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 -

Suanne Derksen
(the " Appellant ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/401

DATE OF DECISION: September 25, 2000

DECISION

APPEARANCES

No one	for the employer
Suanne Derksen	for herself
Dianne H. MacLean	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Suanne Derksen from a Determination dated May 17, 2000. That Determination found that the employer, Harvard Rental Corporation, owed the appellant $3,788.99 for overtime pay and interest. Ms. Derksen appeals the basis on which the calculation of overtime pay was made. The original complaint was filed in December 1996. The matter is now ready for finalization.

ISSUE TO BE DECIDED

1. Did the delegate correctly calculate the rate of pay for the purposes of determining overtime for a salaried employee?

FACTS

The employer operates a party rental company in Burnaby. The appellant/complainant, Ms. Derksen, worked for the company from April 18, 1994, to June 27, 1996. Ms. Derksen was known as the special events manager. Ms. Derksen's main duties included sales and customer services with some supervisory duties. The finding that Ms. Derksen was not a manager for the purposes of the *Act* is not under appeal.

Ms. Derksen's started at a wage rate of $11.50 per hour. In March of 1995, she was put on a bi-weekly salary of $1280; in March of 1996 this was increased to $1337.60. From the commencement of her employment Ms. Derksen usually worked more than a 40-hour week. The file material listing hours of work starts with June 28, 1994. From this time onward the first week that Ms. Derksen did not work overtime is January 15, 1995. There is no issue that during the period for which Ms. Derksen was being paid $11.50 per hour she was receiving overtime for any hours worked in excess of 8 in a day or 40 in a week.

Once Ms. Derksen was put on a bi-weekly salary it appears her hours of work regularly exceeded 40 hours per week. (The delegate could find no record of hours of work between April 8, 1995 and September 16, 1995. There was no issue that the appellant worked in this period and the

delegate assumed a 40-hour week. These hours were excluded for the purposes of determining the average hours worked per week).

The delegate determined that Ms. Derksen was not a manager; therefore, Ms. Derksen was entitled to overtime. The delegate further determined that Ms. Derksen had not provided enough evidence that the salary was to be based on a 40-hour workweek. The regular wage therefore was determined by dividing the average hours of work per week into the weekly salary.

In determining the overtime rate the delegate took the hourly wage calculated using the above method and applied it to all the hours worked by Ms. Derksen for the period she was paid by salary. For instance, in the week of September 17, 1995, Ms. Derksen worked 51.25 hours. The delegate determined that she earned $510.40 for the 40 hours worked, and $237.65 in overtime pay.

ANALYSIS

As Ms. Derksen states in her notice of appeal the real dispute in this case is whether the correct method for determining the rate of overtime for employees on salary was used. Ms. Derksen also raises an issue of the length of time it took to complete the investigation and the possibility that some evidence has gone missing. Ms. Derksen has provided no particulars in support of this assertion. Consequently I have nothing before me to find in her favour on this point.

Section 40 of the *Act* controls the amount of overtime to be paid employees. Section 40 states:

> *(1) An employer must pay an employee who works over 8 hours in a day and is not on a flexible work schedule adopted under section 37 or 38*
>
> *(a) 1 ½ 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 ½ times the employee's regular wage for the time over 40 hours, and*
>
> *(b) double the employee's regular wage for any time over 48 hours.*

There is no dispute that Ms. Derksen was not on a flexible work schedule. Section 1 defines regular wage. For the purposes of this appeal the relevant portion of the definition is:

> *(c) if an employee is paid a weekly wage, the weekly wage divided by the lesser of the employee's normal or average weekly hours of work.*

There have been a number of cases that have reviewed this definition. These cases support the delegate's determination that in the absence of an agreement basing the salary on 40 hours per week, the *Act* cannot be used to infer such an agreement (*Re McIver's Appliance Sales & Services Ltd* [1998] BC EST #D526/98, and *Re RAP-ID Paper Vancouver Ltd* [1996] BCEST #D182/96). As such, the regular wage is determined by dividing the weekly salary by the average hours of work in a week. As stated in *Re McIver's* it is not open to the Tribunal to redraft this definition so as to place a 40-hour cap on the definition of regular wage. I am not completely comfortable with the rational; however, the Legislature has not amended this definition therefore the rationale expressed in these cases will be followed.

