

An appeal

- by -

Friends Recycling Everything Everyway Co-operative operating as Good
Neighbours Thrift Stores
("Free Co-op")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: James Wolfgang

FILE No.: 2002/187

DATE OF HEARING: June 13, 2002

DATE OF DECISION: July 15, 2002

DECISION

APPEARANCES:

Rick Kuecks	for FREE Co-op
Shirley Gust	for Ralph George
Ralph George	for himself (by conference call)

OVERVIEW

This is an appeal by Friends Recycling Everything Everyway Co-operative operating as Good Neighbours Thrift Store (“FREE”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* of a Determination issued by the Director of Employment Standards (the “Director”) dated March 20, 2002. There had been two complainants originally, Ralph George (“George”) and Shirley Gust (“Gust”). The Determination found FREE had violated Sections 40(1) of the *Act* and owed George \$586.41 for overtime and interest. The Determination also found Gust, who claimed she had not been paid overtime, to be a manager within the meaning of the *Act*, and therefore was not entitled to overtime. The Determination further found Gust had received proper notice of termination in accordance with Section 63(2) of the *Act*. Gust did not appeal the Determination.

The Determination found George had not been paid overtime during the period March 23, 1999 to February 23, 2001.

FREE was a co-operative not for profit operation that relied heavily on volunteers in addition to paid staff. There were as many as 100 volunteers involved at different times.

A Board of Directors first operated the company and later, when the business was in difficulty, a Management Committee took over. The company is insolvent and has been in receivership for over one year. There is a certain amount of money being held in trust and the Trustee is waiting on the outcome of this appeal before finalizing the case.

Some of the records are with the Trustee in Bankruptcy and Rick Kuecks (“Kuecks”) retained some. Kuecks is the former CEO and later a member of the Management Committee of FREE. He is trying to finalize the affairs of FREE.

Kuecks takes the position George was not authorized by the Board of Directors to work overtime and therefore should not be paid. He is of the opinion the money being held by the Trustee in Bankruptcy should not be paid to George and should be used to pay the creditors. Kuecks’ appeal to the Tribunal received April 04, 2002 states:

I have included all necessary time sheets and have attached pay stubs for all of 2000/1—1999 pay stubs are available, but I have put enough time into this already.

Please cancel this Determination and allow the money in the estate to go to the creditors who really do deserve it.

The organization has always done the best ---- for our employe (sic). -Doesn't it seem strange that out of 25 employees, only 2 complained and their statements are not supported by facts or documentation.

In the Director's submission dated May 08, 2002 it states:

The employer did not produce these records during the investigation, even though he said they existed. Until the Determination was issued and then they were attached to the appeal

A hearing was held on June 13, 2002 and evidence was taken under oath. George attended the hearing by telephone conference call.

The Determination imposed no penalty on FREE.

ISSUES

Should the payroll records supplied to the Tribunal be allowed?

Does FREE owe George overtime for the period March 23, 1999 until February 23, 2001?

THE FACTS AND ARGUMENT

Ralph George was employed by FREE as a Cashier/Labourer until February 23, 2001. When first hired he was paid at the rate of \$9.00 per hour. This was later changed to \$8.50 when the business was in financial difficulty.

George claims he was told by the Store Manager, Gust, to report for work one hour in advance of store opening to clean the store and bathrooms.

Kuecks supplied the time sheets for the Duncan store covering the period March 23, 1999 until February 23, 2001 with his appeal received by the Tribunal April 04, 2002. Kuecks claims he had considerable difficulty in finding the records as some were with the Bankruptcy Trustee and some were in old files in storage. They show George started working 7.5 hours per day until November 9, 1999 when he began working 8 hours per day. He worked 8 hours per day until January 08, 2000 at which time his reported hours were 7.5. They do not indicate any daily overtime was worked. He was paid at the rate of \$9.00 per hour until the end of July 2000 at which time his rate changed to \$8.50 per hour.

The submission from the Director to the Tribunal dated May 08, 2002 states:

The employer did not provide any information about the hours worked by Mr. George when the information was requested. In addition I visited the office of Smythe Ratcliffe Insolvency Inc., the trustee, and was unable to locate these records in the boxes provided for me to inspect. I advised the employer on February 06, 2002, that I had found no records for Ralph George. He said that he would get the records but failed to produce them, finally on March 20, 2002 the Determination was issued using the employee's records.

George claims all of the employees tried very hard to make a success of the business and even took a cut in pay to help pay the creditors. The employees also took a reduction in hours from 8 hours per day to 7 ½.

In his appeal Kuecks states, in part:

Times shown are materially incorrect – see sheets-

Mr. George was NEVER required to work extra hours that he was not paid for-

Incorrect Times shown for Mr. George's sick leave or holidays – see sheets

Basically Mr. George's records are incorrect – materially incorrect. We have always paid Mr. George based on the time sheets submitted by Ms. Gust—if she submitted false Time sheets, what part of what she says should we believe – where is her proof?

As well there are witnesses who will verify that Ms. Gust was NEVER authorized (to) require overtime from anyone! except as noted on Time sheets and paid for-

George was one of the few employees, except for management, who had a key to the store and had the security code for the alarm system. This allowed him to come to work earlier than the other staff. George indicates he never recorded his daily hours on his time sheet as the Store Manager did this.

