellant alleged the following error in the Determination:

Our reason for appeal is that the determination letter indicates that the definition for regular wage (refer to page 3 of the determination) is as follows:

This appeal is based upon the agreement between both the employer and employee that states Ms. Delwisch's salary was based upon 50 hours per week (refer to the "findings of facts" page 3). Therefore, the appropriate method for calculating the hourly rate should be as follows:

$(8x + (1.5 \text{ times } 2x)) \text{ multiplied by } (52 \text{ times } 5 \text{ work days}) = \text{annual salary}$

In conclusion, both Wildstone and Ms. Delwisch have agreed that Ms. Delwisch's annual salary was based upon a fifty-hour workweek. We believe that the definition for regular wage does not take into account this 50 hour work week agreement or calculation of hourly rate. Therefore, we are seeking a re-calculation of the determination based upon the calculation for annual salary for a fifty-hour workweek.

The method of calculating overtime for a salaried employee is set out in the *Act* and has been considered by the Tribunal in a number of cases. In particular I refer to *McIver's Appliance Sales & Services Ltd.*, BC EST #D526/98:

Further, this Tribunal has consistently held that there is no 40-hour "cap" on normal or average weekly hours for purposes of calculating a salaried employee's regular wage: see *RAP-ID Paper Vancouver Ltd.*, *BCEST Decision No. D182/96* and *Kocohani Holdings Ltd.*, *BCEST Decision No. D337/96*.

The method of calculating the regular wage of a salaried employee is set out in s 1 (d) of the *Act*:

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

The Delegate calculated correctly the daily rate of Ms. Delwisch, and he took into account the 50-hour work week on which the salary was based.

The Delegate also correctly determined that an agreement between the parties that an employee was only entitled to overtime wages after 50-hours per week, is not enforceable by reason of s. 4 of the *Act*. Ms. Delwisch is not an employee who is excluded from the operation of the overtime sections of the *Act*. There is no flexible work schedule agreement for this workplace. The Delegate calculated overtime for each hour worked over 8 per day or 40 per week at 1.5 times the employee's hourly rate. The Delegate calculated overtime for each hour worked over 11 per day or 48 hours per week, correctly and in accordance with s. 40 of the *Act*.

The *Act* does not preclude an employer and employer from setting a monthly salary which is based on an agreed hours per month, consisting of overtime and straight time hours: *Kask Bros. Ready Mix Ltd.*, BC EST #D311/98:

In my view, the Employer is not prohibited from agreeing with an employee to work for a certain hourly rate, with pay for a guaranteed or minimum number of hours, including overtime hours, and set out the wages on an annualized basis, provided the agreement otherwise meets the requirements of the *Act* and the *Employment Standards Regulation*. However, the hourly rate must be clearly explained to the employee.

The employer, however, did not explain an arrangement to Ms. Delwisch as described in the passage above. The employer was under the misapprehension that because its employee agreed to a 50-hour workweek, it was not obliged to pay overtime unless the employee worked over 50-hours per week. The employer misunderstood the operation of the *Act*.

**ORDER**

Pursuant to section 115 of the *Act*, I confirm the Determination of the Delegate made April 3, 2000.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**