

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 -

Greg Jones
("Jones")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 98/632

DATE OF DECISION: December 16, 1998

DECISION

OVERVIEW

This is an appeal by Greg Jones (“Jones”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 10, 1998.

The Director’s delegate determined that Jones was not owed any wages by Kitt Contracting Ltd. (“Kitt”). In his appeal, Jones argues that the formula utilized by the Director’s delegate to calculate his “regular wage” is in error.

This appeal was decided based on the written submissions of the parties.

ISSUES TO BE DECIDED

The issue to be decided in this appeal is whether the Director’s delegate correctly calculated Jones’ “regular wage”, and if not, whether Jones is owed any wages by Kitt.

FACTS

In the Determination issued on September 10, 1998 the Director’s delegate made the following findings of fact:

- Jones was employed by Kitt from September 13, 1997 to November 27, 1997.
- Jones and Kitt were involved in a one-year training plan sponsored by the Workers’ Compensation Board (the “WCB”). The terms and conditions of this employment relationship was set out in a Letter of Understanding signed by Jones. Jones agreed to accept a position as a Project Manager at a rate of pay of \$3,050 per month. Subsequently, a retroactive raise of \$950.00 per month was granted which increased Jones’ pay rate to \$4000.00 per month
- Kitt provided daily hourly records and Jones agreed that approximately one hour per day should be deducted for lunch times. After the deduction for lunch times the records indicate that Jones, for the most part, worked in excess of 8 hours in a day and 40 hours in a week.
- Kitt submitted evidence that Jones was paid \$12,985.00 and this was the figure used in the calculation of wages.

- There was no clear evidence to indicate, as claimed by Jones, that his salary was based on 40 hours of work per week.

Based on the above findings of fact, the Director's delegate used Jones' average weekly hours, which were in excess of 40 hours in a week, to determine his "regular wage" and from this rate the Director's delegate determined the overtime rate of pay. In the end, the Director's delegate found that no additional wages were owed to Jones.

In his appeal, Jones effectively argues that the formula utilized by the Director's delegate to calculate his "regular wage" is in error and that the Director's delegate should have based his "regular wage" on a 40 hour work week. This would cause his hourly rate of pay, and with it, his overtime rates of pay, to be significantly higher than that determined by the Director's delegate. It would also mean that Kitt owes additional wages to Jones.

ANALYSIS

An employer is obliged to pay overtime after 8 hours worked in a day or 40 hours worked in a week. The overtime pay rate must be based on the employee's "regular wage". The relevant statutory provisions are set out below:

Definitions

1(1) "**regular wage**" means

- (a) if an employee is paid by the hour, the hourly wage,
- (b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period,
- (c) if an employee is paid a weekly wage, the weekly wage divided by the lesser of the employee's normal or average weekly hours of work,
- (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, and*
- (e) if an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work;

(italics added)

Overtime wages for employees not on a flexible work schedule

- 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.

When, as here, the employee is paid a monthly salary, the employee's "regular wage" must be derived by multiplying the monthly salary by 12 and then dividing that amount by 52 times the lesser of the employee's normal or average weekly hours of work.

The Director's delegate found that there was no clear evidence that Jones' normal work week was 40 hours or that his salary was based on a 40 hour work week and therefore he used the average weekly hours worked by Jones in his calculations. His calculations are as follows:

September	$(\$4000.00 \times 12) / (62 \text{ hours} \times 52)$	= \$13.3770 per hour
October	$(\$4000.00 \times 12) / (53.8 \text{ hours} \times 52)$	= \$17.1576 per hour
November	$(\$4000.00 \times 12) / (60 \text{ hours} \times 52)$	= \$15.3847 per hour

Using the above rates, the Director's delegate determined the overtime rates of pay and found that no wages were owed to Jones as he had been paid in excess of his earnings.

If Jones' position were to be accepted, his hourly rate for the entire period of his employment would be as follows: $(\$4000.00 \times 12) / (40 \text{ hours} \times 52) = \23.08 per hour. Using this rate, and the concomitant overtime rates, would mean that the wages paid by Kitt were less than the wages earned by Jones.

In my view, given the circumstances of this case, the approach taken by the Director's delegate is correct.

There is absolutely no evidence that Jones' monthly salary was based on a 40 hour work week. There is nothing about hours of work in the Letter of Understanding signed by Jones, and there is no dispute he regularly worked in excess of 40 hours per week.

In his appeal, Jones appears to suggest that the WCB will support his position that his salary was based on 40 hours per week. No documents, however, were supplied by the WCB to support Jones' position. Jones did submit a copy of a letter from a Workers' Advisor from the Ministry of Labour to the Ombudsman's Office dated September 25, 1998

in which the Advisor states that Jones' expectation was to work a forty hour work week and that the compensation system often deems a worker's earning capacity based on a 40 hour work week. The Advisor goes on to say that Jones asked the WCB to provide information to the Director's delegate on his hours of work but the WCB did not do so, with the result that the Director's delegate had no alternative but to base Jones' wage rate on the total hours worked. The Advisor requests that the Ombudsman's Office review the matter.

The above letter from the Worker's Advisor does not establish an agreement between the WCB or Kitt and Jones regarding a 40 hour work week.

Given the absence of any evidence which supports Jones' claim, I must conclude that the Director's delegate did not err in his calculations.

ORDER

I order pursuant to Section 115 of the *Act* that the Determination be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal

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