There was a General Manager, Jim Harden, for all of the stores and 2 store managers at the Duncan location where George worked.

One of the Store Managers, Gust, gave evidence as to the practice in the Duncan store. According to Gust, Kuecks had suggested all employees should work one half hour extra to help the company get started. Gust claimed she and the other store manager came in at least one half hour early to set a good example for the employees. They did not get paid for this time. Gust claims she was told not to report overtime on the time sheets and have the employees take time off rather than pay overtime. She said there was never enough extra staff to allow the employees to take compensatory time off. Gust also claims George often stayed after work to wash the floors on his own time, as they were too busy during the day.

Kuecks does not recall having made the suggestion to Gust that employees should work one half hour extra without pay to help the company.

It was Gust, as manager, who told George to come to work early and she claims this was after discussing the matter with the General Manager and he had approved the overtime. She believed there is a memo to that effect in the files. She claims she had no authority to hire and fire employees, however she did make recommendations to the General Manager.

In the Director's submission dated May 8, 2002 it states:

The Manager for the employer, Shirley Gust, states that she asked Mr. George to work overtime at the request of Mr. Kuecks. In his appeal the employer states that Ms. Gust did not have the authority to authorize overtime. However, during the investigation he argued that she was a manager in every sense of the word and as such was not entitled to the overtime, which she claimed to have worked.

ANALYSIS

The first issue that must be dealt with is the question of whether the Tribunal should accept the payroll records provided with the appeal. There is strong precedent from previous Tribunal decisions that appellants cannot rely on documents in their appeal that were available and not provided to the Director at the time of the investigation. The underlying consideration in the other Tribunal decisions is the situation where the employer seeks to enter documents at the hearing that show the Determination gave the employee a more generous award than the records would provide.

At the time of the Determination the delegate took the best information available and created the payroll. The records provided to the Tribunal do not match the payroll created by the delegate because those records were not before her. The actual payroll indicates periods of time off for sickness or holidays that are not reflected in the “created” payroll. In contrast, we now have the actual payroll records. If George is entitled to overtime it should be calculated on the actual days that he worked. On the information supplied by the delegate, there may have been a deliberate attempt to withhold the payroll records hoping for a more favourable Determination. A valid reason now exists for these records to be considered. I believe in the interest of fairness and justice that the records provided to the Tribunal should be allowed.

Kuecks claims the Directors did not approve the overtime for George. If they were a “hands on” Board running the business that closely they should have been aware of a practice that existed for over two years. Whether the General Manager was reporting that he had approved scheduled overtime or not, and whether the Board may or may not have known of this practice does not excuse the employer from the obligation to pay overtime nor is it a deciding factor.

The deciding factor is whether George worked the overtime and whether he is entitled to be paid.

The evidence of George was that he was not paid for one-hour overtime each day from March 23, 1999 until February 23, 2001.

If, as the evidence suggests, George worked one hour more each day than the payroll records indicate and that overtime was authorized by Gust, a manager, he would be entitled to overtime for the 23 month period.

The evidence supporting George’s claim is as follows:

George had keys to the store and had the access code for the security system, which other employees did not have. He claims this was to allow him to come in early to clean the store and washrooms before the store opening.

Gust supports George’s evidence that he worked one hour overtime each morning.

Gust claimed she was instructed by the General Manager not to report the overtime although he was aware of it being worked and had approved it. Gust was not falsifying payroll records but was following the orders of the General Manager. Gust has no reason not to be honest in reporting the events as she recalls them.

Employees were to take time off in lieu of overtime, however it was apparently not possible to take compensatory overtime leave off. The evidence was there was insufficient staff to allow for overtime to be taken off.

Kuecks stated in his submission to the Tribunal there were witnesses who would verify Ms. Gust was never authorized to require overtime of anyone. There were no witnesses called by Kuecks to give that evidence. Further that claim is in conflict with the statement by Kuecks to the delegate that Gust was a manager in every sense of the word when she was claiming overtime.

The payroll records do not reflect any overtime worked however the evidence clearly establishes overtime was worked on a daily basis and a person in authority authorized it.

We have no evidence George took any time off in lieu of overtime. There was no method indicated as to how any overtime worked would be recorded so it could be taken off at a later date. Therefore the liability for overtime pay for George exists, however, the amount would vary depending on his regular hours of work. When he was working an 8 hour regular day he would be entitled to one hour at time and one half. When he was working a 7.5 hour day he would be entitled to pay at straight time for the first one half hour and time and one half for the second one half hour.

There is an onus on the appellant to prove the Determination is wrong in fact or in law. The fact the time sheets do not indicate overtime was worked appears to have been a management policy, with or without Board approval. According to the evidence, George worked the overtime and the appellant has failed to prove that evidence wrong. The matter of the overtime is referred back to the Branch for a proper calculation of the amount owed George.

ORDER

In accordance with Section 115 of the *Act* I am amending the Determination by the Director dated March 20, 2002. The matter of overtime for George is referred back to the Director for the calculation of overtime using the payroll records provided to the Tribunal in the appeal with the addition of the one hour or portion thereof of overtime per day being added to the days George worked. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal