

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-

Indo-Canadian Times Inc.  
(the “Appellant”)

-of a Determination issued by-

The Director of Employment Standards  
(the “Director”)

<b>ADJUDICATOR:</b>	E. Casey McCabe
<b>FILE No.:</b>	97/246
<b>DATE OF HEARING:</b>	September 18, 1997 October 3 & 8, 1997
<b>DATE OF DECISION:</b>	January 5, 1998

BC EST # D598/97

DECISION

APPEARANCES

Mr. G. Haddock	Counsel for Indo-Canadian Times Inc.
Mr. Tara Singh Hayer	for Indo-Canadian Times Inc.
Manjit Johal	for himself
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the “Act”) from a determination dated March 20, 1997. That determination found that the Indo-Canadian Times Inc. (the “Employer”) had breached Sections 40 and 63 of the Act. The employer was ordered to pay the amount of \$6,728.72 to Mr. Johal for unpaid overtime and 6 weeks compensation for length of service.

Mr. Johal cross appeals the determination. He appeals the discount of the amount of \$1,838.38 for work which the Director’s delegate determined was done on a personal basis for Mr. Hayer rather than as an employee of the Indo-Canadian Times. He also claims that the determination did not detail his claims for overtime for working through lunch breaks, for payment for time worked on statutory holidays and for minimum daily pay for occasions when he was called out to cover special events.

ISSUE(S) TO BE DECIDED

At the commencement of the hearing counsel for the employer acknowledged that Mr. Johal was entitled to compensation for length of service. The employer limited its appeal to the merits of the determination of the overtime pay.

Mr. Johal maintained his appeal of the discount of \$1,838.38 for work that was performed for Mr. Hayer in his capacity as an author of certain books rather than as an employee of the Indo-Canadian Times.

BC EST # D598/97

## FACTS

The employer publishes a Punjabi language newspaper known as the Indo-Canadian Times. Mr. Johal was employed as a proofreader/photographer/typesetter. His primary duties focused on proofreading although, due to the fact that the employer is a small business, the employees worked across classifications. Mr. Johal commenced employment on July 27, 1990. His employment terminated on August 7, 1996. The bulk of the overtime claim was founded upon work that Mr. Johal performed at his home. Particularly, Mr. Johal would peruse newspapers and magazine type publications that had been published in India and sent to the employer. Mr. Johal's job was to select photos and cartoons from these publications for publication in the Indo-Canadian Times. Another part of the claim for overtime was based upon photography assignments that were given to Mr. Johal which were performed in the evening or on weekends. For these assignments Mr. Johal would attend social functions to photograph dignitaries or guests of honour that were present. Another aspect of the claim for overtime rested on a claim that on certain days he had worked through his lunch period and was therefore claiming one-half hour overtime for that day. Finally Mr. Johal claimed he was entitled to overtime pay for statutory holidays on which he worked.

The nub of the overtime issue centered on whether Mr. Johal actually worked the amount of time that was entered on his time cards. Presented in evidence were time cards for nearly all of the days that Mr. Johal had worked from August 7, 1994 through to August 7, 1996. The employer challenged 87 days in which Mr. Johal had entered hours worked at home and an additional 75 days on which Mr. Johal had recorded overtime hours. The significance of the first figure is that the employer took the position that prior to the coming into force of the Act work performed at home did not qualify as work under the definition in the predecessor Employment Standards Act. The employer therefore challenged all of the overtime entries commencing with August 9, 1994 through to October 24, 1995. Alternatively, the employer argued that if those overtime hours were properly considered then the manner in which the overtime calculation was made was faulty. It is the employer's position that there was an agreement between it and Mr. Johal that all overtime hours worked, whether at home or the employer's premises, would be multiplied by two and recorded at straight time. That is, if Mr. Johal worked 8 hours at the employer's premises and 1 hour at his home in the evening he would enter on his time card 10 hours. The employer took the position that there was no overtime pay owing and in fact under the agreement the employer was paying double time rather than the time and a half required by the Act. Mr. Johal took the position that there was no such agreement and that all hours recorded on the time sheets were actual hours worked and, therefore, he was entitled to the overtime premium acknowledging that he had been paid the straight time rate for those hours.

It was necessary for the employer, in order to present its case, to challenge each of the impugned overtime entries. The challenge to the overtime entries was generally based on a contention that the amount of time that was recorded by Mr. Johal for the tasks performed was essentially twice the amount of time that it would normally take to perform those tasks.

Thus, argues the employer, the entries on the time sheets supported the employer's contention that there was an agreement that overtime worked would be marked at double the time actually worked but paid at straight time. Mr. Hayer testified that he had personally performed such tasks as proofreading and the selection of articles from the Indian publications and that he knew how long it should take a normal worker to complete those duties. The employer's evidence challenged the allocation of overtime for certain days where Mr. Johal worked through his lunch period. The employer also challenged the entries on the time cards where Mr. Johal had marked three to four hours, depending on the event he attended for doing the photographic shoots at the assigned functions. It was the employer's view that, depending on the function, the amount of time that it should have taken was one-half to one hour. It was the employer's view that Mr. Johal was not entitled to stay at the function and charge the employer for the time.

Mr. Johal's evidence, generally, was that the amount of time that he marked on his time cards for the various tasks was time actually worked. He lead evidence of the types of publications that he would peruse for photographs and cartoons and gave an indication of the amount of time that it would take to perform this task. He stated that he did not read the entire publication when performing this task but rather would limit his reading to the first and last paragraphs under a picture to help him assess whether the picture and/or the article were worthy of submission to Mr. Hayer for his consideration as to whether it should be published in the Indo-Canadian Times. Mr. Johal strongly asserted that the amount of time that he marked on his time card for performing this task was the actual time the task took. With respect to the photography assignment Mr. Johal testified that when marking his hours he would include travel time. He took the position that these assignments, whether performed in the evening or on weekends, amounted to a callout to which he was entitled to a minimum of 4 hours pay under the Act. He also lead evidence that he had worked through his lunch on certain days and for that reason had marked an extra one-half hour. Finally, with regard to the overtime recorded for proofreading Mr. Johal lead evidence that his speed at the employer's premises ranged from 50 to 60 column inches per hour depending on the copy he was proofreading. His time cards showed that his speed for the proofreading that was performed at home fell within the same range. He testified that this was his normal speed and had been so for the length of time that he was employed at the Indo-Canadian Times. He challenged Mr. Hayer's assertion that a proofreader should be able to read 80 to 100 column inches per hour.

It is significant that Mr. Johal was paid straight time for all hours recorded on his time cards. That is, the employer, during the years of his employment and particularly a period from August 1994 through to August 1996 did not challenge Mr. Johal's proofreading speed nor the amount of time it took him to peruse the Indian publications nor those days that he entered one-half hour overtime for working through his lunch break. Regardless, the real thrust of the employer's argument was based on the alleged agreement that the employer had with Mr. Johal and, as asserted by the employer, the other employees regarding how overtime would be marked on the time cards and paid. I repeat, the employer asserted that the employees would take into consideration the overtime premium when recording their time and would mark on their time cards twice the amount of time that it actually took to perform the task and would be paid straight time on the hours recorded.

I turn now to the cross appeal. Mr. Johal testifies that he worked a significant number of hours proofreading copy of text for certain books that Mr. Hayer authored. These books, although authored by Mr. Hayer, were not published by the Indo-Canadian Times. However, the dispute arises because Mr. Johal was paid for the hours worked on an Indo-Canadian Times cheque signed by Mr. Hayer. Mr. Johal took the position that because his paycheque for this work came from the Indo-Canadian Times that this work should be considered as work in the course of his employment with the Indo-Canadian Times. Mr. Johal challenged the discounting of the payment for these hours. For the most part this work was performed by Mr. Johal at his home and if considered as part of the employment for the Indo-Canadian Times would be considered overtime hours. In response, Mr. Hayer testified that Mr. Johal knew that the proofreading of the copy for the books was work that was being performed for Mr. Hayer personally and not for the publication of the Indo-Canadian Times Newspaper. Mr. Hayer lead evidence that although Mr. Johal was paid with Indo-Canadian Times cheques that he, Mr. Hayer, was reimbursing the Indo-Canadian Times for the costs incurred in publishing these books. In other words, although the expenses of publishing the books were paid for by the Indo-Canadian Times Mr. Hayer was personally reimbursing the Indo-Canadian Times for those expenses.

## ANALYSIS

Firstly I turn to the matter of the appeal by the employer of the award for unpaid overtime. As stated earlier Mr. Hayer alleges that there was an agreement with Mr. Johal that he would record his time as twice the amount actually worked for the work that was performed at home and would be paid at straight time rates. Mr. Johal counters that he marked his time as the hours actually worked and that since he was paid only straight time rates for those hours he is entitled to the overtime premium. Mr. Johal points to the time sheets to show that his proof reading speed ranged between 50-60 column inches per hour whether he was working at his office or his home. Mr. Hayer lead evidence that a proof reader doing the type of work that Mr. Johal was doing should have a speed of 80-100 column inches per hour depending on the precise nature of the work. Mr. Hayer relies on his own experience and points to the evidence of Mr. Aujla and the time sheets of Ms. Bual.

On this point I find in favor of Mr. Johal. Mr. Johal can point to time cards which clearly show the dates that he worked at his home and the publications which were perused. It is clear that over the period of this claim Mr. Johal's proof reading speed was consistent. That speed did not vary substantially between the work performed at his home and that performed at his office. Mr. Hayer argued that the proof reading performed in the office was consistent with the speed of the proof reading performed at home because the work performed at the office was constantly being interrupted or did not accurately reflect the hours actually spent only on proof reading. I do not accept that explanation. The evidence shows clearly that Mr. Johal's speed did not vary between the work performed at the office and the proof reading performed at his house. It may well be that other people are faster proof readers than Mr. Johal. However, I am not able to conclude on the evidence before

me that Mr. Johal's proof reading speed varied significantly depending on the venue of his work. For these reasons I conclude that Mr. Johal marked his time cards for the hours actually worked and is entitled to the overtime premium for those hours.

I turn now to the employer's alternative argument. The employer argues that under the predecessor Employment Standards Act S.B.C. Chap. 10 the definition of "work" excluded work performed by an employee at his or her residence. The employer contrasts the definition of work in the current Employment Standards Act S.B.C. Chap. 38. In the predecessor act "work" was defined as:

"work" means the labour or services an employee is required to perform for an employer and includes time the employee is required to be available for his employment duties at a place designated by the employer but does not include the time spent by an employee in his own living accommodation, whether on or off the employer's premises.

The employer argues that this definition of work excludes work performed by an employee at his or her residence. The employer submits that this argument is bolstered by the change in definition to the word "work" found in the current Employment Standards Act. Under the current Act "work" is defined as:

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

The employer argues that because the definition of work in the current Act specifically includes work at or in an employee's residence that such work was not intended to be captured in the predecessor Act. The employer argues that because the definition of work changed when the current Act came into force on November 1, 1995 that all overtime hours claimed by Mr. Johal for work performed at his house prior to November 1, 1995 are not subject to the overtime premium because those hours did not qualify as work under the predecessor Act.

