

HOURS OF WORK AND OVERTIME

Prepared and Presented by:

Simon K. Kent

Kent Employment Law

604-266-7006

simon@kentemploymentlaw.com

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A. Introduction

This paper will review the relevant sections of the *Employment Standards Act* of British Columbia (the Act) and Regulations that relate to hours of work and overtime. This topic is often the focus of disputes between employees and employers and therefore, a working knowledge of the rules in this area is an important preventative step in avoiding employee complaints to the Employment Standards Branch of British Columbia (the ESB).

This paper reviews the sections of the Act that deal with:

- Hours of work limitations (meal breaks, split shifts, minimum daily pay, hours free from work, no excessive hours),
- Overtime generally (daily and weekly overtime, travel time, opting out of the Act),
- Banking overtime, and
- Managers and overtime.

Claims for overtime brought by employees in court are also discussed.

This paper contains excerpts taken directly from “Fact Sheets” provided on-line by the ESB (www.labour.gov.bc.ca/esb/facshts). The author has also included portions of case summaries found in the Continuing Legal Education Society of BC publication entitled “Employment Standards in British Columbia: Annotated Legislation and Commentary”.

B. Hours of Work Limitations

1. **Meal Breaks (Section 32)**

Rules

The Act sets out that an employee must not work more than five hours in a row without a 30-minute meal break. As well, an employee does not have to be paid for a meal break unless he or she is required to work or be available for work during a meal break.

Employers are not required to provide coffee breaks.

A meal break must be uninterrupted. In other words, employees are entitled to be paid for any meal break which does not last at least one-half hour from start to finish. The Employment Standards Tribunal (the Tribunal) will imply a term into the employment contract of an employee which allows the employee to take breaks with pay if the employer knew the employee was taking breaks and if the employer routinely paid wages for those breaks without objection.

An employer cannot seek a variance of section 32 of the Act. Variances are for employers and employees who need the flexibility to establish work arrangements and schedules that do not strictly meet the requirements of the Act. In these cases, the employer and affected employees can apply to the Director of Employment Standards for a 'Variance.'

Examples

In one Employment Standards case, a store clerk had unscheduled “free time” during a shift but was required to remain in the store and be available to attend to customers. It was determined by the Tribunal that “free time” was not a meal break and must be counted towards the calculation of hours of work.

2. Split Shifts (Section 33)

Rules

Nothing in the Act precludes an employer from instructing an employee to take breaks that split his or her shift. However, a split shift must be completed within 12 hours of when the shift started.

Examples

In one Employment Standards case, since the employer did not require the employee to be available to work and because the employer specifically instructed employees to take breaks, the employee was not entitled to payment for overtime.

3. Minimum Daily Pay (Section 34)

Rules

Under the Act, an employee who reports for work must be paid by the employer for at least two hours, even if the employee works less than two hours. If an employee who is scheduled for more than eight hours reports for work, the employee must be paid for at least four hours.

If work stops for a reason completely beyond the employer's control, the employee must still be paid for two hours or the actual time worked, whichever is greater. An employee who reports to work but is unfit for work only has to be paid for time actually worked.

An employee who is not in compliance with WorkSafeBC (WCB) health and safety regulations only has to be paid for the time actually worked.

An employee cannot waive his or her statutory right to minimum daily hours.

Examples

In one Employment Standards case, the employee during her shift told her employer she was sick. The employer sent the employee home even though the worker told the employer that she was capable of working to the end of the day. The Tribunal found that the employer did not meet its obligation to provide evidence to the ESB that the employee was not fit to work, and as a result the employee was entitled to be paid for the minimum daily hours that she had worked.

In another case, it was found that the fact that an employee sets his own hours does not relieve the employer from the duty to pay minimum daily hours. As well, the employer cannot escape liability for payment for minimum daily hours on the basis that it gave the employee complete flexibility of working hours.

In a third case, the employer knew that the employee was working less than the minimum hours prescribed under this section of the Act and the employer allowed this to occur. Therefore, the employer was found liable to pay the worker for the minimum hours required by this section of the Act.

4. Hours Free From Work (Section 36)

Rules

An employee must have at least 32 hours in a row free from work each week. If an employee works during this period, he or she must be paid time-and-a-half for all hours worked. An employee is also entitled to have eight hours off between shifts unless required to work because of an emergency.

5. No Excessive Hours (Section 39)

Rules

Under this section of the Act, an employer must not require or allow an employee to work excessive hours or hours harmful to the employee's health or safety.

Employment Standards case law suggests that there are four questions that need to be answered in considering whether an employee can (with justification) refuse work because his or her health was at risk:

- a) Did the employee honestly believe that his or her health or well being was endangered?

- b) Did the employee communicate this belief to the supervisor in a reasonable and adequate manner?
- c) Was this belief reasonable in the circumstances?
- d) Was the danger sufficiently serious to justify the particular action the employee took?

If a Variance is sought regarding section 39 of the Act, the employer must propose an alternative schedule. Stating that the employees will work 40 hours per week on average, with excessive hours being worked from time to time when required, is not sufficient for the granting of a Variance under the Act.

C. Overtime Generally

1. **Daily Overtime (Section 40)**

Rules

After working eight hours in a day, an employee must be paid time-and-a-half for the next four hours worked, and double-time for all hours worked in excess of 12 hours in a day.

2. **Weekly Overtime (Section 40)**

Rules

An employee who works more than 40 hours in a week must be paid time-and-a-half after 40 hours. Only the first eight hours worked each day are used to calculate total hours for weekly overtime. For example, an employee who worked six 11-hour days in

one week would be paid 18 hours of daily overtime and eight hours of weekly overtime at time-and-a-half.

A week runs from Sunday through Saturday for the purposes of calculating overtime.

Section 35 of the Act places responsibility on the employer to control an employee's hours of work if that employer wants to avoid liability for overtime. Just having a workplace overtime "policy" is not enough. The overtime section of the Act states that if an employer "directly or indirectly" allows an employee to work more than eight hours a day or 40 hours per week, that employer will be responsible for paying overtime.

Employment Standards case law sets out that an employee has the onus (on a balance of probabilities) to prove that he or she worked overtime hours. In order to make a successful overtime claim, an employee will normally need supporting documentation proving the amount of overtime worked.

Employers must keep proper records. An employer's claim that it was not aware that an employee was working extra time does not interfere with the employee's right to be paid overtime wages for extra time worked. As well, employers cannot discharge their overtime liability through the payment of bonuses.

3. Travel Time

Rules

Travel time by an employee is compensable for the purposes of calculating overtime if the time is “work” time and not simply traveling to and from work.

4. Opting out of the Act (Section 4)

Rules

Section 4 of the Act states:

Requirements of this Act cannot be waived

- 4 The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3 (2) or (4), has no effect.

Examples

The effect of section 4 of the Act is to prevent an employee and employer from contracting out of the requirements of the Act (this includes the overtime requirements under section 40 of the Act). In other words, an agreement by an employee to work overtime for “straight-time” pay is not a valid agreement and cannot be enforced by the employer at the ESB or in Court.

D. Banking of Overtime (Section 42)

Rules

At an employee’s written request, an employer may establish a time bank and credit the employee’s overtime wages to it instead of paying the wages as they are earned. An employee can ask an employer at any time to pay out all or part of the wages credited to

the bank. The employee may also request time off with pay for some mutually agreed period, or request in writing that the bank be closed. Upon termination, or upon receiving an employee's request to close the bank, the employer must pay the outstanding balance to the employee.

An employer can close an employee's time bank after one month's written notice to the employee. Where an employer closes an employee's time bank, the employer must, within six months of closing, pay the employee all of the overtime wages credited to the time bank, allow the employee to use the credited overtime wages to take time off with pay or a combination of the two.

Overtime used or paid out must be paid or used at the rate it was earned. For example, an employee who banks two hours at time-and-a-half is entitled to three hours off or three hours pay.

If a time bank is established, subsections 27(1)(j) and 28(1)(j) of the Act describe the records that the employer must keep.

Section 72 of the Act does not allow for a variance of section 42.

An agreement to provide one hour of paid time off for one hour of overtime violates section 4 of the Act (as described above in Part C4 of this paper).

If an employee has a negative balance in a time bank at the end of his or her termination, the employer is not entitled to set off the amount owing on the employee's final pay cheque.

Please note that special rules on overtime (generally) apply to agriculture, transportation, oil and gas exploration, silviculture and high technology employees. Please see the Act and Regulations for more information on these employment types.

E. Managers and Overtime

Rules

A "manager" is excluded from the protections accorded to employees in Part 4 (hours of work and overtime) and Part 5 (statutory holidays) of the Act.

The Employment Standards Regulation defines a "manager" as: (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or (b) a person employed in an executive capacity. A person is said to be in an executive capacity when he or she makes key decisions which are critical to the business, such as:

- How many employees are to be employed;
- What product should be purchased or produced;
- What services should be provided;
- From whom should supplies be purchased; and
- At what price should products be sold.

Although managers are not entitled to payment for overtime they do remain entitled to be paid for work performed. If a manager is paid to do a pre-determined amount of work then any work in excess of that amount is work for which the employee is entitled to be paid. For example, if an office manager is hired to work 40 hours per week but instead works 50 hours in a given week, that manager should be paid for an additional 10 hours of work at his or her regular hourly wage.

If a manager is hired at an agreed salary that is paid regardless of the number of hours worked, that agreement should be given effect, unless it does not meet the minimum requirements of the Act.

1. Who is a Manager: Considerations

To determine if an employee is a manager, the ESB considers:

- a) How much can the individual, on their own or otherwise, materially and substantially affect the employment conditions of those for whose work they are held responsible by the organization? and
- b) What kind of responsibilities does the employee have with regard to company resources, even if there are certain checks on their authority?

ESB Examples

Example 1

An individual works for a large retail chain as a Pharmacy Manager. The employees she supervises are hired by the retail chain. This individual is not a pharmacist but is

responsible for supervising and directing the day-to-day activities of the department. The individual is in charge of merchandising, advertising and other administrative functions related to the operation of the pharmacy.

This individual is a manager because she supervises human resources and directs other resources for the employer.

Example 2

A project manager for a corporation is responsible for overseeing a contract to implement a new computer system. The project manager has no employees reporting to her but is responsible for a large budget. The project manager has a great deal of discretion in running this project but not in running the corporation.

This individual is a manager because she directs resources for the corporation.

Example 3

A floor manager in a department store is responsible for ensuring stock is maintained in good order and customers are served quickly. The floor manager is required to approve any customer refunds within stated company policy. The floor manager can recommend staffing actions but has no direct authority to hire and fire employees. The floor manager also serves customers.

This individual is not a manager. Although there are elements of supervision and managing resources in the job, the floor manager has limited authority to act independently.

2. Who is a Manager: Non-Considerations

Determining who is a manager is not based on:

- a) The title given to a position or the fact that other employees refer to that person as a “manager”;
- b) The form of payment of wages (e.g. salary, hourly wage, commission); or
- c) The responsibility to open and close the business for the day.

F. Court Claims for Unpaid Overtime

A significant legal development relating to employee claims for overtime occurred in 2007. In two separate British Columbia Supreme Court decisions in 2007 an employee was permitted to bring a claim for overtime in Court that would have historically only been permitted to be brought to the Employment Standards Branch.

In the case of *Macaraeg v. E Care Contact Centers Ltd.*, 2006 BCSC 1851, Ms.

Macaraeg sued her former employer for wrongful dismissal and unpaid overtime. She argued that the overtime pay requirement under section 40 of the current Act was an implied term of her employment contract and that she was therefore entitled to recover the overtime payment owed to her in her civil claim for wrongful dismissal.

In her reasons for judgement in *Macaraeg*, Madam Justice Wedge considered the decision of the Supreme Court of Canada in *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, as well as the following authorities from other provinces which support the view that the effect of a minimum benefit conferred by employment standards legislation is to introduce an implied contractual term into the contract of employment: *Stewart v. Park Manor Motors Ltd.* (1967), 66 D.L.R. (2d) 143 (Ont. C.A.); *Kolodziejski v. Auto Electric Service Ltd.* (1999), 174 D.L.R. (4th) 525 (Sask. C.A.); and *Beaulne v. Kaverit Steel and Crane ULC* (2002), 219 D.L.R. (4th) 482 (Alta. Q.B.). Wedge J. held that the statutory overtime benefits in the current Act were an implied term of Ms. Macaraeg's employment contract.

In the case of *Holland v. Northwest Fuels Ltd. et al.*, [2007] BCSC 569 Mr. Holland sued his ex-employer for \$17,388 in unpaid overtime which he worked in 2000 and 2001. As in *Macaraeg*, the main issue before the Court in *Holland* was whether Mr. Holland could sue in court for this unpaid overtime or whether he could only bring such a claim through the Employment Standards Branch. A second question asked in *Holland* was whether Mr. Holland (in bringing his claim for overtime to court) was subject to the six month limitation period set out in the Act for overtime claims.

Following *Macaraeg*, the Court found that Mr. Holland's right under the Act to overtime is an implied (unwritten) term of his employment contract, such that the Act did not preclude him from pursuing his claim in court. The Court went on and found that the six month limitation period set out in the Act does not apply in court actions. An overtime claim would constitute a claim for breach of contract, and therefore the appropriate

limitation period is six years. (Note: the author of this paper was counsel for Mr. Holland)

The *Macaraeg* decision is being appealed to the British Columbia Court of Appeal. The *Holland* case was not appealed.

The *Macaraeg* and *Holland* decisions have essentially increased an employer's liability for unpaid overtime from six months to a maximum of six years. Therefore, it has become even more imperative for employers to be on-side regarding hours of work and overtime issues.