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 -

Aleza West Contracting Ltd.
("Aleza West")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Hans Suhr

File No.: 1998/762

Date of Hearing: March 1, 1999

Date of Decision: March 18, 1999

DECISION

APPEARANCES

Elizabeth Pugh on behalf of Aleza West Contracting Ltd.

Douglas Pugh on behalf of Aleza West Contracting Ltd.

George Caros on his own behalf via telephone conference call

OVERVIEW

This is an appeal by Aleza West Contracting Ltd. ("Aleza West"), under Section 112 of the *Employment Standards Act* (the *"Act"*), against a Determination dated November 10, 1998 issued by a delegate of the Director of Employment Standards (the "Director"). Aleza West alleges that the delegate of the Director erred in the Determination by concluding that George Caros ("Caros") was entitled to compensation for length of service and overtime wages. The Director's delegate concluded that Aleza West owed compensation for length of service and overtime wages to Caros in the total amount of $2,144.78 (includes interest).

ISSUES

The issues to be decided in this appeal are:

1. Does Aleza West owe overtime wages to Caros ?

2. Does Aleza West owe compensation for length of service to Caros ?

FACTS

The following facts are not in dispute:

- Caros commenced work for Aleza West on October 28, 1996 and his last day worked was March 17, 1997;
- Aleza West issued a Record of Employment ("ROE") dated March 31, 197 which indicated that the reason for issuance was "K" - Workers Compensation claim;
- on or about February 7, 1997 Caros commenced work as a "bucking contractor" and did that work until March 17, 1997;

- Caros signed a "bucking contract" some days after he had commenced bucking for Aleza West;
- while work was being performed near Bear Lake, from Nov. 17, 1996 to Dec. 6, 1996, Caros was required to drive a company truck and transport other employees to/from the work site.

Aleza West further states that:

- Except for the work near Bear Lake, Caros was not required to transport other employees to/from the work site and used his own transportation;
- Depending on the location of the work site, Caros received "travel time" which was actually a vehicle allowance for his using his own vehicle while commuting to/from work;
- Caros knew that he would be laid off at spring "break up";
- Caros advised Aleza West that he would go to work for North American Construction every spring;
- Caros was laid off because there was not enough work to keep him busy.

Caros further states that:

- he was told that the bucking job would carry him through the spring "break up" period;
- he occasionally gave a co-worker a ride to work while he was bucking;
- on March 17, 1997 he sustained an injury at work and he was directed by the 1st Aid attendant to see his Doctor;
- he went to see his Doctor;
- later that night he was telephoned by his foreman who told Caros that he was laid off;
- he felt that as the log yard was full of logs to be bucked, there was a lot of work still left to do;
- he felt that the foreman should have advised him that morning that he was to be laid off and not waited until later that night after he had been injured;
- the company was still having logs hauled into the bucking area after March 17.

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Aleza West.

The section of the *Act* which contains the requirements for payment of overtime wages is Section 40. The relevant portions of Section 40 provide:

Section 40, Overtime wages for employees not on a flexible work schedule

*40. (1) An employer must pay an employee who **works** over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38*

(a) 1 1/2 times the employee's regular wage for the time over 8 hours, and
(b) double the employee's regular wage for any time over 11 hours.

*(2) An employer must pay an employee who **works** over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38*

(a) 1 1/2 times the employee's regular wage for the time over 40 hours, and
(b) double the employee's regular wage for any time over 48 hours.

*(3) For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours **worked** by an employee in each day are counted, no matter how long the employee works on any day of the week.*

(4) If a week contains a statutory holiday that is given to an employee in accordance with Part 5,

(a) the references to hours in subsection (2) (a) and (b) are reduced by 8 hours for each statutory holiday in the week, and
(b) the hours the employee works on the statutory holiday are not counted when calculating the employee's overtime for that week.

(emphasis added)

It is plain from the reading of Section 40 that before there is any obligation to pay overtime rates of pay, there is a basic requirement that an employee **work** in excess of the 8 hours per day or 40 hours per week.

Section 1 of the *Act* defines "work" as:

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

When considering whether the "travel time" constitutes work, I must determine whether the action by Caros in transporting other employees to/from the work site provided "services or labour ..... for an employer....".

The undisputed evidence was that for the period Nov. 17, 1996 to Dec. 6, 1996, Caros was directed by Aleza West to drive the company truck and transport the other employees to/from the work site. The fact that Caros transported those employees at the direction of Aleza West and in the company truck clearly demonstrates that "work" was being performed.

Except for the odd occasion when Caros gave a co-worker a ride to work in his own vehicle, there was no evidence that Caros was required to transport other employees to/from work other than the period Nov. 17 - Dec. 6, 1996.

Based on the evidence provided and on the balance of probabilities, I conclude that the "travel time" for the period Nov. 17 - Dec. 6, 1996 is "work" as defined in the *Act* and must be considered in the calculation of overtime wages. I further conclude that the "travel time" payments for Caros' other periods of employment was in fact a "vehicle allowance" and the time spent by Caros travelling to/from work must be considered as commuting time and not "work".

