

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-

Todd M. Simmons

(“Simmons”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/564

DATE OF HEARING: October 7th, 1997

DATE OF DECISION: December 4, 1997

DECISION

APPEARANCES

Brian Markus for Todd M. Simmons
Susan Arnold for Coast Fiber-Tek Products Ltd.
Julie Brassington for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Todd M. Simmons (“Simmons”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on July 10th, 1997 under file number 81908 (the “Determination”).

The Director determined that Coast Fiber-Tek Products Ltd. (“Fiber-Tek” or the “employer”) did not owe any monies to Simmons on account of unpaid wages.

The appeal was heard at the Tribunal’s offices in Vancouver on October 7th, 1997 at which time I heard submissions from Mr. Markus, on behalf of the appellant Simmons, and *viva voce* evidence from Mr. Lee Hicks, the president of Fiber-Tek, and submissions from Fiber-Tek’s counsel, Ms. Arnold.

ISSUE TO BE DECIDED

Simmons’ appeal addresses the appropriateness of the formula utilized by the Director to calculate Simmons’ regular wage and his overtime entitlement, if any.

FACTS

Fiber-Tek is a retailer of fiberglass and plastic products. The employer offers products and advice for the “do-it-yourselfer”.

Simmons did not testify on his own behalf at the hearing, nor was any other evidence presented by the appellant. The key facts do not appear to be in dispute. On the basis of the uncontradicted evidence of Lee Hicks, I find as follows:

- Simmons was first hired in March 1992 at a monthly salary of \$2,000; he usually worked Monday to Friday and a five-hour shift every third Saturday.

- In 1993, the parties renegotiated their arrangement; Simmons continued to work Monday to Friday but now worked a seven-hour shift every second Saturday (this was the basic schedule although it did vary slightly over time). Thus, Simmons worked an alternating schedule of 40 hours one week and 47 the next for a weekly average of 43.5 hours or 2,262 hours per annum. Simmons monthly salary was increased by \$100 to \$2,100.
- Subsequently, in 1994 and again in 1995, Simmons monthly salary was increased. When Simmons resigned his employment, in early January 1997, his monthly salary was \$2,600.

ANALYSIS

Mr. Markus submits that the Director incorrectly calculated Simmons' regular wage and, in consequence, Simmons is entitled to nearly \$8,700 in unpaid overtime pay. Ms. Arnold, on the other hand, submits that the Director's calculations are entirely correct.

Pursuant to section 40 of the *Act*, daily and weekly overtime must be calculated on the basis of an employee's "regular wage". "Regular wage" is defined in section 1(1) of the *Act*, *inter alia*, as follows:

"regular wage" means...

(d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work...

Using the above formula, which I believe to be the correct one to be applied in the circumstances of this case, Simmons "regular wage" is $\$2,600 \times 12 = \$31,200 \div [52 \times 43.5 = 2,262] = \underline{\$13.79}$.

Although this latter figure is marginally greater than the \$13.70 figure used by the Director in her calculations, when the \$13.79 figure is substituted in Director's calculations the net result is the same--Simmons does not have any unpaid overtime claim.

ORDER

The appeal is dismissed. Pursuant to section 115 of the *Act*, I order that the Determination in this matter be confirmed as issued.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal