

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 -

Petroleum Enviro Services Division of ASM Corrosion Control Ltd.
(“ ASM ”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/438

DATE OF DECISION: October 6, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Petroleum Enviro Services Division of ASM Corrosion Control Ltd. (“ASM”) of a Determination which was issued on June 1, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that ASM had contravened Section 40 of the *Act* in respect of the employment of Ryan Hillaby (“Hillaby”), Kelly Whitehead (“Whitehead”) and Curtis Boos (“Boos”), collectively “the complainants”, and ordered ASM to cease contravening and to comply with the *Act* and to pay an amount of \$2346.42

ASM contends that the Determination is wrong due to “*errors in the findings of fact*”.

ISSUE

The sole issue in this case is whether ASM has shown any error in the conclusion that ASM contravened Section 40 of the *Act*.

FACTS

Hillaby worked for ASM as a technician for a period commencing September 3, 1996 and ending April 24, 1998. His rate of pay was \$12.00 an hour until May 3, 1997, when it was increased to \$13.00 an hour. Whitehead also worked as a technician from May 26, 1997 to April 24, 1998. His rate of pay was \$12.00 an hour. Boos worked for ASM as a Flagperson/Labourer from February 28, 1998 until April 25, 1998 at a rate of \$10.00 an hour.

At the time of hiring ASM had an overtime policy that provided employees with two options:

1. The employee would be restricted to a maximum of 48 hours a week; or
2. The employee accepted all overtime would be paid at one and one-half their hourly rate and had the option to bank overtime toward time off at a later date.

Each of the complainants took the second option and signed an acceptance the terms and conditions contained in the company policy and procedures manual, including the overtime policy.

ARGUMENT AND ANALYSIS

ASM argues that the complainants agreed in writing to work a straight time hourly rate for 44 hours a week and to work at 1½ their hourly rate for all hours in excess of 44 hours a week. The explanation for this arrangement is described in the appeal:

Due to the nature of our services to gasoline fuel stations (Esso, Shell, Petro Canada, etc.) our employees from both offices were required to work in both [Alberta and British Columbia].

The employees would not tolerate different levels of overtime pay for individuals working on similar projects. An employee working from our Kamloops office making double-time on overtime would cause bad morale beside an employee from our Edmonton office making time and one-half on overtime.

ASM says that to compensate employees in British Columbia for the difference between the requirements of the *Act* and the system that was implemented, employees in this province were paid a “premium hourly rate” of approximately 8.73% beyond the Alberta hourly rate, rounded up to an even dollar amount per hour. In other words, ASM contends that the complainants were paid a “Section 40 premium” in order to satisfy the requirements of the *Act*. The material suggests, however, that even if this “premium hourly rate” for employees in this province existed, based on the examples given by ASM, the complainants received less than what was required by the overtime provisions in the *Act*.

In reply, the Director says that notwithstanding the appeal is based on alleged “*errors in the findings of fact*”, there is nothing in the submission indicating what “findings of fact” were “in error”. The Director says the argument that the employees agreed to accept less than the requirements set out in the *Act* was raised by ASM during the investigation and answered in following paragraph in the Determination:

The major cornerstone of the *Act* is Section 4, which reads as follows:

Requirements of this Act cannot be waived

4. *The requirements of this Act or the regulations are minimum requirements, and any agreement to waive any of those requirements is of no effect, subject to Sections 43, 49, 61 and 69.*

The *Act* does not allow employers or employees to make an agreement or contract that violated the *Act*. It would appear that the company overtime policy is in violation of Section 40 and 42 of the *Act*.

Lastly, the Director argues that the investigation revealed no evidence of a “B.C. premium” being paid to the complainants. In the appeal, ASM has provided no material or other evidence demonstrating the existence of any such “premium”. But even if they had, the overtime requirements of the *Act* are clear and ASM did not comply with them.

ASM has not established any error, either in fact or in law, in the Determination. The analysis in the Determination was correct. The acceptance by the complainants of an overtime policy that did not meet the minimum requirements of the *Act* was, by operation of Section 4, of no effect.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 1, 2000 be confirmed in the amount of \$2346.42, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal