

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 -

Stage One-Accounting Inc.
(Stage One”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Hans Suhr

FILE NO.: 97/547

DATE OF HEARING: August 29, 1997

DATE OF DECISION: September 2, 1997

DECISION

APPEARANCES

Judy Rhodes	on behalf of Stage One-Accounting Inc.
Terri McGeachy	on behalf of Stage One-Accounting Inc.
Dianna Dragon	on behalf of Stage One -Accounting Inc.
Janie (Griecken) Dunning	on her own behalf
Gene Dunning	an observer

OVERVIEW

This is an appeal by Stage One-Accounting Inc. (“Stage One”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination dated June 30, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). The delegate of the Director determined that Stage One owed wages in the amount of \$1,136.00 plus interest to Janie Griecken, now Janie Dunning. Stage One alleges that the delegate of the Director erred in determining wages were owing as Dunning had in fact been overpaid for the work performed.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Dunning is owed wages ?

FACTS

Stage One states that:

- Dunning was not granted time off with pay during the 1996 Christmas/New Years period;
- Dunning was “probably” told she could have time off during the 1996 Christmas/New Years period and that she would have to make up the time during tax time when it was busy;
- the Company policy with respect to overtime hours worked was that overtime would be banked on an hour banked for hour worked basis and applied against either future or past time off for sick days, personal time off or extended vacations;

- Dunning submitted information to the Employment Standards Branch that the office was closed from December 24, 1996 to January 2, 1997 yet Dunning submitted information to the Tribunal that the office was closed December 24, 1996 to January 6, 1997;
- Dunning was not paid for the period January 13 - 24 & 27, 1997 as she had already been paid for 72 hours when she was not at work;
- there is no dispute that Dunning did work 13.5 hours of overtime which were not paid for;
- the payroll error of the overpayment to Dunning was not discovered until after Dunning had left employment as previously it was felt that any imbalance between hours worked and hours paid would be corrected during the busy tax season.

Terri McGeachy stated that:

- she has been employed by Stage One for 4 1/2 years;
- she has never gotten time off with pay unless the 'extra time' had been earned by working overtime;
- during Christmas 1996 the policy was that time off could be taken by employees but that banked time would have to be used;
- except for the recognized Statutory Holidays and Boxing Day, the office was never closed over the Christmas period;
- the time sheets submitted showing her hours worked during the 1996 Christmas period were completed at the time the hours were worked;
- generally little overtime is required or worked except during tax time;
- time sheets filled out and submitted on a weekly basis;
- her time sheets are kept on her computer until completed and then she keeps a 'hard copy' after submitting them;
- she worked on the Friday, Saturday and Monday preceding Christmas Day 1996 and then took Tuesday, December 24 as a day off;
- she would not lie for her employer or anyone.

Dianna Dragon stated that:

- she has worked for Stage One for 3 years;
- she has never been given time off with pay except when she had accumulated banked overtime hours;
- at Christmas 1996 the Company policy was if time off was desired, then banked time would be taken;
- if she was sick or needed time off for personal reasons, banked time off would be taken;
- generally did not work overtime hours except during the tax season, from March to the end of April;

- the time sheets submitted which show her hours during the 1996 Christmas period are the ones that she completed at that time;
- she would not lie for anyone;
- she does not recall having a conversation with Dunning in regard to quitting because Judy Rhodes (“Rhodes”) was so inflexible;
- she did hand in notice of resignation in January 1997 due to not getting along with Dunning and another employee and because her children were not well, however, she did change her mind as is still employed by Stage One.

Janie Dunning stated that:

- she was originally to start with Stage One on September 9, 1996 but was asked by Rhodes to wait until September 16, 1996 in order to fit the pay period;
- she was to be paid at the rate of \$1,040.00 semi-monthly;
- she worked 13.5 hours of overtime at the direction of Pat McSkimming who was in charge during Rhodes’ absence;
- she was never told to track overtime hours or to submit time sheets until Rhodes returned from vacation;
- her job was to be a 9 to 5 job but she was usually there from before 9 a.m. and stayed later than 5 p.m. but did not keep any detailed records of this time;
- she was told by Rhodes that she could have the time off during the Christmas period with pay
- Stage One offices were closed from December 24, 1996 to January 2, 1997 and concedes that the January 6 date was an error on her part.

ANALYSIS

There is no dispute that Dunning worked during the period January 13 - 24 & 27, 1997 and was not paid for this time. Stage One alleges that in line with the company policy, time off would only be paid for by applying either accumulated overtime hours already worked or by applying future overtime hours against time off already taken. The practice by Stage One of ‘granting’ 1 hour paid time off for 1 hour of overtime worked is contrary to the provisions of Sections 40, 41 and 42 the *Act* which requires that hours worked beyond 8 per day or 40 per week be compensated for either at the appropriate overtime rate of 1 1/2 or 2 time regular rate or the appropriately calculated wages may be banked.

The Determination issued by the delegate of the Director which is the subject of this appeal by Stage One does not deal with the issue of overtime wages which may be owing. I am, in my view, constrained from dealing with any issue which was not the subject of the Determination being appealed, therefore I will not consider the issue of whether overtime wages are owing.

The practice of permitting employees to utilize 'banked overtime hours, both past and future, to cover days off clearly places Stage One at risk when an employee has been granted time off without having any accumulated hours in the overtime bank with the expectation that future overtime hours will make up the time paid for. Stage One had paid Dunning for the time off taken during her period of employment and cannot, in my view, subsequent to her termination, attempt to recover an alleged overpayment simply because Dunning is no longer in a position to work the extra hours to 'make up the time' already paid for.

I am satisfied on the basis of the evidence provided that the practice at Stage One was to utilize overtime hours worked to "fill in" wages when time off, which would normally be unpaid, was taken. The practice of keeping a 'running total' of available banked hours would not normally create a problem, however, in this instance, the 'running total' indicated a negative balance at the time that Dunning left her employment. Stage One unilaterally applied the negative balance against wages owing for the period January 13 - 24 & 27, 1997.

Sections 21 and 22 of the *Act* are the provisions which deal with deductions and assignments and provide that:

Section 21, Deductions

- (1) *Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*
- (2) *An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.*
- (3) *Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.*

Section 22, Assignments

- (1) *An employer must honour an employee's written assignment of wages*
 - (a) *to a trade union in accordance with the Labour Relations Code;*
 - (b) *to a charitable or other organization, or a pension or superannuation or other plan, if the amounts assigned are*

- deductible for income tax purposes under the Income Tax Act (Canada),*
- (c) *to a person to whom the employee is required under a maintenance order, as defined in the Family Maintenance Enforcement Act, to pay maintenance,*
 - (d) *to an insurance company for insurance or medical or dental coverage, and*
 - (e) *for a purpose authorized under subsection (2).*
- (2) *The director may authorize an assignment of wages for a purpose that the director considers is for the employee's benefit.*
- (3) *An employer must honour an assignment of wages authorized by a collective agreement.*
- (4) *An employer may honour an employee's written assignment of wages to meet a credit obligation.*

There was no evidence provided that the payment of wages for the days off taken by Dunning (the alleged overpayment) were either an advance on wages or somehow constituted a credit obligation in favour of Stage One. Section 17 of the *Act* requires that Stage One pay Dunning all wages earned during a pay period and there is no dispute that wages were not paid for the period January 13 - 24 & 27, 1997.

I conclude that based on the evidence provided that Dunning is owed wages for the period of January 13 - 24 & 27, 1997 in the amount as calculated by the delegate of the Director.

For all of the above reasons, the appeal by Stage One is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 30, 1997 be confirmed in all respects.

Hans Suhr
Adjudicator
Employment Standards Tribunal