

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act* S.B.C. 1995, C. 38

Van Isle Plywood Sales Ltd.

("Van Isle")

-and-

**THE DIRECTOR OF EMPLOYMENT STANDARDS**

(the "Director")

**ADJUDICATOR:** Ralph Sollis

**FILE NO.:** 95/139

**DATE OF HEARING:** February 20, 1996

**DATE OF DECISION:** February 29, 1996

**DECISION**

**APPEARANCES**

Michael Hanson                      for     Van Isle Plywood Sales Ltd.

Jayson K. Arsenaault                      on his own behalf

**OVERVIEW**

This is an appeal by Van Isle Plywood Sales Ltd. ("Van Isle") pursuant to Section 112 of the Employment Standards *Act* (the "*Act*") against Determination #CDET 000267 issued by the Director of Employment Standards (the "Director") on December 1, 1995. In this appeal Van Isle claims that no wages are owed to Mr. Jayson K. Arsenaault ("Arsenaault").

A hearing was held at 239 Menzies Street, Victoria, B. C. on February 20, 1996.

Also attending the hearing were Mr. Robert Bruce, Mr. Kenneth Arsenaault and Mrs. Megan Arsenaault. The parties indicated that none of these persons would be called as witnesses, consequently they were not excluded from the proceedings.

**FACTS**

To assist in the efficient hearing of this appeal, Mr. Hanson ("Hanson") and Arsenaault agreed that the following facts are not in dispute.

1. Arsenaault was employed by Van Isle as an Inside Salesperson from October 1, 1993 to May 1, 1995.
2. Arsenaault filed a complaint under the *Act* for overtime pay on June 2, 1995.
3. The overtime claim as set out in the Determination encompasses the period from January 1 to May 1, 1995.

4. During this period Arsenault was paid a salary as follows:

January 1 to February 28/95 - \$900.00 semi-monthly.  
and  
March 1 to May 1/95- \$1025.00 semi-monthly.

5. During the period January 1 to May 1/95 Arsenault's normal starting and finishing hours were 8.00 am to 5.30 p.m. for Monday, Tuesday, Wednesday and Friday.

6. On December 1, 1995 Determination #CDET 000267 was issued and Van Isle filed a Notice of Appeal on December 21, 1995.

In dispute were the hours worked by Arsenault on Saturdays, the length of the lunch breaks and overtime allegedly worked over and above the complainant's normal hours of work or on days of rest. Arsenault's employment ended before November 1, 1995 (the date on which the *Act* was proclaimed into force) and therefore the relevant statute for purposes of determining the employer's liability is the Employment Standards *Act* (SBC Chapter 10) (the former *Act*). The relevant parts of Section 28 and 30 of the former *Act* state:

**Maximum hours of work**

**28.** Subject to Sections 29, 31 and 35, an employer shall not require or permit an employee to work more than 8 hours in a day or 40 hours in a week unless the employer complies with section 30.

**Overtime pay**

**30.** (1) An employer shall, in addition to all other amounts due to an employee, pay an employee who works more than the number of hours specified in section 28,

(a) except as provided in paragraph (b), 1 1/2 times his regular wage for all hours worked in excess of

(i) 8 in a day, and

(ii) 40 in a week, but excluding from the calculation hours worked in excess of 8 in a day, and

(b) double his regular wage for all hours worked in excess of

(i) 11 in a day, and

(ii) 48 in a week, but excluding from the calculation hours worked in excess of 8 in a day.

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Both Hanson on behalf of Van Isle and Arsenault gave evidence under oath.

The evidence of Hanson was that he became manager/partner of Van Isle as a result of a share purchase in January, 1995. Mr. Bruce became acting manager during the interim period up to

January 23, 1995. Hanson stated after taking over Van Isle, he called a meeting of the staff and assured them their employment would remain unchanged and the status quo would continue with the exception of Arsenault who would now have Sunday off. Hanson emphasized that Arsenault had been paid for all hours worked and consequently no wages were owing to the complainant.

During Hanson's evidence the parties agreed that Arsenault worked from 9 a.m. to 5 p.m. on Saturdays. The exception was January 28, 1995 and February 4, 1995 when he started an hour earlier.

Hanson testified that employees were to receive one hour for lunch each day. He acknowledged that a schedule of hours of work had not been posted nor that he or Mr. Bruce had given specific instruction to the staff concerning lunch breaks.

Other than questions from the chair, Arsenault did not cross examine Hanson. Arsenault's evidence was that overtime had been worked on a regular basis and not paid in accordance with the *Act*.

After questioning from the chair, Arsenault stated that he was initially hired by Tom Stobbart, the previous owner, and supervised by Jamie Smith. His original salary was \$1,600.00 per month, later increasing to \$1,800.00. His hours and days of work were defined and lunch breaks were between 30 and 40 minutes or less, depending on business. Occasionally lunch would be as little as 15 minutes or eating "on the go".

Arsenault also testified that there was no set time for lunch other than he usually followed the "door man" at about 12:15. Lastly, he stated that overtime over and above the normal work hours would be due to inventory or stock taking.

Hanson cross examined the witness whether the store was open on January 22, 1995 and after some clarification, the witness replied that he did not know but said he had worked from 10 am to p.m. that day. Additionally the witness was questioned about the seminar he attended in March and also about his time record. To the latter, Arsenault testified that he had recorded his hours of work each day on a calendar and not in a diary.

## **ARGUMENTS**

Hanson argues that Arsenault was paid in full for all hours worked and, with the exception of January, 1995, did not submit an overtime claim until after he was terminated.

## **ANALYSIS**

The former *Act* requires that Employers post in a conspicuous place a notice setting out the hours at which work begins and ends and the eating periods allowed during the period of work that are

not counted as part of the hours worked. Additionally there is an onus on the employer to keep and maintain an accurate record of the hours worked each day for each employee. Similar provisions are contained in the present *Act*. Van Isle failed to post such a notice or to record Arsenault's daily hours of work but instead indicated each day of work with a check mark.

Arsenault's evidence as to the length of his lunch breaks was not refuted by Van Isle nor was any other evidence submitted regarding this matter. Consequently, I have accepted that lunch breaks were on an average of 30 minutes per day.

Based on the evidence, I have concluded that Arsenault's normal hours of work were as follows:

- Monday, Tuesday, Wednesday and Friday - 9 hours each day
- Saturday - 7 1/2 hours (except January 28 and February 4)
- Normal weekly hours - 43 1/2 hours..

In addition, Arsenault worked over and above his normal hours, particularly during January, 1995 and for which he received extra payment.

In determining Arsenault's regular rate of pay, I have relied on the relevant part of Section 26 of the former *Act*:

26. In this Part

"overtime wage" means the wage that an employee is entitled to receive under section 30- or 31;

"regular wage" means,

- (d) where paid on a monthly basis, the monthly wage of the employee multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work;

For the period January 1 to February 28, 1995, Arsenault was paid \$1,800.00 per month. Therefore his regular wage for overtime purposes would be:

$$\frac{1,800 \times 12}{52 \times 43.5} = \$9.55 \text{ per hour}$$

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and for the period March 1 to May 1, 1995 the salary; was \$2,050.00 per month.

$$\frac{2,050 \times 12}{52 \times 43.5} = \$10.87 \text{ per hour}$$

I have recalculated the overtime for the period set out in Determination #CDET 000267 (January 1 to May 1, 1995). For the four overtime hours each week that were part of Arsenault's normal hours of work, I have recalculated the earnings from straight time (\$9.55 or \$10.87 per hour) to time and one half (\$14.325 or \$16.30 per hour). All other overtime was calculated in accordance with Section 30 of the former *Act*.

The adjustments are as follows:

January 1 to February 28, 1995.

34 hours @ \$ 4 .....	\$162.35
31 hours @ \$14.325 .....	444.07
19 hours @ \$19.10 .....	<u>362.90</u>
Sub-total .....	\$969.32

March 1 to May 1, 1995.

32 hours @ \$ 5.44 .....	\$174.08
7 1/2 hours @ \$16.30 .....	<u>122.25</u>
Sub-total .....	\$296.33
<b>Total .....</b>	<b>\$1,265.65</b>
Less overtime paid in Jan/95 .....	<u>-\$548.48</u>
Balance .....	717.17
Annual vacation pay .....	<u>28.68</u>
Total wages and vacation pay .....	<u><b>\$745.85</b></u>

**ORDER**

I therefore order, pursuant to Section 115 (1) of the *Act*, that Determination #CDET 000267 be varied and that Van Isle pay to Arsenault the amount of \$745.85.

*“Ralph Sollis”*  
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**Ralph Sollis**  
**Adjudicator**  
**Employment Standards Tribunal**

February 26, 1996  
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**Date**