

An appeal

- by -

Gary Lok
(the "Employee")

- 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: Ib S. Petersen

FILE No.: 2001/143

DATE OF DECISION: June 11, 2001

DATE OF DECISION: June 14, 2001

DECISION

APPEARANCES:

Mr. Gary Lok	on behalf of himself
Ms. Sylvia Chen	on behalf of the Employer

OVERVIEW

This matter arises out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director issued on January 26, 2001. The Determination concluded that Oswald was not any money on account of overtime wages.

FACTS AND ANALYSIS

The Employee appeals the determination. The Employee, as the appellant, has the burden to persuade me that the Determination is wrong.

Lok worked for Allity Importers Ltd. (the “Employer”) as a warehouse assistant from July 7 to September 11, 2000. He claimed that he worked half an hour of overtime on July 21, September 1, 6 and 8, 2000. On these days it was 6:30 p.m. before he finished delivering goods and returned to the work place. His normal quitting time was 6:00 p.m. and he normally worked 40 hours per week. He says that he reported the overtime to the payroll clerk. He also says that he worked on July 23, 2000 at a community event, in which the Employer participated. He says that he was required to attend this event and should be paid at the overtime rate. Finally, he says that he worked through his lunch break on several occasions.

The Employer says that Lok is not entitled to overtime wages. He was not required to work overtime and did not submit any records of overtime until the day of his resignation. The employer also says that, while it did encourage the attendance at the community event, Lok was not required to attend.

Considering the circumstances, the delegate found that there was insufficient evidence to support Lok’s claim for overtime wages.

Turning first to the claim for July 23, 2000, there is no dispute that Lok participated in the community event, a “walkathon” for the Chinese community in support of United Way. The Employer had a booth at the event, serving tea and soy drinks to the walkers. Lok assisted with the booth, which had an obvious promotional value to the Employer’s business. The question, though, is whether Lok was required to attend and, therefore, entitled to be paid. The Employer’s evidence was that he was told that he did not have to be there and, in fact, several employees stated that they were not going to attend and did not attend. Lok’s evidence was

somewhat equivocal. He said that the Employer told him that he had to be there. However, he also said in cross examination that the Employer told him that “you are not must go, but you have to go (sic).” This was Lok’s first job in Canada and, while his English seemed sufficient to deal with work and other situations (he was assisted in the hearing by an interpreter), in the circumstances, I am prepared to accept that he may have misunderstood the Employer’s instructions. In other words, I accept the employer’s evidence that Lok was not required to attend this event. I agree with the delegate’s conclusions in this respect and no overtime wages are owed for July 23.

Turning to the other dates for which overtime is claimed, I also agree with the delegate’s conclusions. The employer essentially says that there is no evidence that Lok worked overtime on the dates claimed. He did not report overtime to payroll and, in any event, overtime had to be approved. In the circumstances, I am inclined to accept the Employer’s explanation that it had no record of the overtime claimed. Lok testified that the overtime on these four days was due to late return to the work place because of traffic jam and that he reported it to the payroll clerk, who, he said, told him that she recorded it. As mentioned above, he says he is entitled to be paid until 6:30 p.m. for each of these days. In his appeal, Lok also claims that he worked during his one hour lunch on occasion. There is no documentation for these claims and Lok does not claim to have reported this work. If, as he says, he reported all overtime hours to the payroll clerk, I find this surprising. In the circumstances, I find that Lok did not, as accepted by the delegate, report and claim overtime until after his resignation, at which time, of course, it is more difficult for the Employer to respond to the claim. There is, as noted by the delegate, no documentation for the overtime claim, which was investigated by the delegate, and I accept her conclusions that there is insufficient evidence in that regard. In short, I dismiss the appeal with respect to Lok’s claim for overtime wages.

I am of the view that the Employee has not discharged the burden on the appeal and the Determination is upheld.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated January 26, 2001, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal