BC EST #D491/98

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 -

ECM Electrical Civil Mechanical Consulting Ltd.
("ECM")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 98/452

DATE OF HEARING: October 8, 1998

DATE OF DECISION: November 2, 1998

DECISION

APPEARANCES

Kamil Aksoylu	For ECM
Henning Sorensen	The Complainant

OVERVIEW

ECM Electrical Civil Mechanical Consulting Ltd. ("ECM"), appeals, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a Determination by a delegate of the Director of Employment Standards dated June 22, 1998. The Determination is that ECM has contravened section 40 of the *Act* and that it owes $95.26 in overtime wages and interest to Henning Sorensen, its former employee.

ISSUES TO BE DECIDED

The number of hours worked is at issue. ECM claims that the Determination overstates Sorensen's work.

The matter of whether or not overtime wages are owed is at issue. ECM argues that Sorensen has been fairly paid for its work.

ECM complains of bias on the part of the Director's delegate. In that regard, it charges that the Director's delegate listened only to one side and was dictatorial.

FACTS

ECM operates as an electrical contractor. Henning Sorensen was hired by ECM and he began work as an electrician on the 27th of February, 1998. His last day of work was March 13, 1998.

ECM provided the delegate with a record of work. That record indicates that Sorensen worked Monday, March the 2nd and the next 5 days before getting Sunday off. The record shows that Sorensen worked 8 hours on each of those days with the exception of Saturday, March 7th. He worked 10 hours on that day. The record also shows that Sorensen worked 9 hours on the 12th of March.

On appeal, Kamil Aksoylu, owner of ECM, claims that its record of work is wrong in that it overstates Sorensen's work. He says that two employees told him that Sorensen worked

4 hours less than is shown for the 6th and the 12th, 2 hours each day. One of the employees writes in that regard. Nothing is heard from the other employee. There is no other evidence of the extent of Sorensen's work on those days.

Sorensen worked more than 8 hours on some days and more than 40 hours in one week. He was not paid overtime because ECM calculates pay on a biweekly basis and pays overtime only where it is over 80 hours in a pay period.

ECM claims that there was an agreement that Sorensen would work Saturday the 7th in exchange for two days off, the 16th and 17th of March. Sorensen says there was no such agreement.

Aksoylu alleges bias. His charge of bias stems from comments by the Director's delegate and the Determination. He found the delegate unbending and unyielding on issues. That is the extent of his complaint.

Aksoylu tells me that he is quite unwilling to pay Sorensen anything further. Indeed, he tells me that, no matter what I might find, and no matter what the Director might do, neither he, nor ECM, will ever pay Sorensen.

ANALYSIS

There is in this case, above all else, a clear failure to understand the *Employment Standards Act* and what it requires. Three sections of the *Act* are of importance in this case, 1, 4 and 40. Section 40 governs the paying of overtime where the employee is not on a flexible work schedule, the case here, and it is as follows:

> **40** *(1) An employer **must** pay an employee who works **over 8 hours a day** and is not on a flexible work schedule adopted under section 37 or 38*
>
> *(a) 1 1/2 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 1/2 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.*
>
> *(3) For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.*

> *(4) If a week contains a statutory holiday that is given to an employee in accordance with Part 5,*
>
> *(a) the references to hours in subsection (2) (a) and (b) are reduced by 8 hours for each statutory holiday in the week, and*
>
> *(b) the hours the employee works on the statutory holiday are not counted when calculating the employee's overtime for that week.*
>
> (my emphasis)

Sorensen worked more than 8 hours on some days. He is clearly entitled to overtime pay under the *Act.*

Section 1 of the *Act* defines a week as a period of seven consecutive days for the general purposes of the *Act.* But for the purpose of calculating overtime, a week is 7 consecutive days beginning Sunday.

> ***"week"*** *means a period of 7 consecutive days beginning,*
> *(a) for the purpose of calculating overtime, on Sunday, and*
> *(b) for any other purpose, on any day;*

Sorensen did not work Sunday, March the 1st, but he did work the next 6 days. In total, a result of working Saturday, the 7th, he worked more than 40 hours in that week. As such, he is entitled to overtime pay as set out in the *Act*, namely, 1½ times the regular wage for the first 8 hours of work beyond 40 hours [section 40 (2)(a)].

The delegate, in issuing the Determination, relied on the record of work which was submitted by the employer. ECM can hardly fault the delegate for relying on its own record of work. But, now, it alleges that its record of work overstates work by 4 hours. I find that that is a trivial issue for which ECM supplies no proof. The appeal is based on hearsay and a single letter from an employee. And that letter must be given little weight. The employee is open to pressure from the employer and it is not shown that the employee was in any position to know the true extent of Sorensen's work.

Sorensen denies that he agreed to work Saturday, the 7th, for pay at straight-time wage rates. Even if he did, such an agreement would have no force or effect. An employer and an employee cannot contract out of the minimum entitlements of the *Act.*

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

I have heard from Aksoylu of ECM and I have found nothing which indicates that the Determination is wrong in some respect. And I find no evidence of bias. This is a straight-forward case. The delegate has simply applied the *Act* as he is required by law to do.

The amount of the Determination is $95 and change. Clearly, this appeal is not about money. Nor, do I find, that this case is about principle. ECM appeals the Determination but presents neither evidence nor argument which challenges the Determination in any important respect. The employer raises trivial matters, demonstrates an unwillingness to accept the decision to pay overtime which I find unreasonable, and appears simply to want to drag matters out as a way of irritating and inconveniencing the employee. I am, for that reason, dismissing this appeal not only on the basis that it is without merit but because it is trivial, vexatious and not brought in good faith, and as such, one which may be dismissed pursuant to section 114 of the *Act.*

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated April 29, 1998 be confirmed and that ECM pay Henning Sorensen the $95.26 that it owes him in wages, vacation pay and interest, together with whatever further interest is owed pursuant to Section 88 of the *Act.*

_____

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunals