

An appeal

- by -

Janice Brunner  
("Brunner")

- 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:** Carol L. Roberts

**FILE No.:** 2001/547

**DATE OF DECISION:** October 22, 2001



## DECISION

This is a decision based on written submissions by Janice Brunner on her own behalf, R.M. Acheson, Vice-President, Poulin's Exterminators, and Jim McPherson for the Director of Employment Standards.

### OVERVIEW

This is an appeal by Janice Brunner ("Brunner"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination issued by the Director of Employment Standards ("the Director") July 10, 2001. The Director's delegate found that Poulin's Exterminators ("Poulin's") had contravened Sections 17(1), 18(2), 40(1) and 40(2) of the Act. Poulin's voluntarily paid the amount the Director's delegate determined owing, which was \$3,353.60 less statutory deductions. No Order was made.

### ISSUES TO BE DECIDED

The issue is whether the Director's delegate correctly calculated the amount owing to Brunner.

### FACTS

Brunner worked as an office administrator for Poulin's from February 1, 1999 to September 30, 2001. Her rate of pay varied. She received \$1900 per month from February 1, 1999 to April 30, 1999, \$2100.00 per month from May 1, 2000 until January 31, 2001, \$2200.00 for the month of May, 2001, and \$2300.00 thereafter until the end of her employment.

The delegate found that, since Brunner did not have a normal work schedule, her hourly rate of pay varied according to the number of hours she worked. Although Poulin's originally contended that Brunner was a manager, and therefore not entitled to overtime wages, it later conceded that she was not a manager, and voluntarily paid the amount determined owing by the delegate.

To determine the amount owing to Brunner, the delegate "added up the wages she earned during the specific periods of time when she earned the same salary", and divided that by the number of hours she worked in that period to arrive at an hourly wage. He then used those hourly wages to calculate the additional wages Brunner was entitled to receive.

### ARGUMENT

Brunner argues that the delegate's calculations were not based on the normal or average hours of work, but on the amount of wages paid divided by the hours of work. She contends that her normal work week was 35 hours, based on a WCB report filed by Poulin's on her behalf. She



argues that, since her normal weekly hours of work were 35 hours, anything over that amount should be calculated as overtime.

The delegate contended that the calculations were accurate. He states that his calculations were based on the definition of "regular wage" contained in the Act.

## **ANALYSIS**

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has been met.

Section 1 of the Act defines regular wages, for employees who are not paid on a monthly basis, as Brunner was, as "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".

At issue is whether the delegate should use a 35 hour week, which Brunner states was her normal hours of work, or an average of what she actually worked.

On June 15, 2000, the Vice-President of Poulin's filed an Employer's Report of Injury or Occupational Disease with the Workers' Compensation Board in respect of an injury to Brunner. In that report, he indicated that Brunner's normal work week was 35 hours, or 7 hours per day.

Although there is no evidence of an employment contract indicating what Brunner's normal work hours were, I accept, based on the WCB report, that Brunner did have normal working hours, and that she normally worked a 35 hour week.

Consequently, I allow the appeal.

## **ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination, dated July 10, 2001, be referred back to the delegate for a recalculation of overtime wages based on a 35 hour work week.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**