EMPLOYMENT STANDARDS TRIBUNAL

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

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

-by-

Raymond Schroeder

("Schroeder")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	96/746
DATE OF DECISION:	February 18th, 1997

DECISION

OVERVIEW

This is an appeal brought by Raymond Schroeder ("Schroeder") pursuant to section 112 of the *Employment Standards Act* (the "Act" or the "ESA") from Determination No. CDET 004695 issued by the Director of Employment Standards (the "Director") on November 18th, 1996. The Director determined that Barnston Island Herb Corp. ("Barnston") did not owe Schroeder any monies on account of unpaid overtime or "sick time" (an additional claim for unauthorized wage deductions was settled, at the instance of the Director's delegate, in favour of Schroeder).

The Director determined that Schroeder was a "farm worker" as defined in section 1 of the ESA Regulations and, as such, did not meet the higher hourly threshold for payment of overtime set out in s. 23 of the ESA Regulations. Further, the Director held that the Act does not require an employer to pay for time not worked due to illness.

FACTS

Barnston grows herbs, packages them on site and then delivers the packaged product to various locations around the province. The firm is located on Barnston Island, in Surrey, B.C. The principal customers for the firm's products include restaurants, hotels and retail food stores. According to Schroeder, the bulk of Barnston's business is not selling its own products, but rather repackaging other farmer's products (including from overseas) and that, in effect, Barnston is in the "import/distribution business". Barnston acknowledges that it has, since 1987, sold "complimentary product lines" but also says that its own products represent over $250,000 in annual sales and that "products which are produced on this farm are on every truck that goes out to deliver each day" [see letter dated February 6th, 1997 from Barnston to the Tribunal].

Schroeder worked as a delivery truck driver for Barnston from July 6th, 1994 to August 23rd, 1996. Schroeder's basic duties included making deliveries in the greater Vancouver and Victoria areas, loading the truck and on occasion doing some packaging of the firm's products.

ISSUE TO BE DECIDED

Schroeder's appeal is primarily based on his assertion that he was a "delivery truck driver" and not a "farm worker" as determined by the Director.

ANALYSIS

By reason of section 34(1)(p) of the ESA Regulations, a "farm worker" is excluded from the hours of work and overtime provisions of the Act (Part 4). Instead, "farm workers" are entitled to overtime based on a different formula which is set out in section 23 of the ESA Regulations:

> 23. An employer who requires or allows a farm worker to work more than 120 hours within a 2 week period must pay the farm worker for the hours in excess of 120 at least double the regular wage.

A "farm worker" is defined in section 1 of the ESA Regulations as follows:

> "farm worker" means a person employed in a farming, ranching, orchard or agricultural operation, but does not include
>
> > (a) a person employed to process the products of a farming, ranching, orchard or agricultural operation,
> >
> > (b) a landscape gardener or a person employed in a retail nursery, or
> >
> > (c) a person employed in aquaculture;

None of the exclusions set out in subparagraphs (a) through (c) is relevant to this appeal.

I am satisfied that there was ample evidence before the Director upon which it could reasonably be concluded that the appellant was a "farm worker". In my view, it is abundantly clear that Barnston is an "agricultural operation" involved in the business of growing and selling agricultural products. I might note that while the Director relied on certain "Interpretation Guidelines" in determining that Schroeder was a "farm worker", these guidelines do not have the force of law and I have not relied on these guidelines in this decision.

There was no compelling evidence before the Director, nor is there before me, that Schroeder worked in excess of 120 hours within any two-week period.

Lastly, I fully concur with the Director's view that the Act does not compel employers to pay employees their regular wages when the employee is unable to work due to illness. Many employers, of course, contractually obligate themselves to provide such payments but there is no evidence of such a contractual undertaking in this case. Thus, the appellant's claim falls under the Act and, as previously noted, the Act does not mandate the payment of "sick pay".

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 004695 be confirmed.

_____

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal