

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Kocohani Holdings Ltd. operating Statewood Waterbeds
("Statewood")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Hans Suhr

File No.: 96/567

Date of Decision: November 27, 1996

DECISION

OVERVIEW

This is an appeal by Kocohani Holdings Ltd. operating Statewood Waterbeds (“Statewood”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 003945 issued by a delegate of the Director on September 11, 1996. In this appeal Statewood claims that no overtime wages are owing to Gary H. Chan (“Chan”).

I have completed my review of the submissions received from Statewood, Chan and information provided by the Director.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Statewood owes wages to Chan.

FACTS

Chan was employed by Statewood as a salesman from January 2, 1996 to May 29, 1996.

There is agreement by the parties that Chan’s rate of pay was \$2,000.00 per month, that Chan worked more than 8 hours in one day and that Chan worked more than 40 hours in one week.

SUBMISSIONS BY THE PARTIES

Statewood states that Chan was originally offered \$1,500.00 per month but that this amount was increased to \$2,000.00 per month to compensate him for the extra hours.

Statewood further states that Chan never raised the issue of overtime during his period of employment.

Chan states that he was offered and accepted \$2,000.00 per month as the rate of pay.

Chan states that on at least 3 occasions he raised the issue of Statewood not paying him overtime rates of pay and that the only response from Statewood was to hire a replacement for his job.

ANALYSIS

The *Act* in Section 40 requires the payment of overtime rates of pay to an employee who works more than 8 hours in one day and more than 40 hours in one week. Section 40 states:

Overtime wages for employees not on a flexible work schedule

- 40.** (1) An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38
- (a) 1 1/2 times the employee's regular wage for the time over 8 hours, and
 - (b) double the employee's regular wage for any time over 11 hours.
- (2) An employer must pay an employee who works over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38
- (a) 1 1/2 times the employee's regular wage for any time over 40 hours, and
 - (b) double the employee's regular wage for any time over 48 hours.
- (3) For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.
- (4) If a week contains a statutory holiday that is given to an employee in accordance with Part 5,
- (a) the reference to hours in subsection (2) (a) and (b) are reduced by 8 hours for each statutory holiday in the week, and
 - (b) the hours the employee works on the statutory holiday are not counted when calculating when calculating the employee's overtime for that week.

There is no dispute that Chan worked in excess of 8 hours per day and in excess of 40 hours per week and therefore Statewood is required to pay Chan overtime rates of pay for

those hours. As Chan was paid on a monthly basis, I must determine what his regular wage would be.

The *Act* defines “regular wage” for an employee who is paid on a monthly basis as:

(d) 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, and ...

The payroll records provided by the employer indicate that Chan did not have normal weekly hours of work, therefore Chan’s regular wage must be determined by utilizing his average weekly hours of work. Chan worked a total of 872.5 hours during his 19 weeks of employment, therefore, his average weekly hours and regular wage are calculated as follows:

872.5 total hours ÷ 19 weeks = **45.92 hours average per week**
 \$2,000.00 per mo. x 12 ÷ 52 ÷ 45.92 = **\$10.05 per hour**

Recalculation of Chan’s earnings for his period of employment based on \$10.05 per hour indicates the following:

total earnings	= \$9,613.64
4 % Vac. Pay	= \$ 384.55
sub-total	= \$9,998.19
less wages paid	= \$9,090.37
Wages Owing	= \$ 907.82

I conclude that Chan is owed wages in the amount of **\$907.82**.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 003945 be varied to be in the amount of \$907.82, plus interest pursuant to Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal

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