

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 -

Kenneth Brownridge
("Brownridge")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 97/696

DATE OF HEARING: October 24, 1997

DATE OF DECISION: November 7, 1997

DECISION

APPEARANCES

Brian Brownridge on his own behalf

Kerry Gibbons on behalf of CIG Consumers Investments Group Ltd.

OVERVIEW

This is an appeal by Kenneth Brownridge (“Brownridge”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated September 12, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Brownridge alleges that the delegate of the Director erred in the Determination by concluding that pursuant to Section 76 (2) (d) of the *Act*, there is not enough evidence to prove the complaint therefore the complaint was dismissed.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Is there enough evidence to prove Brownridge’s complaint ?
2. If the answer to No. 1 is Yes, is Brownridge entitled to any overtime wages ?

FACTS

Brownridge was employed by CIG Consumers Investments Group Ltd. (“CIG”) from November 1, 1995 to December 5, 1996.

Brownridge was listed on business cards as “Business Manager” although, since the fall of 1995 he was the only employee and his duties consisted of performing accounting services and insurance sales.

Brownridge was a licensed insurance agent.

At the time of being hired, Brownridge and CIG agreed that Brownridge would “bring” his existing clients to CIG, bill those clients through CIG and that CIG would receive payment from those clients for Brownridge’s services.

Brownridge, with the consent of CIG, continued to provide accounting services to a number of his pre-existing personal clients while working for CIG.

Brownridge provided services to his personal clients both during regular office hours of CIG and after those hours.

Brownridge billed some of his clients through CIG and on at least some occasions the client paid Brownridge personally for those invoices.

On other occasions, Brownridge billed his clients personally and was paid personally by those clients.

CIG did not keep any records of the hours worked by Brownridge on a daily basis.

Brownridge claims that he worked excess hours during the tax season in March and April 1996.

Brownridge kept a record of only the overtime hours he claims to have worked in March and April 1996.

Brownridge states that the business records of CIG would indicate how many hours were worked on each tax file during March and April 1996.

ANALYSIS

The burden of proving that the delegate of the Director erred in the Determination rests with Brownridge.

Brownridge worked at least part of the time as an insurance agent for CIG. An insurance agent is excluded from the provisions of the *Act* pursuant to Section 31 (g) of the *Employment Standards Regulation* (the "*Regulation*") which states:

31. The Act does not apply to an employee who is

.....

(g) a person licensed as an insurance agent or adjuster under the Insurance Act,

Brownridge acknowledged that he performed work for his own personal clients both during and after the normal business hours of CIG.

Neither CIG or Brownridge kept records to distinguish which hours were worked for the benefit of CIG and which hours were worked for the benefit of Brownridge. Furthermore, there is no record of the hours in which Brownridge was engaged in selling insurance, an occupation which is excluded from the provisions of the *Act*.

Brownridge concedes that the hours noted on the tax files are only the total hours worked on each file and would not indicate what day the work was performed nor would they

indicate when during the day the work was actually performed, ie. during the normal business day or after hours.

I am satisfied that Brownridge did, in all probability, work overtime hours during the months of March and April 1996. I am further satisfied that due to the lack of detailed records being kept by either CIG or Brownridge it is not possible to determine if the hours worked by Brownridge in March and April were for the benefit of CIG, for the purpose of selling insurance (excluded under the *Act*), for the benefit of Brownridge personally or some mixture of all three possibilities.

In the absence of specific evidence, it would not be appropriate for me to speculate as to how many of the hours worked by Brownridge would be actual overtime hours for the purposes of entitlement to overtime pay under the provisions of Section 40 of the *Act*.

I conclude therefore, that based on the evidence provided, there is not enough evidence to prove the complaint.

The appeal by Brownridge is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination dated September 12, 1997 be confirmed in all respects.

Hans Suhr
Adjudicator
Employment Standards Tribunal