I do not agree with this argument. I find that the work performed by Mr. Johal was a necessary and integral part of the duties he was required to perform for his employer. He performed these duties at his home because there was not sufficient time during his normal work day to perform them at the office. I find that the work that Mr. Johal was required to perform at his home was labour or services an employee is required to perform for an employer as contemplated in the definition. I further find that the work performed by Mr. Johal was not exempt from the definition of the Act by virtue of the predecessor Act referring to time spent by an employee in his own living accommodation. I find that the reference to the time spent by an employee in his own living accommodation qualifies the prior clause which contemplates that the definition of work includes time the employee is required to be available for employment duties at a place designated by the employer. In other words, if your employer requires you to be on stand by and you remain on stand by at your home that time does not qualify as work. That is in contrast to an employer assigning work which is taken home and performed in the residence. Such specific assignment is

captured by the first element of the definition. For these reasons I dismiss the alternative argument of the employer.

I turn now to the cross appeal by the complainant. Mr. Johal appeals the discounting of the hours that he worked proof reading certain books that Mr. Hayer authored. Mr. Johal argues that because he was paid on Indo Canadian Times paycheques for this work that the work should be considered overtime because the work was performed over and above the 40 hours that he worked in a normal week for the employer. The employer argues that this work was assigned to Mr. Johal by Mr. Hayer on a personal basis and that there was a clear understanding between the parties that the work was being performed for Mr. Hayer personally rather than for the Indo Canadian Times. The employer points to the fact that the hours spent proof reading his books were accumulated over a period of time by the complainant and submitted in bulk at intermittent intervals. This is in contrast to the hours submitted for the proof reading of the Indo Canadian Times which were submitted regularly and paid for on regular paydays.

I agree with the employer on this point. To accept Mr. Johal's argument would allow form to triumph over substance. It is a fact that Mr. Johal was paid for this time on a cheque issued by the Indo Canadian Times. However, Mr. Hayer reimbursed the Indo Canadian Times by personal cheque for Mr. Johal's time and other expenses associated with the publication of the books. I find that the publication of the books is separate and distinct from the business of the publication of the Indo Canadian Times. I agree with Mr. Hayer that the parties understood that the work on the books was in addition to the regular employment at the Indo Canadian Times rather than a continuing aspect of the business of that publication. For the above reasons I dismiss Mr. Johal's cross appeal on this point.

Mr. Johal further appeals that he is owed "callout" pay for those times when he attended at special functions to take pictures and provide editorial copy of his coverage of the event. I find that on those occasions when Mr. Johal was called out on weekends or a statutory holiday that he is entitled to the minimum daily pay provisions under the Act. He is entitled to those minimum daily pay provisions in instances where he did not otherwise work that day. However, on days where he worked all or part of a normal shift he is not entitled to "callout" or the minimum daily pay provisions of the Act with respect to the work done covering these special events. On those days he is entitled to the hours that he actually worked in addition to his regular hours. That may mean that some or all of the time spent covering the event would attract overtime rates. That may be the case as well for those times on weekends or statutory holidays where he covered an event. The overtime rates may apply to that work depending on the hours he worked that day or that week. I refer this portion of the calculation back to the Director's delegate for finalization.

Mr. Johal further appeals that the calculation of the overtime does not include compensation for the day without pay that he should have been granted for those statutory holidays that he worked. It is not clear from a reading of the Determination whether the Director's delegate included that compensation in his calculation. I refer this matter back to the delegate for clarification. Likewise, it is not clear from the face of the Determination

that a consideration has been made for the times when Mr. Johal worked through his lunch period. I refer this matter back to the Director's delegate for clarification.

ORDER

I order that the Determination be confirmed on the matters going to the calculation of the overtime premium for the work performed by Mr. Johal at his home. I further confirm the Determination regarding the discounting of the monies paid for the proof reading of the books which Mr. Hayer authored. I confirm the Determination regarding the compensation for length of service. I remit the matters of the clarification of entitlement to minimum daily pay, for the time worked through the lunch break and for the calculation of compensation for the day off with pay for those statutory holidays which were worked back to the Director's delegate. I further order that any interest that may have accrued, pursuant to Section 88 of the Act, since the date of issuance be paid.

---

E. Casey McCabe  
Adjudicator  
Employment Standards Tribunal