These cases do not however stand for the principle that if the contract calls for a salary based on a set amount per hour this amount will be superseded by the definition of regular wage. If it can be shown that the salary was based on an hourly wage the employer will be bound to pay overtime on that wage and not the hourly wage determined by the weekly wage divided by the average hours worked. It is long established that the Director can enforce payments of amounts that are in excess of the minimum standards set in the *Act* if it can be established that the amount is owed under the employment contract (*Re International Energy Systems* [1997] BC EST #D269/97).

There is some evidence that the salary was to be based on an hourly rate. A unsigned document, which the employer has admitted is in his hand writing, states that from April 2, 1995 the wage would be $15.00 an hour in salary to April 2, 1996 when it would be increased to $16.00 per hour, but as salary. There is nothing in this document to indicate how many hours were to be worked per week nor the total amount of salary per week. The actual salary paid to Ms. Derksen, if it was based on an hourly wage at 40 hours per week, would have been $16.00 an hour in 1995, and $16.72 in 1996. It is clear then that Ms. Derksen did not accept the April 2, 1995 offer from the employer. It is also clear from this document that the parties were negotiating a salary based on an hourly rate. What is not clear is whether the subsequent agreement was also meant to be based on an hourly rate or whether it was to be strictly salary. In the absence of evidence clearly establishing a salary based on an hourly rate I do not intend to overturn the delegate's decision.

In the Determination the delegate provided tables summarizing her calculations. Table I was a summary of wages paid for the pay period ending July 7, 1994 through the pay period ending July 5, 1996. The total wages paid by the employer to the complainant during that period was $70,068.63. Table II listed the hours worked each week. The delegate listed the hours for the week ending July 9, 1994 through June 29, 1996. It must be kept in mind that for the period of the week ending April 8, 1995 through September 16, 1995 no record of the hours of work was available and, therefore, this period was excluded from the calculation of the average weekly hours. Table III provides a breakdown of the calculation of regular wage. The delegate determined that during the period when the complainant's bi-weekly salary was $1,280.00 she worked an average of 50.2 hours per week. When that figure is divided into the weekly wage of $640.00 it provided for a regular wage of $12.76 per hour. Similarly, when the bi-weekly salary was raised to $1,337.60 the average weekly hours remained at 50.2 and the regular hourly wage rate became $13.33.

Table IV provided for the calculation of vacation pay outside the calculation period. Table V then provided for a calculation of wages owing. The delegate calculated the wages owing by

determining the wages earned per the overtime calculation report and adding 4% vacation pay to determine the total wages earned. From that she subtracted monies already paid and provided a further calculation for vacation pay before the two year period. She then determined that the net amount owing was $3,070.89 to which $718.10 interest was added. This brings the total amount owing to $3,788.99.

As stated earlier in this award Section 1 defines regular wage. That definition has been interpreted by this Tribunal in Re: *McIver's Appliance Sales & Services Ltd.* and Re: *RAP-ID Paper Vancouver Ltd.*, supra. I am not completely comfortable with the rational as stated in the above cases. It leads to the conclusion that the more hours one works the lower one's hourly rate becomes unless the employee and the employer have defined the number of hours of work per week on which the salary is based i.e. 40 hours per week. Without such a definition the rational in the above cases leads to conclusion that working more hours reduces the hourly rate. For example the complainant in this case who averaged 50.2 hours per week on a $640.00 per week salary had an effective hourly wage rate of $12.76. If she had worked 60.2 hours per week her effective hourly wage rate would be $10.64. However, the definition of "regular wage" has been considered by this Tribunal and the Legislature has not subsequently amended the definition. I am not prepared to depart from the rational in Re: *McIver's*, supra.

The complainant submitted further documents to the Tribunal on August 10, 2000. The file had been assigned to me July 26, 2000. The evidence was submitted past the time allowed for submissions. That alone is a sufficient reason to reject it. However, I did review the submission and find that it does not change my reasoning.

ORDER

The Determination dated May 17, 2000 is confirmed with additional interest to be paid to date.

E. Casey McCabe

E. Casey McCabe
Adjudicator
Employment Standards Tribunal