

**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 -

Aurora Instruments Ltd.  
("Aurora")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2000/507

**DATE OF DECISION:** September 15, 2000

## DECISION

## OVERVIEW

Aurora Instruments Ltd. (“Aurora” or the “employer”) appealed a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 8<sup>th</sup>, 2000 under file number ER 052159 (the “Determination”) pursuant to which Mr. Jinfu Yang (“Yang”) was awarded the sum of \$15,394.06 on account of unpaid wages (overtime pay and concomitant vacation pay) and interest. The Director’s delegate held that Yang was *not* a “manager” as defined in section 1 of the *Employment Standards Regulation* and was, therefore, entitled to overtime pay. The delegate also held that Yang was not entitled to any compensation for length of service because Aurora gave Yang the appropriate amount of written notice (2 weeks) called for in section 63 of the *Act*. Yang did not appeal this latter aspect of the Determination nor did Aurora challenge the delegate’s finding that Yang was not “manager”.

Aurora’s appeal—which principally concerned Yang’s entitlement to overtime pay—was heard at the Tribunal’s offices in Vancouver on May 23<sup>rd</sup>, 2000 and on June 9<sup>th</sup>, 2000 I issued reasons for decision (BC EST #D220/00) allowing Aurora’s appeal and remitting the matter of Yang’s overtime pay entitlement back to the Director’s delegate for recalculation. My key findings are reproduced below (at pages 5 *et seq.* of my June 9<sup>th</sup> decision):

“I am not satisfied, based on the evidence before me, that Yang was engaged by Aurora on the specific understanding, as alleged by the employer, that his salary would be based on a 50.5 hour work week (and thus included an allowance for overtime pay) nor do I accept Yang’s assertion that he and Mr. Liang specifically agreed that his salary would be based on a 5-day, 40-hour work week. Accordingly, in my view, the delegate erred in concluding that Yang’s monthly salary “only applied to a 40 hour workweek (8 hours per day, Monday through Friday)” (Determination, p. 6)...

...*nothing* was specifically agreed as between the parties with respect to Yang’s compensable working hours; the parties only agreed on a \$2,000 monthly salary. Therefore, and in accordance with the provisions of the *Act*, Yang’s was entitled to overtime pay in addition to his monthly salary but, as will be seen, I am of the opinion that the delegate did not apply the appropriate “regular wage” rate in calculating Yang’s overtime entitlement...

The delegate, in her calculations, relied on the employer’s time records which Yang accepts as accurate (at least with respect to the hours recorded therein). Inasmuch as Yang has not appealed the Determination, I hereby confirm the *number of overtime hours* awarded to Yang by way of the Determination. However, in my view, the delegate did err in calculating Yang’s “regular wage” for purposes of fixing Yang’s actual *overtime pay entitlement*. Yang’s overtime pay entitlement appears to be overstated in the Determination...

As recorded at page 6 of the Determination, the delegate used a \$13.06 hourly rate when calculating Yang's entitlement to overtime pay for May 1997. However, in my opinion, given that Yang was paid a monthly salary, subparagraph (d) of the section 1 definition of "regular wage" applies. In other words, Yang's "regular wage" must be calculated based on the fact that his "normal or average weekly hours of work" was 50.5. Thus, Yang's "regular wage" for May 1997 was not \$13.06 per hour but rather \$10.51 per hour— $[\$2,300 \times 12] \div [52 \times 50.5] = \$10.51\dots$

## ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied in accordance with these reasons. This matter is remitted to delegate solely for the purpose of recalculating Yang's unpaid wage entitlement, including interest payable pursuant to section 88 of the *Act*."

## ISSUE TO BE ADDRESSED

In accordance with my order, the delegate undertook the requisite calculations and transmitted her findings to the Tribunal on July 14<sup>th</sup>, 2000. The delegate calculated that the amount owed by Aurora to Yang, as of June 27<sup>th</sup>, 2000 (including accrued interest), was \$4,428.79.

Neither Yang nor Aurora agree with the delegate's calculations regarding Yang's overtime entitlement and thus the correctness of the delegate's calculations has been returned to me for review.

## FINDINGS

I have reviewed the delegate's calculations and find them to be entirely in accord with the directions set out in my June 9<sup>th</sup> decision and order.

Yang, for his part, does not suggest that the *calculations* are incorrect but rather, simply challenges my original decision which found that the parties' agreement did not include a specific term that the monthly salary was based on a 40-hour work week. That latter issue is not properly before me.

Aurora says, incorrectly, that the delegate miscalculated Yang's overtime hours worked in certain months—my review shows that the delegate (who relied on the employer's own time records) made no such errors. It should be recalled that the delegate's finding as to the *number* of overtime hours worked by Yang was confirmed by my June 9<sup>th</sup> decision and is not now open to challenge by the employer (or by Yang).

I believe the employer's error stems from a misunderstanding of the overtime provisions of the *Act*—overtime entitlement is triggered after the employee works either 8 hours in a day or

40 hours in a week whereas the *overtime wage rate* is, in this case, based on the normal or average weekly hours worked by the employee.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be varied to indicate that Aurora is liable to pay Yang the sum of **\$4,428.79** together with additional interest to be calculated by the Director in accordance with section 88 of the *Act* as and from June 28<sup>th</sup>, 2000.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**