

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-

Lisa Boda
(the “Appellant”)

-of a Determination issued by-

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: E. Casey McCabe

FILE NO.: 97/219

DATE OF DECISION: September 17, 1997

DECISION

APPEARANCES

Lisa Boda	for herself
Susan Vincent	for Midland Walwyn Capital Inc.
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal by Lisa Boda of a Determination dated March 13, 1997 which determined that Ms. Boda was not entitled to overtime pay pursuant to Section 40 of the *Employment Standards Act* (the "Act").

ISSUE TO BE DECIDED

Is Ms. Boda entitled to overtime pay in the amount of 1 hour per day (5 days per week) for the period of January 12, 1996 to May 1, 1996 based on the difference between a work week of 35 hours versus the 40 hours that she claims she worked.

FACTS

Ms. Boda was hired on January 12, 1996 as a receptionist. She was provided with a letter of engagement dated January 12, 1996 which set out that: she would receive a salary of \$20,000.00 per annum; she would be entitled to 9 vacation days in 1996 and thereafter in accordance with the employer's vacation policy; her starting date would be Friday, January 12, 1996; her first three months of employment were considered a probationary period; she would receive the benefit of a formal performance review at the third month stage of her employment; she was entitled to all group benefits currently offered by Midland Walwyn Capital Inc. It is notable that the hours of work were not defined in this letter.

Ms. Boda contends that she worked an 8 hour day/40 hour week with 1 hour for lunch and 1 ten minute break each day. She contends that her starting salary of \$20,000.00 per annum was based on a 35 hour week and that, since she worked a 40 hour week, she is entitled to overtime pay for the 5 hour difference.

In response to the complaint Ms. Vincent, Vice-President, Human Resources, writes in her submission of May 6, 1997 that Ms. Boda accepted employment as per the engagement letter and in agreement with certain negotiated terms which included hours of work from 7:30 a.m. to 4:30 p.m. daily. Ms. Vincent acknowledges that the hours of work were not mentioned in the January 12, 1997 engagement letter. She states that it is not the employer's practice to include hours of work in the employment letter but that hours of work are discussed at the time the verbal offer of employment is made.

Ms. Boda bases her complaint on her perception that the other employees at Midland Walwyn Capital Inc. in Victoria, B.C. work only a 35 hour week. Furthermore she performed duties for one of the financial advisors over and above her reception duties for which the financial advisor paid her personally. Ms. Boda argues that this is a recognition that a standard work week at Midland Walwyn Capital Inc. was 35 hours and that her work in excess of the 35 hours constituted overtime.

It is notable that on May 1, 1996 Ms. Boda received a pay increase from \$20,000.00 to \$22,000.00 per annum. At the time that she received the pay increase she was informed that it was a merit increase. However, when she asked that her personal file be produced she discovered a document entitled Staff Change Form which not only showed her salary increase but also had an annotation which stated: "adjustment from 35 hr work week to 40 hr work week." Ms. Boda argues that this is recognition that the \$2,000.00 salary increase was not for merit but rather was to compensate her for a 40 hour work week rather than a 35 hour work week.

ANALYSIS

Ms. Boda claims that she is entitled to overtime for the 1 hour per day or 5 hours per week that she worked in excess of 35 hours per week. She takes the position that the standard work week for employees of Midland Walwyn Capital Inc. is 35 hours and that because she worked 40 hours per week she should receive overtime payment for the excess 5 hours. I do not agree with Ms. Boda.

Firstly, although the engagement letter of January 12, 1996 is silent on the matter of hours of work, Ms. Boda does not contradict the fact that Ms. Vincent has stated that her hours of work, as agreed verbally at the commencement of her employment, were 7:30 a.m. to 4:30 p.m. with a 1 hour lunch. In fact Ms. Boda confirms that she did take a 1 hour lunch break. Unfortunately, there is no evidence offered that the other employees were working only a 35 hour work week. I do not accept the gratuitous payment by the financial advisor for the extra hours that were worked by Ms. Boda as evidence that the other employees were working only a 35 hour week. I do accept payment by the financial advisor as recognition of effort above and beyond regular duties by Ms. Boda. It should also be noted that that payment was a personal payment which did not reflect any acknowledgment or acquiescence by the employer that additional payment was warranted for the work.

Ms. Boda further argues that the annotation on the Staff Change Form indicates that her standard work week was 35 hours yet she worked a 40 hour week. It is acknowledged by Ms. Boda that after May 1, 1997 when she received the \$2,000.00 per annum increment that her work week was defined as 40 hours per week. However, when she received the increase she was told that it was a merit increase. There is no indication on the face of the Staff Change Form who made the annotation. I do not accept that this annotation indicates that the employment contract was intended to be based on a 35 rather than a 40 hour week. Rather, I accept the evidence of Ms. Vincent that Ms. Boda, as a receptionist, was hired to work from 7:30 a.m. to 4:30 p.m. with a 1 hour lunch. In other words Ms. Boda was hired to work an 8 hour day/40 hour week.

Finally, Section 40 of the *Act* contemplates overtime payments only in a situation where an employee works in excess of 8 hours per day or 40 hours per week. Ms. Boda did not work in excess of 8 hours per day or 40 hours per week. Employees who negotiate a work week of less than 40 hours may not be entitled to overtime for the difference between their negotiated work week and 40 hours per week (or 8 hours per day) unless it has been specifically negotiated between the employee and the employer that overtime rates will apply to time worked in excess of the regular work day or standard work week. In this case there has been no such agreement.

The onus is on Ms. Boda to show that she in fact worked eight hours per day or forty hours per week and that it was a term of her employment contract that she would receive overtime for hours in excess of thirty-five per week. It is not the employer's onus to show that Ms. Boda did not work forty hours per week. I find that Ms. Boda did not show that her contract of employment was for a thirty-five hour week or that she was entitled to overtime for hours that were worked.

ORDER

I confirm the Determination dated March 13, 1997.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal