

An appeal

- by -

Pimm Production Services Inc.
("Pimm")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2001/530

DATE OF DECISION: October 22, 2001



DECISION

OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* (“the *Act*”) and by Pimm Production Services Inc. (which I will refer to as “Pimm”, “the employer” and also “the Appellant”). Pimm appeals a Determination issued on June 26, 2001 by a delegate of the Director of Employment Standards (“the Director”). In that Determination, the employer is ordered to pay Walter Holloway \$7,090 in overtime pay and interest.

On appeal, the employer argues that the Determination is wrong in that it fails to recognise that there were two different rates of pay, one for electrical work and one for travel. The Appellant claims that in paying the latter, it in effect paid for travel at overtime rates. The Appellant also claims that an error has been made in respect to the number of hours worked by the employee on November 11, 1999. In regard to the first matter, I find that the employer failed to pay overtime as the *Act* requires. In regard to the second matter, I find that it is not 17 hours that were worked on November 11, 1999 but only 9. The Determination is therefore varied.

This case has been decided on the basis of written submissions.

ISSUES TO BE DECIDED

The issue is whether the employer has or has not met the requirements of the *Act* in regard to the payment of overtime. The employer claims that it has paid overtime pay for all overtime work and, in the alternative, that it need not pay overtime as set out in the Determination because the employee agreed to being paid for overtime travel at what is in effect his straight-time pay rate.

At issue is the number of hours worked on November 11, 1999.

What I must ultimately decide is whether the Appellant has or has not shown that the Determination ought to be varied or cancelled, or a matter referred back to the Director, for reason of an error or errors in fact or law.

FACTS

Walter Holloway worked for Pimm as an electrician’s apprentice from October 12, 1999 to March 27, 2001.

Holloway’s work day began and ended at the employer’s shop in Fort St. John but his work involved a fair amount of travel.



The employer paid Holloway for time spent travelling to and from the shop. The employee was paid for all travel time at the same rate, an amount equal to the wage which Holloway received for his work as an electrician's apprentice. That is said to be mere coincidence, however. The employer claims that there were two rates of pay, one for work as an electrician's apprentice and one for travel. It is said that the rate for travel is $\frac{2}{3}$ of the employee's normal pay rate times one and one-half. While that is obviously just another way of stating the employee's regular wage [$R = \frac{2}{3}R \times 1.5$], the employer is in this case claiming that overtime was in effect paid for all travel because it had a basic rate for travel and that was multiplied by 1.5.

Double time was never paid for travel even though the employee worked more than 11 hours on some days.

I find that the employer led its employees to believe that they would receive only their regular wage for all travel. In a memo dated March 10, 1994 the employer advised employees that the former *Act* allowed "employers to pay travel time at straight time rate of pay". A memo dated January 13, 1999 advised employees that they would "be paid at straight time rate for travel time". And that is what the employer did. The employer's wage statements do not show two rates but only one wage rate, the employee's regular wage. Beyond that they show only the time spent travelling and the amount paid for that travel time. That latter amount is the number of hours spent travelling times the employee's regular (straight-time) wage rate.

The employer's records show that the employee, on November 11, 1999, a statutory holiday, worked 9 hours. The employer has pointed out that the delegate's detailed calculations have Holloway working 17 hours that day. The delegate does not explain her use of the latter figure.

ANALYSIS

The employer's own memos indicate a plan to pay straight time wages for overtime hours spent travelling. That is, quite simply, contrary to the *Act*.

The employer is required to pay overtime wages as set out in section 40 of the *Act*. That section of the *Act* 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.
- (my emphasis)



Clearly, overtime rates are to be based on the regular wage.

The term “regular wage” is defined in the *Act*. That definition is as follows:

“regular wage” means

(a) if an employee is paid by the hour, the hourly wage,

Did the employer pay Holloway 1 ½ times the regular wage for travel which was after 8 hours in a day or 40 hours in a week? Did it pay double his regular wage for work after 11 hours in a day and 48 hours in a week? It is clear to me that it did not.

It is said, in this case, that there is not one wage rate but two, one for work as an electrician’s apprentice and one for travel. But the employer paid the same hourly amount for travel as it did for Holloway’s work as an electrician’s apprentice. There is, as such, not two but, rather, one regular wage rate.

As I see it, the *Act*’s reference to regular wage is a reference to that which is “customary, usual, or normal” [Definition of “regular”, *Canadian Dictionary of the English Language*, ITP Nelson, 1997 edition]. The employer’s argument is that there is, in effect, a regular wage rate for travel, that being 2/3 of the employee’s regular wage (what I am going to call “the basic rate”), and a premium rate which is 1½ times the basic rate and that, because the latter was paid, overtime was in effect paid. But that is not to pay 1½ times the regular wage. It was not the customary, usual or normal practice of the employer to pay for travel at the basic rate. That rate is one which exists only in the employer’s imagination. The consistent and therefore customary, usual and normal practice of the employer was to pay 1½ times the basic rate for all travel. It is only the premium rate which could be viewed as being the regular rate.

It is the suggestion of the employer that Holloway agreed to travel pay which is 2/3 of his regular wage rate times 1½. Is it that the employer need not pay overtime for reason of that?

I am unable to find clear evidence of any such agreement. Holloway denies the existence of any such agreement. But, most importantly, had he entered into such an agreement, I would then consider it to be a nullity. The overtime provisions of the *Act* are minimum provisions and an employee cannot accept less than what the *Act* provides.

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.

Turning to the matter of work performed on November 11, 1999, I find that the Appellant is correct: Holloway did not work 17 hours on that day but only 9 hours. It therefore follows that the Determination must be reduced.



Where an employee like Holloway works a statutory holiday, he or she is to be paid 1 ½ times the regular wage for the first 11 hours of work.

- 46** (1) An employee who works on a statutory holiday must be paid for that day
- (a) 1 1/2 times the employee's regular wage for the time worked up to 11 hours,
 - ...

Holloway worked 9 hours on the 11th and as such it is not \$534.09 plus 8 hours statutory holiday pay that he is owed but \$252.99 [(9 x 18.74)1.5] plus 8 hours of statutory holiday pay. I am satisfied that Holloway's earnings have been overstated by \$281.10.

The Determination awards Holloway \$6,973.71 in wages plus interest. I have found that Holloway is owed only \$6,692.61 [\$6,973.71 minus 281.10] plus interest. The amount of interest must be recalculated. I am ordering that interest be calculated on \$6,692.61 and that Holloway receive interest to the date of this decision.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated June 26, 2001 be varied. The amount which Pimm Production Services Inc. owes Walter Holloway is \$6,692.61 plus interest as provided by section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal