BC EST #D457/99

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 -

Labour Ready Temporary Services Ltd. -and- Cheryl Anita Lynn

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Alison H. Narod

FILE NO.: 1999/083

DATE OF DECISION: October 28, 1999

DECISION

The Appellant, Labour Ready Temporary Services Ltd. ("Labour Ready") appeals a Determination dated January 22, 1999 in which a delegate of the Director of Employment Standards found that it violated Sub-sections 17(1), 18(1), 40(1) and (2) and 46(1) and (2) of the *Employment Standards Act* and ordered it to pay $8,577.81 to its former employee, Cheryl Anita Lynn.

More specifically, the delegate found that the Employer:

(a) failed to pay Ms. Lynn time worked as a result of taking pager calls at least semi-monthly contrary to s.17(1);

(b) failed to pay all wages owing within 48 hours of termination of her employment contrary to s.18(1);

(c) failed to pay overtime when overtime was worked contrary to Sections 40(1) and (2);

(d) failed to pay statutory holiday pay in accordance with Sections 46(1) and (2).

Briefly, the Delegate accepted Ms. Lynn's claim for overtime and minimum daily pay for work she performed as a result of taking over 300 pager calls outside of her normal work hours in 1996 and 1997 and for 68 hours of overtime she worked between June and November, 1997.

FACTS

Labour Ready (the "Employer") is in the business of providing temporary labourers. Labour Ready's clients submit requests for workers to perform work and specify when, where and how long the workers are needed. Some of its clients operate around the clock, 7 days a week.

Additionally, people seeking work register with the Employer. As requests for workers are made, it dispatches available workers to the job. The Employer pays the workers for the hours worked and charges the client for services.

During the relevant time period, the Employer operated a Surrey office, which was open Monday through Friday, from 5:30 a.m. to 6 p.m. and Saturdays, from 6 a.m. to 10 a.m. and from 4 p.m. to 6 p.m. When the office was closed, clients and workers could phone an answering machine, which provided a pager number for a representative who callers could contact after hours.

Ms. Lynn was employed as a Customer Service Representative from May 8, 1995 until December 17, 1997, when she went on sick leave and ultimately did not return to work. During her employment, she was paid an hourly wage, plus bonus and commissions.

a) Pager Use

During her employment, Ms. Lynn was provided with a pager. From time to time, her pager number was advertised on the office's answering machine as being available for after-hours calls and she was required to respond to pager calls. One of the issues is whether or not Ms. Lynn is entitled to minimum daily wages for answering pager calls. The Employer challenged Ms. Lynn's credibility regarding the frequency of the pager calls she received and the amount of time she was required to work as a result of them.

The Employer acknowledged that Ms. Lynn took pager calls, but asserted that she was not the only person to do so, that the responsibility was rotated amongst others in the office and that Ms. Lynn also took pager calls during office hours. The Employer said that Mr. Don Lenaghan, who was formerly the Manager of the Surrey office, had advised that Ms. Lynn's pager calls included personal calls. The Employer did not call Mr. Lenaghan as a witness.

Jean Major was the Employer's Director of Canadian Operations from January 1996 to June, 1998. He gave evidence that all employees were provided with a pager which was to be kept on at all hours. He knew that employees received pages, but did not know whether they were paid for taking them. He said that Ms. Lynn did not tell him that she wanted to be paid for the pages she was answering.

Mr. Major visited the Surrey office every 3 weeks. He admitted that he did not know how many after hours pages the Surrey Office received. Nor was he familiar with the Surrey office's experience with clients placing work orders after hours. He opined that the number of calls claimed by Ms. Lynn seemed a little high to him. He also said he recalled Ms. Lynn's pager going off a couple of times when they. were both in the Surrey office.

Eleanor Foster worked at the Employer's Surrey office from September 1995 to February, 1996. She gave evidence that she was required to carry a pager. She recalled that pager numbers for the Manager and one other person were left on the answering machine. She did not recall whether or not both numbers were on the answering machine at the same time or whether they were rotated. The pager numbers most frequently listed on the answering machine were hers and Ms. Lynn's. She did not recall how frequently her number was on the machine.

Ms. Foster recalled receiving after hours pages, but said they were infrequent and sporadic. She might get 3 pages a week and then nothing for a couple of weeks. These pages included urgent client calls for workers, but these types of requests were infrequent. She did not recall Ms. Lynn telling her she was receiving a lot of after hours calls.

Mish Stone was the Acting Manager at the Surrey office from the time it opened at the end of 1995

until late 1996 or early 1997. She gave evidence that, initially, Ms. Lynn's pager was advertised on the answering machine. Later the pager numbers were rotated. Ms. Stone said Ms. Lynn did not complain about how many pages she was receiving or that she ought to be paid for pages. She thought it was unlikely that Ms. Lynn received as many as a page a day, but she might have received a couple a week.

Ms. Stone said that she would have received as many pages as Ms. Lynn was claiming, but pointed out that she was responsible for 4 offices and these would have been internal pages. She would have received about 25 external pages in the Surrey office. She said very few work orders were filled out after work hours.

Ms. Lynn testified that she was required by her employer to carry a pager and to respond to pager calls outside of her normal shifts. The Employer did not keep records of Ms. Lynn's pager use or the amount of time she spent responding to pages. Ms. Lynn kept a calendar at her home on which she noted when she was paged, but not the amount of time spent responding to these calls or who the page was from. She said that she only recorded pages that occurred after work hours and made her records either as they occurred or, if she was not at home, when she returned. She said she may not have recorded all of the pages she received. Ms. Lynn claimed that she received 181 pages in 1996 and 156 in 1997.

Ms. Lynn claimed she was the person most often assigned to do pager duty. During the period of her claim, she was on after hours pager duty all of the time, except on weekends when the Employer rotated pager duty among other employees. She answered pages on evenings, weekends, days off, statutory holidays and on paid and unpaid sick leave days. The calls came from clients and employees. The calls were for various reasons such as: clients seeking workers and inquiring about what to pay employees; and employees inquiring about availability of work, etc. About three-quarters of the calls were from clients. About half of the client calls were orders for workers and half were queries. Some of the calls, such as the queries from clients and calls from workers, could be dealt with briefly: maybe 10 minutes or more, but rarely less than 1 minute.

However, filling orders could take a longer time. Ms. Lynn explained that the initial pager call may or may not require her to do additional work. Once she was paged, she would telephone the caller back, either by using her cell phone or by finding another phone she could use. She would call the party that paged her, ascertain the reason for the call and answer any questions she could respond to during the call or take whatever action was needed to respond to the caller's request.

For example, if a caller needed a replacement for the next shift or an employee had not shown up for work, she would make the necessary calls to find a worker. This could mean making 10 to 15 calls searching for someone to dispatch. As a result, responding to a page might cause her to work for only a few minutes to deal with a short query or for a much longer time depending on the caller's needs.

Ms. Lynn supplied records from BC Tel Mobility of the number of pages she received between mid-March and December, 1997. She acknowledged that if she received pages during office hours, these would be included in the BC Tel Mobility records. She denied that she recorded on her calendar any

pages she received during office hours.

Ms. Lynn also supplied BC Tel long distance phone bills from her home phone and identified a number of long distance charges she said related to responding to pager calls.

Ms. Lynn said that she complained of not being paid for responding to pager calls to "Ed", the person who managed the Surrey office when she started, as well as to Mish Stone, Mr. Lenaghan and Mr. Major. Ms. Stone told her that the Employer did not pay for pages. She did not specifically ask Ed or Mr. Major to be paid for pager work. Ms. Lynn also said she complained to Mr. Major of the number of pager calls she received and that she was not being paid for her long distance phone expenses. Mr. Major's evidence was that he had no recollection of this.

Ms. Lynn supplied a letter from a former co-worker, Charlie Gillan, confirming that while he worked at the Surrey office (April, 1997 to October, 1997), he and Ms. Lynn carried pagers and were called at all hours of the night by people looking for temporary workers and workers looking for jobs.

Ms. Lynn said she was often paged by two people from Merlin Plastics, one of the Employer's clients. She supplied a letter from Kevin Andrews of Merlin Plastics, stating that Merlin used the Employer regularly in 1997 and 1998, that Mr. Andrews called at all hours for workers and that he called Lynn at her pager number or cell phone on more than 10 occasions. The letter did not specify when he made these calls to Ms. Lynn.

Marsha Hickey, who was a Customer Service Representative at the Surrey office from June 1997 to December 1997, gave evidence on behalf of Ms. Lynn. She said that she was required to wear a pager and she was told that it was grounds for dismissal to turn it off. Ms. Hickey said that while she was at Labour Ready, there was only one pager number on the answering machine at a time. During the week, the pager number was Ms. Lynn's. The person who worked the Saturday shift at the Surrey office was the person whose pager number was advertised on the answering machine for the Saturday pager shift. Ms. Hickey alternated working Saturdays for a period of time. Pager duty became an issue by October, 1997, when Ms. Lynn asked to split pager duty with a co-worker. Ms. Hickey did not know how the issue was resolved.

Ms. Hickey said that when she worked the Saturday pager shift, she would get 3 pages on average per shift. Ms. Hickey did not recall Ms. Lynn's pager going off during working hours.

Ms. Hickey said that Ms. Lynn complained to Mr. Lenaghan on several occasions about the amount of pager work she was required to do. In the Fall of 1997, Ms. Hickey was present along with two co-workers, when Ms. Lynn and Mr. Lenaghan had a "major argument" about the number of pages she received. Ms. Hickey said Ms. Lynn told Mr. Lenaghan she was not happy that she was on pager duty constantly.

The Delegate found that the BC Tel Mobility records were fairly consistent with Ms. Lynn's calendar records. Therefore, the Delegate used Ms. Lynn's records to calculate her pager use. Additionally, since there were no records to verify actual time spent responding to pager calls, and in the absence of any alternative suggested by the Employer, the Delegate accepted Ms. Lynn's suggestion that 15 minutes per call was a reasonable estimate of the amount of time spent on pager calls.

In calculating the amount owed under the *Act* for work performed responding to pages, the Delegate used the following criteria:

> "1. Simply being required to carry a pager does not attract payment.
> 2. In the event Ms. Lynn was paged, she would be entitled to payment as follows:
> - on a day on which she worked 8 hours, 15 minutes per page at time and a half rate.
> - minimum 4 hours pay if she was paged on a non worked day, or on a non-paid sick day.
> - on a paid sick day, no extra pay if paged.
> - on a statutory holiday, minimum 4 hours pay at time and a half rate."

The Employer's appeal related primarily to the evidentiary basis of the Delegate's determination and the Delegate's interpretation of section 34 of the *Employment Standards Act*.

Decision re Pager Use and Minimum Daily Pay

As noted, the Employer challenged Ms. Lynn's credibility. For example, the Employer challenged the Delegate's acceptance of the number of pager calls to which Ms. Lynn claimed she responded. It also challenged the Delegate's decision to base the calculations of the time Ms. Lynn worked per pager call on an average of 15 minutes per call. The Employer said there was insufficient supporting documentation of work orders and the like to corroborate the number and dates of the claimed pager calls and the Employer pointed to the absence of documentation, such as long distance phone records, to substantiate the amount of time spent on phone calls. The Employer queried whether Ms. Lynn's records were made contemporaneously with the pager calls and suggested that some of the recorded calls were likely made while Ms. Lynn was at the Surrey office during business hours.

The Employer argued that little weight should be given to Mr. Gillan's and Mr. Andrews' letters, as they were hearsay. The Employer produced a letter of resignation Mr. Gillan gave to Mr. Lenaghan commending the workplace and thanking him for his help and support. It pointed out that Mr.

Andrew's letter referred to Merlin's use of Labour Ready in 1998, after Ms. Lynn left its employ. I find that Mr. Gillan's and Mr. Andrews' letters were hearsay and I attribute little weight to them.

I found Ms. Lynn to be a credible witness. The evidence supports her allegations that she was required to respond to after hours pages as part of her job, that the Employer did not keep records of this work and it did not pay her for it. The Employer was aware that she was answering pages. The evidence supports the conclusion that she was on after-hours pager duty most of the time, and shared this duty with others periodically.

The Employer's witnesses gave evidence which did not cover the entire period of Ms. Lynn's claim and they were unable to successfully challenge the particulars of her records. In fact, their evidence tends to support that Ms. Lynn could reasonably have received at least 3 pages a week. Mr. Major, who was unable to provide direct evidence that contradicted Ms. Lynn's, thought the number of pages Ms. Lynn claimed was a "little" high. He did not state it was unreasonably high. Ms. Foster was unable to say how frequently she was on pager duty, but said she might get up to 3 pages a week. Ms. Stone did not say she was on pager duty herself, and so her evidence of the number of pages she received could not be taken as comparable to the number of pages Ms. Lynn received while on pager duty.

Ms. Lynn's records indicate that she often received up to 3 or 4 pages a week and sometimes more and sometimes less. Her claims are supported by the BC Tel Mobility records. I have examined the BC Tel Mobility records for the period of April, 1997 to December, 1997, excluding the number of pages recorded for March, 1997 because of the difficulty ascertaining the portion of the month that they cover. Those records corroborate the number of calls Ms. Lynn recorded on her calendar as having been made to her pager from April to December, 1997.

The Employer relied on *518820 B.C. Ltd c.o.b. Pelican Rouge Coffee Co., Supra,* in aid of an argument that Ms. Lynn's records were unreliable because they were not shown to have been made contemporaneously. I note that the cross-examination in this case concerning contemporaneity related to the pager records. Ms. Lynn's evidence substantiated that her pager records were made contemporaneously, except when Ms. Lynn received pages while away from home, in which case she recorded them when she returned home. I accept that the records were made reasonably contemporaneously.

The Employer cited *Turchenek (Re), Supra,* as a case where the complainant's evidence was insufficiently particularized because it did not record dates or the amount of time worked on those dates. The Employer failed to show how long, on average, Ms. Lynn would work per call. Ms. Lynn's evidence was that calls could range the gamut from less than a minute in rare cases to 10 or more minutes for inquiries and significantly longer where she was required to find a worker for a client. The claim for pager work listed the dates of the pages, but not the duration of the work entailed. I find that the Delegate did a reasonable investigation of what the pager work entailed and came to a reasonable conclusion that the work on average was 15 minutes per call.

Section 34

The Employer argued that Ms. Lynn was not entitled to four hours minimum daily pay under Section 34 of the *Act* because she was not required to report for work at a location designated by the Employer. The Employer stated that Section 34 is only intended to apply where an employer requires an employee to report for work at a location designated by it.

The relevant provisions of the *Act* are as follows:

> 1. (1) In this Act...
> "work" means the labour or services an employees performs for an employer whether in the employee's residence or elsewhere.
>
> (2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.
>
> 34. minimum daily hours -
>
> (1) If an employee reports for work on any day as required by an employer, the employer must pay the employee for
>
> (a) at least the minimum hours for which the employee is entitled to be paid under this section or,
>
> (b) if longer, the entire period the employee is required to be at the workplace.
>
> (2) an employee is entitled to be paid for a minimum of
>
> (a) four hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or
>
> (b) two hours at the regular wage, in any other case unless the employee is unfit to work or fails to comply with the Industrial Health and Safety Regulation of the Workers' Compensation Board.

It is clear from the *Act* that the definition of work includes work an employee performs at her residence. Additionally, sub-section 1(2) makes it clear that if an employee is on call and the location which the employer designates for the employee to be on call is the employee's residence, then the employee is not deemed to be at work while on call at that designated location. Therefore, while the Complainant was on call at her home, she was not deemed to be at work. When she received a page

and performed labour or services in relation to that page, she was at work, even where that work was performed at her residence. Once the work relating to the page was completed and she resumed being on call at her residence, she was no longer deemed to be at work.

One of the issues in this case is whether or not the Complainant is entitled to minimum daily pay under Section 34 and, in particular, whether she "reported for work as required" by her Employer within the meaning of Section 34 when she responded to pages and performed work as a consequence, at a location which was not designated by her employer (in most instances at her residence).

The Employer argued that Section 34, the provisions respecting minimum daily hours, does not apply to an employee who is not required to report for work at a place designated by it. Therefore, since the Complainant was not required to report for work to any location designated by the Employer and could receive and perform work in relation to pager calls at her residence or anywhere she wished, there is no requirement for the Employer to pay the four hours minimum specified by Section 34(2) of the *Act*.

The Employer drew support for its submission from excerpts from the debates in Committee on Section 39 recorded in *Hansard* dated June 20, 1995 at page 15787 where the then-Minister of Labour, the Honourable Dan Miller, stated, in relation to Section 34:

> The pay requirement is really for the entire period the employee is required to be at the workplace; in any event, it's a minimum of four hours.
>
> and
>
> ...if an employee reports for work....The Act is very clear. Four hours is the minimum. If the employer, for example, says "I do not need you; I don't want you to be here," you're entitled to four hours' pay.

The Employer also relied on the following passage from *Terrace Kitimat Bldg Maint. Ltd. (Re)*, BC EST # D150/97, at page 6:

> The purpose of the minimum hours guarantee is to ensure that employees are not called into work with the expectation of a full shift only to be told to go home, without any work - or pay, for the day. It also prevents an employer from forcing an employee to come to work for a period of time too short to cover the costs incurred in reporting to work. The guarantee also recognizes the disruption to an employee caused by disorganized scheduling.

The Employer argued that the legislative intent of the minimum daily pay requirement was to protect employees from being required to report to work by an employer and then receiving only a short period of work and pay. In particular, the minimum was to provide a remedy to the employee for the inconvenience and expense of reporting to work only to find that there was little work available. In such circumstances, the employee was to be guaranteed at least 4 hours pay, barring the exceptions set

out in Section 34.

The Employer submitted that the Legislature intended to provide an explicit distinction between the pay required for "work" and the pay required for "reporting to work". This distinction is reflected in the legislation, in the *Hansard* debates and in the cases cited by the Employer, including *Terrace Kitimat Bldg. Maint. Ltd., supra.* "Reporting to work" was a precondition to the application of the section.

In response to a request by the panel for submissions on the application of Section 34(2)(b), the Employer said that if it was proven that the Complainant received and responded to a page at home and this constituted reporting to work as contemplated by Section 34, then the work was suspended "for a reason completely beyond the employer's control" when the Complainant finished responding to the page. The Employer had no control over whether a page would be received or what would be the nature and amount of work required as a result.

The Complainant argued that she was entitled to the minimum daily pay of 4 hours because she reported to work by answering pages at home. She contended that the work she did was never suspended for any reason beyond the Employer's control.

Graeme Moore, Program Advisor, submitted on behalf of the Director of Employment Standards that the Complainant was entitled to minimum daily pay of 4 hours at her regular wage rate. He argued that because of modern telephonic communication, an employee can be "on call" virtually anywhere and need not be at a specific location designated by an Employer. However, when that employee answers a page, the employee has, in effect, reported to work and is entitled to the 4 hours minimum daily pay. He argued that there is nothing in the *Act* or Regulations which alters the employee's entitlement to minimum daily pay. He observed that employees who answer pages are not an occupation or group listed in Section 34 of the Regulations as being excluded from Section 34 of the *Act.*

With respect to the question of the application of Section 34(2)(b), Mr. Moore argued that the 4 hour minimum is reduced to 2 hours only where work is suspended for a reason "completely" beyond the Employer's control. He submitted that "completely beyond the Employer's control" appears akin to an "act of God". It would be absurd to find that this includes a circumstance where there is a lack of business or there are no more customers to serve. In this regard, he cited *Rizzo and Rizzo Shoes Ltd.* [1988] 154 D.L.R. (4th) 193 (S.C.C.), *Relco Investment Corp.* (BC EST #D008/96), *Hall Pontiac Buick Ltd.* (BC EST #D073/96), *Terrace Kitimat Bldg. Maint. Ltd., supra,* and *Periklis Enterprises Ltd.* (BC EST #D168/99).

In reply to Mr. Moore's submission, the Employer pointed out that all of the cases relied on by Mr. Moore were ones where the employee concerned attended at the Employer's place of business. Since the Complainant did not attend at the Employer's place of business to perform work, the cases relied on by Mr. Moore were distinguishable. The Complainant had not incurred any costs by being required to attend at the Employer's workplace and therefore was not in need of the type of protection intended

by Section 34.

In a further response, Mr. Moore argued, for the Director, that the Employer chose how to do business. If it required an employee to work at the office, outside normal business hours, to answer customer calls, that employee would be entitled to regular wages for all hours worked at the office, even if there were no calls. Instead, this Employer chose to require its employees to answer pages received outside their normal work day. This method reduced the Employer's wage costs. It was critical, however, that the employee answering the page was attending to the customer. "Reporting to work" is no longer limited to physically reporting to a workplace. In the modern information age, there is no need for a workplace in the form of an office in the traditional or historic form. The employee is reporting to work when the employee answers a page, accesses e-mail or checks voice mail. Being available for the customer and reporting to the workplace are one and the same. The workplace is now the telephone. This ability to report to work telephonically does not eliminate the entitlement of an employee to minimum daily pay.

Additionally, Mr. Moore submitted that the Complainant did incur a cost in carrying the pager and responding to pages. There was an intangible cost of being mindful of the pager, (that the battery was charged and that it was on) of being alert to notice a page, of being ready at a moment's notice to attend to the Employer's business. The Complainant was unable to do things such as leave town or go to the movies. There was the added inconvenience of the interruption to her personal activities, without notice. A decision in the Employer's favour would lead to an inequitable result; the Complainant's entitlement to minimum daily pay would depend on where she received the call, not whether she performed work. The remedial purpose of the *Act* would be overshadowed by undue emphasis on the words "report to work".

I do not think the excerpts from *Hansard* go so far as the Employer contends. In any event, reliance on legislative debates as extrinsic evidence of legislative intent has been eschewed by the Courts in Canada *(Reid v. Vancouver Police Board*, (1996) 25 B.C.L.R. (3d) 162). Moreover, the Minister was not addressing the issue of whether s. 34 applied to work an employer has authorized to be performed in a residence.

Further, the *Terrace Kitimat Bldg. Maint*. case is not a "home work" case and does not address the question at issue in the instant case, which is whether employees can be said to report to work when they are required to by their employers to commence work at their residence or other site not designated by it.

The evidence is that the Complainant was assigned a pager and expected to respond to it and perform work in connection with the pages by the Employer. In *Indo-Canadian Times Inc. (Re)*, BC EST No. D598/97, an adjudicator addressed an Employer's argument that the definition of work excludes work performed by an employee at his or her residence. The employee claimed wages for work performed at his home. In particular, he claimed wages for perusing newspapers and magazine type publications in order to select photos and cartoons for publication in the Employer's newspaper. The adjudicator held:

> I find that the work performed by Mr. Johal was a necessary and integral part of the duties he was required to perform for his employer. He performed these duties at his home because there was not sufficient time during his normal work day to perform them at the office. I find that the work that Mr. Johal was required to perform at his home was labour or services an employee is required to perform for an employer as contemplated in the definition.....In other words, if your employer requires you to be on stand by and remain on stand by at your home that time does not qualify as work. That is contrast to an employer assigning work which is taken home and performed in the residence. Such specific assignment is captured by the first element of the definition. For these reasons I dismiss the alternative argument of the employer.

It is clear that the Complainant was required to perform work at home by her Employer. The Employer required the Complainant to be on call, although it did not specify where she had to remain while on call. It required her to take pages and perform work in connection with those pages as those pages were received and in accordance with the demands of the pages. These duties were a necessary and integral part of the duties the Complainant was required to perform for her Employer and were a necessary and integral part of the business of the Employer.

Although the adjudicator's comments in the *Indo-Canadian Times* case related to the definition of work, I think they are also relevant for the purposes of interpreting s.34.

In our technological day and age, employees can be required to perform work at home using pagers, cellular phones, computers, internet connections and so forth. In the instant case, the Employer required the Complainant to carry a pager and, when a page was received, to respond to it. That response entailed work within the meaning of the *Act*. The requirement to respond to the page and perform work in connection with the demands of the page constitute, in our technological age, a form of reporting for work. However, as noted below, there may be some limits on the Employer's ability to control the amount of work performed by employees at their residence and this control may affect the Employer's obligations under the *Act*.

Section 34 is not on its face inapplicable to work an employer authorizes an employee to perform at a workplace of the employee's choice. The Legislature could have so stated. As noted, in the definition of "work" the *Act* deems an employee to be at work while on call at a location designated by the Employer unless the designated location is the employee's residence. The fact that the Legislature spoke of designated locations in that section and not in section 34 suggests it did not intend to preclude the application of Section 34 to work at workplaces authorized by, but not designated by, the Employer.

Additionally, I note that the tenor of the Act is to be inclusive and exclusions from it are specifically permitted by the Regulations or by such variances as may be authorized under the Act. The inclusion of home-workers in Section 34 of the Act is consistent with Section 34 of the *Employment Standards Regulation*. Section 34 of the *Regulation* states that Part 4 of the *Act*, which regulates hours of work and overtime, does not apply to certain enumerated occupations, including a live-in support worker

(see s.34(q)), a residential care-worker (s.34(x)) and a live-in camp leader (s.34(y)). Section 35(1) of the *Regulation* states that Part 4 of the *Act*, other than s.31, s.36 and s.39, does not apply to a resident caretaker. These sections of the *Regulation* suggest that s.34, which is in Part 4 of the *Act*, would apply to these occupations, but for the specified exclusions.

The next question is whether s.34(2)(a) or (b) of the *Act* applies to the circumstances of this case. In considering s.34(2)(a), adjudicators have addressed the question of whether the work is suspended for a reason completely beyond the Employer's control (See *D.E. Installations Ltd. (Re)* BC EST # D397/97 at para. 39 and *Hintz (Re)* BC EST #D382/98). The concern appears to be whether the Employer can arrange its affairs such that there is sufficient work for an employee to do on those days when the employee left before completing his or her shift. As was stated in *Hintz*, if the employer did not arrange its affairs such that there was sufficient work for the employee to do on those days, the employer must either pay the statutory requirement or not require her to report to work.

In the typical cases where minimum daily pay is at issue, employees have been required to report to work or be on call at a location other their residences. As noted in s.1(2) of the *Act*, an employee is deemed to be at work while on call at a designated location other than their residence. This is different in a case where an employee, such as the Complainant, is required to be on call, but the location is not designated and can include their residence. In those cases, there is an automatic reversion once the work is completed to being back on "on call" status.

In the instant case, the relevant question is whether the reason for the suspension of the Complainant's work was entirely within the Employer's control.

In my view, both the Employer and the employee were aware that neither could predict when a page would occur or how long the work associated with the page would last. All of that was contingent on the requirements of the caller. The evidence was that a page could require as little as one minute's work. As noted, once the work associated with the page was complete, under the *Act*, the employee would no longer be deemed to be at work. The employee would automatically revert to a state of being on call during which she would suffer no inconvenience beyond that of anyone else who was on call at a location not designated by their emp loyer.

Accordingly, in my view, and in the particular circumstances of the case where the start of the work and its length could not be predicted or controlled by the Employer or the employee, and she would automatically revert to a statutory status of not being at work on completion of the work, the Complainant was not entitled to be paid under s.34(2)(a), but under s.34(2)(b). That is, she would be entitled to be paid under s.34(2)(a), which would entitle her to four hours at the regular wage, if she started work, unless the work was suspended for a reason completely beyond the Employer's control, as it was here.

Therefore, Ms. Lynn's entitlement was to be paid under s.34(2)(b), which entitled her to be paid in the amount of two hours at the regular wage in any other case. That is, of course, unless she could establish that she worked more than two hours in any of the days for which she is claiming minimum

daily pay. As noted above, the employee did not keep records that established, nor did she assert, that she worked more than two hours on any of the days in which she claims minimum daily pay. Even on those days when she recorded having received more than one page, she did not also record that she worked in excess of two hours. Accordingly, for those days, I find that she is entitled to two hours minimum pay under s.34(2)(b).

b) Overtime

Ms. Lynn claimed that she had not been paid 68 hours of overtime in accordance with the *Act* between June 1997 and November 1997. She said this was because she had been directed by Don Lenaghan, her Manager at the time, not to write more than 8 hours on her daily time sheets. Instead, she was to keep track of her overtime and take time off in lieu. However, she was not given the time off in lieu as promised.

The Employer said that Mr. Lenaghan denied telling Ms. Lynn not to write her overtime hours on her time sheets and to take time off in lieu of payment. Mr. Lenaghan no longer worked for the Employer. The Delegate was unable to speak with him.

Jean Major gave evidence that the Employer had a longstanding policy respecting overtime. Employees were to document overtime worked on their time sheets. These were to be signed and submitted weekly to their Manager, who would sign them and forward them to Mr. Major's office for processing. The Manager had no authority to deviate from this policy.

Mr. Major had no knowledge of whether or not Mr. Lenaghan had reached a different arrangement with Ms. Lynn respecting overtime. Any deviation from the overtime policy would have had to have been approved by Mr. Major and he gave no such approval. He said Ms. Lynn did not tell him that Mr. Lenaghan had a different arrangement.

Mish Stone said that Ms. Lynn was aware of the Employer's overtime policy and complied with it during Ms. Stone's tenure. She said that according to that policy, overtime was to be approved in advance, except when the employee had to stay late waiting for workers.

Ms. Lynn testified that she had no problems being paid for overtime prior to Mr. Lenaghan's tenure. Ms. Lynn said Mr. Lenaghan was aware that she worked overtime. The overtime was worked both before and after office hours. She said she recorded her overtime in accordance with Mr. Lenaghan's instructions. She recorded the overtime she worked on the calendars she produced to the Delegate.

Ms. Lynn also said that Mr. Major was aware of Mr. Lenaghan's practice regarding overtime because in October of 1997, she told him of the practice and complained that she had not been paid as she had expected when she took time off for a trip to Bellingham. As a result, Mr. Major arranged for her to be paid for her absence. Mr. Major's evidence was that he did not recall the conversation. Ms. Lynn said that on the occasions when she claimed for and was paid overtime in accordance with the company's policy, she did so while Mr. Lenaghan was on leave from the office. This was because she did not believe she could safely continue to claim for overtime when Mr. Lenaghan was at the office.

Marsha Hickey said that Mr. Lenaghan told her that if she worked overtime, she was to take time off in lieu. Ms. Hickey said she was present in the Summer of 1997 when Mr. Lenaghan told Ms. Lynn and two other co-workers the same thing. She and the other two co-workers were salaried employees and did not have to submit time sheets as hourly employees such as Ms. Lynn was required to do.

Ms. Hickey said she participated in a telephone call with Mr. Major and Ms. Lynn in which she and Ms. Lynn each complained about not being paid for taking time off in lieu of overtime as promised by Mr. Lenaghan. She acknowledged that she did not hear what Mr. Major said to Ms. Lynn during that call.

The letter Ms Lynn provided from Mr. Gillan stated that Mr. Lenaghan had told him that he was to bank overtime as he would not be paid for it, but he would be given time off in lieu. Mr. Gillan writes that he was not given time off for the overtime he worked. As noted, I put little weight on Mr. Gillian's letter.

The Delegate preferred Ms. Lynn's evidence about her overtime over the Employer's. In reaching her decision, the Delegate reviewed two other complaints concerning the Employer. In one complaint the Employer's records regarding hours of work were found to be inaccurate. In another, the complainant also complained that Mr. Lenaghan directed her not to record overtime on her time sheets.

As part of its appeal, the Employer submitted that the Delegate did not consider all of its evidence and argument, that she failed to show that the evidence she based her decision on was reliable and that she relied on irrelevant evidence. The Employer challenged Ms. Lynn's credibility and contended that the Delegate accepted her allegations in the absence of supporting evidence.

The Employer denied that any overtime was due to Ms. Lynn. It relied on Ms. Lynn's time sheets which did not show any overtime hours. The Employer argued that there was no side agreement with Mr. Lenaghan to deviate from the Employer's longstanding overtime policy and to record overtime separately from the time sheets and take compensatory time off instead. It argued that even if Mr. Lenaghan made the side deal, Labour Ready did not authorize or agree to such an arrangement.

It noted that Ms. Lynn did not produce written evidence that Mr. Lenaghan had agreed to the arrangement she described. It argued that if Mr. Lenaghan deviated from the Employer's policy, it would be reasonable to expect that Ms. Lynn would have complained about it, since she had not hesitated to complain to Mr. Major in the past, and the absence of any complaint undermines the credibility of her assertion that Mr. Lenaghan instituted a new overtime policy.

The Employer said that Ms. Lynn was well aware of its policy that overtime must be pre-approved by management and points out that this was confirmed in writing to her in the Spring of 1997. It challenged Ms. Lynn's credibility in view of her knowledge of its strictly applied overtime policy. Additionally, it said that her evidence was contradicted by the fact that she received pay for 3.25 hours of overtime worked in the period she claimed the side deal was in effect. Moreover, it said that if she had accumulated the 68 hours of overtime she claimed, it is unlikely she would have asked for

more than one day off in the period of time she accumulated it.

The Employer contended it ought not to be held responsible for a large accruing liability for overtime that Ms. Lynn claimed she privately recorded, but did not bring to the Employer's attention. Further, it objected to the Delegate's reliance on evidence obtained by reviewing other complaints made against the Employer.

The Employer relied on *Health Ventures Ltd.*, [1997] BC EST D No. 297, *518820 B.C. Ltd (c.o.b. Pelican Rouge Coffee Co.*, [1998] BC EST D No. 272, *Turchenek (Re)*, [1998] BC EST D No. 179, *McKeen (Re)*, [1996] BC EST D No. 59, *Gondor (Re)*, [1998] BC EST #D323

Decision re Overtime

The preponderance of the evidence establishes that the Manager of the Surrey office, Don Lenaghan, directed Ms. Lynn to deviate from the Employer's overtime policy by recording her overtime hours separately and taking time off in lieu of payment. Regardless of whether or not he was authorized to do so, he had ostensible authority to give the direction. Accordingly, I find that the Employer was aware that Ms. Lynn was expected to keep a separate record of her overtime. Moreover, I accept Ms. Lynn's evidence that she brought the manner in which overtime was being dealt with in the Surrey office to Mr. Major's attention.

The Employer's challenge to Ms. Lynn's records rested largely on a challenge to her credibility respecting issues such as whether or not she ought to have gone over her superior's head and complained of what it refers to as a side deal. It did not otherwise seriously challenge whether or not the time was actually worked. There was no evidence, for example, of the overtime needs of the Surrey office or whether the amount of overtime claimed was unusual or unreasonable given the demands of the Surrey office.

The Employer asserted that it ought not to be liable for such large accruing overtime liability where an employee does not bring the claim to its attention. While one might have much sympathy for an unsuspecting Employer about an employee's claim for long unreported overtime, in this case, the employee's manager directed her to deviate from the Employer's systems for recording overtime, but did not direct how it ought to be recorded. This is not surprising given the evidence of Ms. Lynn and her co-worker, Ms. Hickey, that he did not intend to pay for it. Since the direction came from her direct superior, the Manager of the office, there was no obligation on Ms. Lynn to go over his head and challenge his instruction.

This case is distinguishable from *Health Ventures Ltd., Supra, McKeen (Re), Supra,* and *Gondor, Supra,* because Ms. Lynn was directed by her immediate supervisor to deviate from the Employer's longstanding overtime policy and keep separate records and because no superior told her to do otherwise during Mr. Lenaghan's tenure as her superior.

I find that Ms. Lynn's records of overtime work are reliable.

ORDER

In summary, I confirm the Determination with the exception that the Complainant's entitlement to minimum daily pay for after hours pager work should be based on 2 hours pay under Section 34(2)(b) instead of 4 hours pay under Section 34(2)(a), as her work was suspended for reasons completely beyond the Employer's control.

I refer the matter back to the Director on the sole issue of these recalculations.

Alison H. Narod
Adjudicator
Employment Standards Tribunal