Aleza West provided evidence that on 19 separate occasions, Caros was paid a "vehicle allowance" in an amount equal to 1 hours pay. Having concluded that these amounts are not "wages" I must then adjust the calculation of wages owing to Caros as set forth in the Determination as follows:

Wages and Vacation Pay	=$18,445.69
Less [Adjust for vehicle allowance (19 x $24.00)]	=$ 456.00
Less [vacation pay (4% of $456.00)]	=$ 18.24
Total Wages and Vacation Pay Earned	=$17,971.45
Less Wages Paid by Employer	=$17,476.91
Total Wages Owing	**=$ 494.54**

Having already concluded that amounts paid for "vehicle allowance" are not wages, I further conclude, based on the evidence provided, that Aleza West owes overtime wages to Caros in the amount of **$494.54.**

I must now consider the second issue raised, that is, does Aleza West owe compensation for length of service ?

The liability of an employer to pay compensation for length of service is set out in Section 63 (1) (2) of the *Act* which provide:

Section 63, Liability resulting from length of service

(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

The employer's liability may however be discharged pursuant to the provisions of Section 63 (3) of the *Act* which provides:

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:
(i) one week's notice after 3 consecutive months of employment;
(ii) 2 weeks' notice after 12 consecutive months of employment;
(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
(c) terminates the employment, retires from employment, or is dismissed for just cause.

There was no evidence provided that Caros was provided with notice of termination prior to March 17, 1997, the last day on which he worked.

The *Act* further contains in Section 65, exceptions to the provisions of Section 63 and 64 (Group Termination). The relevant portions of Section 65 are:

(1) Sections 63 and 64 do not apply to an employee

(a) employed under an arrangement by which
(i) the employer may request the employee to come to work at any time for a temporary period, and
(ii) the employee has the option of accepting or rejecting one or more of the temporary periods,

(b) employed for a definite term,
(c) employed for specific work to be completed in a period of up to 12 months,
(d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act,

(e) employed at a construction site by an employer whose principal business is construction, or
(f) who has been offered and has refused reasonable alternative employment by the employer.

(2) If an employee who is employed for a definite term or specific work continues to be employed for at least 3 months after completing the definite term or specific work, the employment is

(a) deemed not to be for a definite term or specific work, and
(b) deemed to have started at the beginning of the definite term or specific work.

(3) Section 63 does not apply to

(a) a teacher employed by a board of school trustees, or
(b) an employee covered by a collective agreement who
(i) is employed in a seasonal industry in which the practice is to lay off employees every year and to call them back to work,
(ii) was notified on being hired by the employer that the employee might be laid off and called back to work, and
(iii) is laid off or terminated as a result of the normal seasonal reduction, suspension or closure of an operation.

Aleza West contends that Caros knew he would be employed until "spring breakup", however, the actual commencement of spring breakup depends upon a number of factors such as weather, imposition of highway load limits, Forest Practices Code requirements, etc. and can vary by as much as several weeks from one year to the next.

The evidence was that Caros was initially employed as an equipment operator and then as a "bucker". The "Bucking Contract" prepared by Aleza West does not contain any reference to the date of commencement or the date of termination of this "contract".

Caros contends that after his work as an equipment operator ended he was offered the opportunity to continue to work for Aleza West as a "bucker" and he understood that this work would last through the spring breakup period. Caros further contends that he had advised Aleza West that in the past spring, he had worked for North American Construction.

There was no substantive evidence provided that Caros was hired for a "definite term".

Based on the evidence and upon considering the intent of the wording "definite term" as found in Section 65 of the *Act,* I conclude that Caros was not hired for a definite term.

The ROE that was provided indicated that it was issued because of a "workers compensation claim". The letter from Aleza West to the WCB in regard to the injury suffered by Caros states in part "Although Mr. Caros was not specifically told he was to be laid off, we feel that he was aware that he would be facing lay off. (He was actually laid off March 17, 1997.)".

Caros was telephoned at home during the evening of the day on which he was injured and advised that he was laid off.

Section 1 of the *Act* defines a "temporary lay off" as:

> *"temporary layoff" means*
>
> *(a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and*
> *(b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;*

Section 1 of the *Act* also defines "termination of employment" as:

> *"termination of employment" includes a layoff other than a temporary layoff;*

There was no evidence provided to indicate that any attempt was made by Aleza West to bring Caros back to work prior to the expiry of 13 weeks after his date of layoff. The layoff of Caros, at that point in time, then becomes termination of employment pursuant to the definition *supra.*

For all of the above reasons and based on the evidence provided, I conclude that Aleza West owes compensation for length of service to Caros in the amount equal to 1 weeks pay calculated as 40 hours x $25.00 =**$1,000.00** .

The appeal by Aleza West is granted to the extent as set forth above.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated November 10, 1998 be varied to be in the amount of **1,494.56** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date the wages became owing.

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Hans Suhr
Adjudicator
Employment Standards Tribunal