

An appeal

- by -

Wolfgang Hirschfelder
(“Hirschfelder”)

- 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: Lorne D. Collingwood

FILE No.: 2002/525

DATE OF HEARING: December 23, 2002

DATE OF DECISION: January 21, 2003

DECISION

APPEARANCES:

Wolfgang Hirschfelder	On his own behalf
Tracey Lawson	For Coast Spas

OVERVIEW

Wolfgang Hirschfelder, pursuant to section 112 of the *Employment Standards Act* (“the *Act*”), appeals a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 4, 2002. The Determination is that 534176 B.C. Ltd. operating as Coast Spas Manufacturing Inc. (“Coast Spas” or “the employer”) does not owe the Appellant (Mr. Hirschfelder) an additional amount of wages.

Hirschfelder, on appeal, claims that he was not given lunch breaks as the *Act* requires. He claims an extra half hour of pay for each and every work day worked. That is to claim 2 hours of overtime pay a week plus an additional half hour of pay at the employee’s regular wage rate.

I have decided to confirm the Determination. It was made a condition of employment that Hirschfelder take a proper lunch break. I find that, a single shift aside, there was nothing to prevent the employee from taking a proper lunch break and, if it is that the employee did not always take a proper lunch break, that was by choice and not because of instructions by the employer or somehow demanded by the employer. I am not shown that overtime was in any way allowed by the employer. I find that there is not reason to believe that the employer has failed to pay for labour or services which were, strictly speaking, performed for the employer.

An oral hearing was held in this case.

ISSUES

The issue is whether the employee is or is not entitled to be paid for an extra half hour of work each and every workday. According to the employee, he was never told that he could leave the workplace at lunch and there was, in any event, no one to relieve him at lunch. He argues that he was not, as such, given a proper lunch break and that he should be paid for 8 ½ hours of work in the case of shifts beginning Monday through Thursday and 8 hours in the case of his Friday/Saturday shifts.

What I must ultimately decide is whether it is or is not shown that the Determination ought to be varied or cancelled, or a matter or matters referred back to the Director, for reason of an error or errors in fact or law.

FACTS

Coast Spas is a large manufacturer of fibreglass spas. It has well over two hundred employees.

Wolfgang Hirschfelder was employed by Coast Spas from May 7, 2001 to May 6, 2002. He held the position of night security guard.

Mr. Hirschfelder worked a five day week. Mondays through Thursdays, he started at 10 p.m. and finished at 6:30 a.m. the next day. On Fridays he started at started at 10 p.m. and he finished at 6:00 a.m. Saturday. He worked alone.

New employees receive an orientation at Coast Spas. As part of the orientation, they are given a document called the “Employee Handbook”. In that document are various rules and conditions of employment, one of which is that employees take a half-hour unpaid lunch break after working 4 hours.

“Your eight and one-half hour workday with Coast Spas consists of a half-hour, non-paid, lunch break after four hours of work, and two (2) fifteen minute, paid, rest breaks.”

[See A2] Work Day and Breaks, Employee Handbook]

While Hirschfelder was given an orientation and a copy of the Employee Handbook, he claims that it is for production employees and not the security guards because security guards cannot take a lunch break in that there is no one to relieve them. In making this claim, he does not suggest or make any attempt to show, however, that he was told to ignore that section of the handbook that specifies a lunch break. His claim clearly stems from a mistaken belief that a security guard cannot for professional reasons take a lunch break unless there is a relief guard.

The employee is most confusing on the matter of whether he did or did not take proper lunch breaks, so much so that I am led to doubt that he missed any lunch breaks at all. He has said that he took lunch breaks but they were often interrupted by a need to attend to security matters (interview with delegate on August 28, 2002). He argues that he was not given a proper lunch break because he was never told that could leave the workplace during lunch. The Appellant claims that he could not in any event take a proper lunch break because there was no one to relieve him. And the employee also makes the claim that he took lunch breaks at 6:00 a.m. in the case of shifts beginning Monday through Thursday because he was told to do that by his supervisor, Scott Owen.

The delegate has considered the matter of whether the employer might have done something or said something to prevent proper lunch breaks. Her decision is that there is not “evidence to prove that he had to wait until 6:00 a.m. to have his meal break, or that he was told he could not leave (the workplace) during his break, or that his meal break was interrupted for work”. I am not shown that the delegate is in anyway wrong on this. As I see it, with the exception of one single lunch break, there is no evidence of any great need to attend to security matters during lunch breaks, and there was nothing to prevent the employee from taking a proper lunch break. This also leads me to doubt whether the employee did in fact miss any lunch breaks at all.

If it is that the employee did not take a proper lunch break on occasion, that appears to have been by choice and not because of any instructions by the employer, Scott Owen included. The employer has never seen any need to arrange for a relief guard. I am not shown that Hirschfelder was told that he could not take lunch breaks as set out in the Employee Handbook because there was no one to relieve him. I

find that, if it is that the employee did not take proper lunch breaks, that is because it is the employee's belief, and he is quite wrong on this, that a security guard may not for professional reasons leave the workplace during lunch breaks but must remain 'on the job' unless he or she is relieved by another security guard. That is shown by a letter to delegate dated September 20, 2002. Hirschfelder complains in the letter that "at no time was I ever told that I could leave the premises to take a break, as I was solely responsible for the safety and security of Coast Spas' offices, warehouse and the perimeter. ... If I had left at any time during my shift and an incident would have occurred, I would have been in jeopardy of being charged with negligence and would not ever be licensed by the Provincial Government as a Security Guard. I would not take that chance or would allow any employer to put me in that position."

ANALYSIS

I very much doubt that the employee was prevented from taking lunch breaks as the *Act* requires.

The employee claims that he was not told that he could leave the workplace at lunch and there was no one to relieve him in any event, so it follows that he was required to be 'on the job' at all times and did not have a proper lunch break. It does not.

The *Act* requires that lunch breaks be as follows:

- 32** (1) An employer must ensure
- (a) that no employee works more than 5 consecutive hours without a meal break, and
 - (b) that each meal break lasts at least a 1/2 hour.
- (2) An employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.

I am satisfied that Hirschfelder was told at the outset of his employment that he was to take a half-hour lunch break at the four hour mark of his shift, indeed, it was made a condition of his employment.

It is not shown that the employer subsequently did something or said something to prevent the employee from taking a proper lunch break. As I see it, there was nothing to prevent the employee from taking a proper lunch break.

This is not a case where an employer has allowed an employee to work overtime.

- 35** An employer must pay overtime wages in accordance with section 40 or 41 if the employer requires or, directly or indirectly, allows an employee to work
- (a) over 8 hours a day or 40 hours a week, or
 - (b) if the employee is on a flexible work schedule adopted under section 37 or 38, an average over the employee's shift cycle of over 8 hours a day or 40 hours a week.

If it is that the employee was not taking a proper lunch break, that does not appear to have been with the employer's knowledge. The employee worked alone.

The employee did not leave the workplace during his lunch periods. He was not relieved by another security guard during his lunch periods. He thought that it was his professional duty to be 'on the job' at all times, even lunch periods. But he is not entitled to be paid for lunch breaks because, strictly speaking, he did not perform labour or services for the employer during his lunch breaks.

Section 35 requires that overtime wages be paid for “work ... over 8 hours a day or 40 hours a week ...”. Section 18 of the *Act* requires that employers pay all wages that are owing to employees and “wages” are money paid or payable for work (section 1 of the *Act*).

“wages” includes

(a) salaries, commissions or money, paid or payable by an employer to an employee for work,

The term “work” is, however, defined as follows:

“work” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

In my view, there is not work “for” an employer unless it is performed because of instructions by the employer, or somehow demanded or allowed by the employer. That is not true of this case. If it is that the employee was ‘on the job’ during lunch periods, it may be that there was labour or service which was of benefit to the employer but it was purely for reason of a personal interest of the employee that the labour or services were performed. The employee thought it necessary if he was to keep or, at least, not risk, his license as a security guard.

Finally, I should note that even if I am wrong in my analysis of matters, it is clear from what even the employee has to say that the employer does not owe the employee overtime wages. The employee claims that he took lunch breaks from 6 to 6:30 in the morning. While lunch breaks are not to be at the end of a workday, a lunch break at the end of a shift is still a break from work: It is not work for which the employer must pay wages. If the employee was taking half-hour lunch breaks as claimed, it follows that he worked 8 hour workdays and no overtime.

In summary, it was made a condition of employment that Hirschfelder take a proper lunch break. A single shift aside, I find that there was nothing to prevent the employee from taking a proper lunch break, that it is likely that he did take his lunch breaks, and that, if it is that the employee did not always take a proper lunch break, it was by choice and not because of instructions by the employer or somehow demanded by the employer. It is not shown that overtime was in any way allowed by the employer. I am given no reason to believe that the employer has failed to pay for labour or services which were, strictly speaking, performed for the employer.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated October 4, 2002 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal