

An appeal

- by -

Alan Jones Construction Limited

- 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: John M. Orr

FILE No.: 2001/652

DATE OF HEARING: November 28, 2001

DATE OF DECISION: December 6, 2001

DECISION

APPEARANCES

Alan Jones	On behalf of Alan Jones Construction Limited
Gerry Omstead	On behalf of the Director

OVERVIEW

This is an appeal by Alan Jones Construction Limited (“AJC”) pursuant to Section 112 of the Employment Standards Act (the “Act”) from a Determination dated August 22, 2001 by the Director of Employment Standards (the “Director”).

AJC hired Donald Hoskins (“Hoskins”) as a carpenter from June 23, 2000 to March 15, 2001. Hoskins claimed that he was owed unpaid overtime, vacation pay and statutory holiday pay. The Director determined that there were wages owing in the amount of \$1,198.36.

The fundamental issue related to overtime. AJC claimed that Hoskins had been told on numerous occasions that he was not to work overtime. However when he did work overtime AJC paid him at ‘straight time’ i.e. without the required premium for overtime. The question remained as to whether AJC had permitted Hoskins to work overtime at straight time or whether the overtime worked by Hoskins was unauthorised and unpermitted. The Director determined that the overtime was permitted and therefore the premium was payable.

AJC appeals on the same grounds. AJC continues to submit that the overtime worked was not authorised and therefore no premium should be payable.

This decision confirms the determination on the basis that the working of overtime was condoned by the employer and therefore the overtime premium is payable.

ISSUES

The issue in this case is whether the employer had condoned the working of overtime and was therefore liable to pay the overtime premium for the overtime worked.

FACTS AND ANALYSIS

Hoskins was employed by AJC from June 23, 2000 to March 15, 2001 as a carpenter. There is no dispute in this case about the actual hours worked. On July 6 2000 he was sent and received a letter from his employer, AJC. The letter states as follows:

Dear Mr Hoskins:

Re: Hours of Work

As we discussed when you started work two weeks ago, your weekly schedule is flexible, up to forty hours. Unless specifically requested, no overtime is granted. If you do voluntarily choose to work hours in addition to forty hours per week, you will be paid your regular hourly wage. Please remember that you are not required to work overtime as part of your regular schedule.

There may be an occasion were you are specifically asked to perform work in addition to your regular hours. This time will be paid at time and a half for every hour in excess of forty hours per week. It will be very clear when you were requested to perform overtime work.

Despite this letter on July 13th 2000, Hoskins worked one hour of overtime. This one hour and was paid at his regular wage. In the first week of August Hoskins worked 4 ½ hours of overtime and again he was paid for this time at his regular rate of pay. On August 9th and 10th Hoskins worked an extra two hours each day overtime.

Mr Jones testified that when he became aware of the overtime being worked he spoke to Hoskins and reminded him about the letter on July 6th and that he says that he told Hoskins that he should not be working overtime. During the balance of August Hoskins worked a further sixteen hours overtime. He submitted these hours as before and was paid for them at his regular rate of pay.

Hoskins did not work any significant overtime in September and Mr Jones says that he had very specifically told Hoskins not to work any overtime unless it was specifically requested. However in the month of October Hoskins was working six days a week (and seven days in one week). This continued into the first week of November. Hoskins accumulated over 60 hours of overtime in that period, some at double time. Once again Hoskins submitted these hours and was paid at his regular rate of pay. For the balance of his employment there was no significant overtime claimed.

Mr Jones testified that he felt that he had made it very clear to Hoskins that he was not to work overtime. However he felt that he was being a good employer by paying Hoskins at least his straight wage for the unauthorised hours worked. The Director's delegate confirmed that AJC has a good reputation in the industry, was fully cooperative in the investigation, and is generally considered a good employer. However, the delegate submitted that, despite Mr Jones testimony, it is clear that the employer was permissive of the overtime worked provided that it was

understood by Hoskins that he would only be paid his regular wage. The delegate submits that the letter of July 6 2000 is permissive of overtime provided that the employee will only receive his regular wage. In fact, he submits, this is exactly what happened.

It was also significant to me, in the evidence given by Mr Jones, that Hoskins worked alongside a subcontractor who was his foreman/superintendent. While there was no evidence from the foreman, it is a reasonable inference that the foreman must have permitted Hoskins to work the extra days and hours. If the employer had a firm policy that the employee could not work overtime, or more than forty hours a week, the foreman could have easily enforced the policy.

In my opinion the letter of July 6th is ambiguous because section 4 of the *Act* does not allow the parties to contract out of the overtime provisions of the *Act*. Any employment contract that provides for overtime of any sort to be worked at a regular wage is of no effect. The ambiguity was exacerbated because the employer continued to pay for all the hours worked knowing that there were many overtime hours included. In my opinion the employer condoned the working of overtime and therefore the employer is liable to pay the premium for those hours as provided in the *Act*.

The onus on an appeal is on the appellant to persuade me that the determination is wrong. However, overall I am satisfied that the delegate considered the evidence carefully and came to reasonable findings of fact and that he properly applied the provisions of the legislation.

The vacation and statutory holiday issues were not disputed before me and therefore the Determination will be confirmed.

ORDER

I order, under section 115 of the *Act*, that the Determination dated August 22, 2001 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal