BC EST #D050/98

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 -

Interior Retread & Sales Ltd. operating Fountain Tire
("Interior")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John L. McConchie

FILE NO.: 97/467

DATE OF HEARING: October 20, 1997

DATE OF DECISION: **January 28, 1998**

DECISION

APPEARANCES

Ken Johnston	for Interior Retread & Sales Ltd. operating Fountain Tire
Terence W.J. Alcorn	on his own behalf

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Interior Retread & Sales Ltd. operating Fountain Tire ("Interior" or the "Company") from a Determination, dated June 6, 1997 of the Director of the Employment Standards Branch (the "Director"). That Determination found Interior liable to pay to the complainant, Terence Alcorn ("Alcorn" or the "complainant"), the amount of $2,050.40 representing unpaid wages and interest to the date of the Determination.

Interior appeals, arguing that it hired the complainant on a flat rate contract, and that it has lived up to the contract. The complainant's records are wrong, it says, particularly when contrasted with a review of official records known as Motor Vehicle Operator's Daily Log records.

ISSUE TO BE DECIDED

The issue is whether Interior has met its onus to show that the Director erred in relying upon the complainant's records and in finding monies owing to the complainant on account of wages.

FACTS

Interior operates a tire retread plant, retail and service outlet at its plant in Abbotsford. It delivers retreaded tires to and picks up tires to be retreaded from various locations in the Province. Its drivers are occasionally required to go to Vancouver Island and to the Sunshine Coast for that purpose.

Coming into 1997 it needed another driver. It had a route in mind for the driver which would keep him occupied for 80 hours every two weeks. John Green is the President of Interior. He hired Alcorn for this job effective January 2, 1997. He made a contract with Alcorn by which the driver would be paid a flat rate of $1,440.00 every two weeks. This was based on an hourly wage of $18.00 for an expected 80 hours of work every two weeks. Drivers were put on flat rates because the Company had no control over their work hours when they were on the road.
Under this contract, Green testified that Alcorn would have some very long days and

some shorter ones. Interior's business required it to do business on the Sunshine Coast and on Vancouver Island from time to time. Trips to these locations necessarily involved longer days as they required substantial periods either travelling on ferries or waiting for ferries. On other days, Alcorn could finish his work early and go home. He would have every second Friday off.

Alcorn testified that he experienced the longer days travelling to the Island and the Sunshine Coast, but not the shorter days travelling around the Lower Mainland. It was his testimony that even in the absence of a trip outside the Lower Mainland, he did not get off work early. In January, he worked until 4:15 p.m. or even 4:30 p.m. Later, he was required by Interior to stay to unload his truck by himself. This would take him until about 6:00 p.m. After a time, he was required to work on Saturdays, loading his vehicle for the coming week. He found himself working upwards of 20 hours more per week than he had been promised.

He raised the issue of his excessive hours with Green. He thought that he should be paid for them. Green told him that he would think about the matter. Green returned to him and told him that he could not see why Alcorn could not do the job in the allotted hours and that, in any event, he should be able to do the work in 90 hours every 2 weeks. The pay would stay where it was and it up to Alcorn whether he could handle the job. Green told Alcorn that they "had a contract." Shortly after, Alcorn quit and filed his complaint with the Employment Standards Branch.

Interior produced records called Motor Vehicle Operator's Daily Log. These were records kept by Alcorn for statutory purposes. They were considered reliable by Alcorn and by Interior. They measured Alcorn's "on-duty" time and his "off-duty" time. On-duty time included driving time and certain other ancillary functions. Off-duty time included the time spent waiting on or for ferries. The recorded hours for "on-duty time" were roughly half those being claimed as working time by Alcorn.

ARGUMENTS

Although it had no hours of work records of its own, Interior argued that Alcorn's records were obviously deficient. They did not accord with the Motor Vehicle Operator's Daily Logs, as they included long periods of down-time on ferries and waiting for ferries. Alcorn's real working hours were substantially fewer than 80 every two weeks. In addition to this Interior found him to be slow. Although the routes had never been measured with precision, Interior was sure that the routes could be handled in a much more time-efficient way than Alcorn handled them.

Furthermore, Alcorn was not entitled to claim for breaks, including lunch breaks, or overtime. This was by virtue of the exclusion of intra-provincial truckers from the operation of sections 31-38 and 40-42 of the *Act* (by virtue of an Order of the Lieutenant Governor in Council dated February 21, 1997).
In any event, said Interior, the *Act* provides that "regular wages" means:

…

(b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period.

Even if Alcorn's hours of work totalled 100 in the two week period, this would mean only that his effective hourly rate was $14.40 rather than $18.00. He would still have no basis for complaint, as this was well above the minimum hourly rate.

Interior acknowledged that the definition of "work' in the *Act* included time spent "on-call". However, Alcorn was not "on call" during the time which he spent on ferries when he was not in control of the vehicle. This was time which Alcorn could spend as he chose. He was not at that time under the direction of Interior. This was the real issue in the case, Interior argued. Was travel time on a ferry "work" within the meaning of *the Employment Standards Act*?

The *Lone Wolf Contracting* decision of the Tribunal (BC EST #D267/96) supported its case, argued Interior. That decision had dismissed a claim for travel time and established that the employee has an evidentiary onus to establish he was truly at work during the travel time. Alcorn had failed to do so in this case.

For his part, the complainant argued that he made a simple deal and Interior owed him wages under that deal. His hourly rate was $18.00 and his hours of work were to be 80 hours every 2 weeks. Instead, he worked closer to 100 hours every two weeks. The precise hours were set out in Exhibit 4, his personal time records. The log book reflected strictly driving hours and a few others. Interior would not have been paying him for 80 hours a week if it were truly relying on the log books as an accurate reflection of working hours.

ANALYSIS

Interior has the onus of establishing that the Director's delegate has erred in his calculation of wages owing. Interior has no records of its own by which to dispute those prepared by the complainant and accepted by the Director. The Motor Vehicle Operator's Daily Logs are not time-records and do not purport to measure hours of work. They are used to track vehicle usage.

I accept Interior's argument that the complainant is not entitled to overtime pay or to be paid for his breaks. The complainant testified that he took few breaks and accounted for these in his time records. In the absence of some cogent reason for refusing to accept the records, I can find no error in the delegate's acceptance of the record as a valid indicator of the complainant's hours of work while employed with the Company*: Total Credit Recovery (BC) Ltd.*, (BC EST #D307/96). The record does, however, include time spent on and waiting for ferries. The Company has argued that this time is not "work" within the meaning of the *Act*.

It is unnecessary to decide that issue here. That is because I have found that this time is "work" within the meaning of the contract entered into between the complainant and Interior, and under which Interior owes the complainant wages. The complainant and Interior entered a contract which called for 80 hours of work in a 2 week period. This was to include lengthy days on the road and shorter days in the Lower Mainland. To compensate for the lengthy days, the complainant was to get every second Friday off. He was also to be permitted to leave early on days when all his work was done. The necessary implication is that the lengthy days on the Island and Sunshine Coast trips generated lengthy work hours. By necessary implication, the contract recognized the lengthy periods on ferries and waiting for the ferries as work for the purposes of the contract. Otherwise, a lengthy trip to the Sunshine Coast would, on the Company's definition of "work", represent no greater number of "hours worked" than a normal day in town. That is not what the parties contracted for. It is not necessary to decide whether, in the absence of such a contract term, time spent waiting for or on ferries constitutes "work".

Interior's argument that the *Act* simply adjusts the complainant's salary in these circumstances to $14.40 from $18.00 misconceives the purpose of the definition of "regular wages" in the *Act.* There is no need to do a mathematical calculation of the hourly rate in this case because the parties themselves agreed to a specific hourly rate as the basis for the flat rate of pay.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination dated June 6, 1997 be confirmed in the amount of $2,050.40, together with whatever further interest may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

John L. McConchie
Adjudicator
Employment Standards Tribunal