

**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 -

Avondale and Associates Protective Services Ltd.  
("Avondale")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NO.:** 97/544

**DATE OF HEARING:** October 27, 1997

**DATE OF DECISION:** November 19, 1997

DECISION

**OVERVIEW**

The appeal is by Avondale and Associates Protective Services Ltd. (“Avondale”) under section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination of the Director of Employment Standards (the “Director”) dated June 27, 1997. The Determination is that Avondale must pay Nicholas Guppy wages including overtime pay, vacation pay and interest.

**APPEARANCES**

Keith Olstrom

For Avondale

Nicholas Guppy

On His Own Behalf

**ISSUES TO BE DECIDED**

At issue is the finding of the Director’s delegate that Avondale owes Nicholas Guppy overtime pay. This is Avondale’s main objection to the Determination. Avondale says that the delegate failed to consider that Guppy was working a flexible work schedule allowed by the *Act* and that any failure to adhere to the approved schedule was purely the choice of the employee.

At issue is the matter of whether or not Guppy is owed wages for his work with Primetime Security Ltd. (“Primetime”). Avondale says that he was fully paid for that work.

Avondale further objects to the Determination in that the complaint by Guppy is said to be frivolous, possibly fraudulent and filed only after Guppy learned of other complaints to the Employment Standards Branch.

**FACTS**

Nicholas Guppy began work as a security guard for Avondale on May 15, 1996. His job was to monitor alarm systems using newly developed software. His last day of work was August 10, 1996.

The Employment Standards Branch received Guppy’s complaint on January 14, 1997. He admits that he really had no idea of his rights under the *Act* and that it was only when he realized that other Avondale employees were filing complaints that he decided to file one as well.

Guppy worked 12 hour days on a four days on, four days off basis. According to Avondale, its employees wanted to work such hours and all agreed to do so. Guppy denies that he was presented with any choice in the matter. There is no hard evidence indicating that the employees actually chose to work a flexible work schedule. That leads me to conclude that they did not.

Avondale did not file a copy of its flexible work schedule with the Director.

Guppy performed work for Primetime under an arrangement between Primetime and Avondale. Primetime provides crowd control at public events. Avondale supplied security officers to Primetime so that its officers could earn some additional money. They could refuse the work if they wanted to. Guppy performed crowd control for Primetime on the 10<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> of July. Invoices bear that out. Guppy agrees that he was to be paid at a rate of \$10.00 an hour, not the \$13.00 an hour used in the calculations of the Director's delegate.

Avondale says that it paid Guppy for all of his work with Primetime, in cash for the most part. Guppy denies it. In the absence of any hard evidence indicating that payments of some sort were paid for the work, I find that none were made.

Guppy admits that he switched shifts with a worker. That allowed him to spend time with his mother during a visit to Vancouver. The result was that he worked on the 22<sup>nd</sup>, 23<sup>rd</sup>, 24<sup>th</sup> and 25<sup>th</sup> of August instead of taking those days off. Avondale had no prior knowledge of the switch. The matter of who would work what days and who would not was a matter which was left up to employees, those agreeing to switch shifts and the employee in charge of shift scheduling.

Avondale presents no evidence of fraud.

## **ANALYSIS**

There is nothing pointing to a frivolous complaint. The employer makes no attempt to prove fraud. That leaves the matter of Avondale's concern with the fact that Guppy filed his complaint only after learning that other Avondale employees had filed complaints. Is the complaint somehow out of order for that reason?

The complaint is in order. The fact that an employee learns of the *Act*, and the protection which it offers employees, some time after being terminated and/or through other complaints, is of no importance. The employer is simply mistaken in that regard. It matters not how an employee learns of his or her rights under the *Act*, or when the complaint is filed except that it be in time [Section 74 of the *Act*]. Guppy had six months in which to file his complaint and his complaint was in time.

The *Act* sets the 8 hour day and the 40 hour week as the standard for employees unless they choose to work a flexible work schedule [sections 35 and 37 of the *Act*]. It is section 37 of the *Act* which sets out how employers can move to a flexible work schedule.

- 37. (1) An employer may adopt a flexible work schedule for employees not covered by a collective agreement if*
- (a) the schedule is prescribed in the regulations and is for a period of at least 26 weeks,*
  - (b) the employer follows the procedure in the regulations,*
  - (c) at least 65 % of all employees who will be affected by the schedule approve of it, and*
  - (d) within 7 days after the date of approval by the employees, the employer has provided the Director with a copy of the schedule.*

The *Employment Standards Regulation* allows a 4 days on, 4 days off work schedule consisting of 12 hour days [Appendix 1] provided that all other requirements of section 37 of the *Act* are met. Avondale has not met those other requirements and as such it was at no time legally in a position to adopt a flexible work schedule. Avondale did not file its schedule with the Director. To Avondale, the need to do the latter may seem overly bureaucratic but it is a requirement of the *Act*, nonetheless. Most importantly, there is nothing to show that Avondale ever gained the required approval of employees affected by its flexible work schedule.

As Avondale was not legally in a position to adopt a flexible work schedule, it is required to pay overtime wages beyond 8 hours a day and 40 hours in a week. Avondale makes much of the notion that Guppy somehow agreed to accept less than that. But like many employers, it fails to realize that employees may not agree to accept less than the standards of the *Act*. They are **minimum** standards. Any agreement to accept less is null and void.

- 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, ... .*

Moreover, it is a requirement of the *Act* that where employees are working the standard work week, the employer must pay overtime wages where the employer merely **allows** an employee to work beyond the daily and weekly standards of the *Act*. Section 35 is as follows:

- 35. An employer must pay overtime wages in accordance with section 40 or 41 if the employer requires, or directly or indirectly, allows an employee to work*
- a) over 8 hours a day or 40 hours a week, ... .*

Avondale failed to monitor shift switching and limit it so as to prevent work beyond the standard work week. As such it indirectly allowed Guppy to work overtime. As it did so, it must now pay Guppy overtime pay as calculated by the Director's delegate.

As the facts are presented to me, there is nothing to show that Avondale paid Guppy for the hours that he worked with Primetime. Invoices show that Avondale billed Primetime for his work. But Guppy says that his pay rate was only \$10.00 an hour, not the \$13.00 used by the delegate in his calculations. That leads me to amend the Determination. I find that Guppy should be paid for his 42 hours of work with Primetime at \$10.00 an hour, which is \$420, and that he is owed 4 percent vacation pay on that for a grand total of \$436.

The total amount of the Determination is therefore reduced to \$2,088.36 including interest.

**ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated June 27, 1997 be varied. Avondale owes Nicholas Guppy \$2,088.36 in wages including overtime, vacation pay and interest.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**

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