

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 -

Maid West Housecleaning Services Ltd
("Maid West")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/667

DATE OF HEARING: February 17, 1997

DATE OF DECISION: February 24, 1997

DECISION

APPEARANCES

Agnes McKellar Glen Garrod	on behalf of Maid West Housecleaning Services Ltd.
Rebecca Misener	on her own behalf

OVERVIEW

This is an appeal by Maid West Housecleaning Services Ltd. (“Maid West”), under Section 112 of the *Employment Standards Act* (the “*Act*”), against Determination No. CDET 004416 which was issued by a delegate of the Director of Employment Standards on October 23, 1996. The Determination found that Maid West owed wages to Rebecca Misener (“Misener”) in the amount of \$487.24 plus interest. Maid West submits that no wages are owed to Misener and seeks to have the Determination cancelled.

A hearing was held on February 19, 1997 at which time Agnes McKellar and Rebecca Misener gave evidence under oath.

ISSUE TO BE DECIDED

Is Maid West required to pay wages to Misener for time spent travelling to and from clients' homes?

FACTS

Maid West provides house cleaning services to its clients. This requires its employees to travel from one client's home to the next in order to carry out their assigned tasks.

Maid West does not pay its employees wages for the time spent travelling from one home to the next. Both McKellar and Misener gave evidence that this condition of employment was made known and understood before Misener was employed in May, 1995.

Misener was employed by Maid West as a house cleaner from May 11, 1995 to August 4, 1995. House cleaners work in teams of three or four employees who travel together in a vehicle provided by Maid West. Each team has a team leader who drives the car and completes the daily timesheet for each employee.

Daily times sheets record the number of hours that the team of employees spend cleaning each home. Travel time is not recorded on the time sheet and employees are not paid for travelling time.

Maid West paid Misener wages only for the number of hours that she spent performing cleaning tasks.

At the hearing, McKellar testified that Misener was not required to report to the office each morning nor was she required to report back to the office at the end of each day. McKellar testified that only team leaders are required to report to the office each morning and afternoon. Misener was not a team leader.

According to McKellar's evidence, Misener "...never arrived at the office at 8:30 a.m. She was late constantly." She also testified that Misener "...was not required to report to the office at 8:30 a.m. She was required to be at the first client's home at 9:00 a.m.; she can get there any way she wants."

McKellar was asked, in cross-examination by Misener, if a list of clients' names and addresses was given to her by Maid West. McKellar testified that a list had never been requested and that Misener was "...told that she would not get paid for driving time." According to McKellar's evidence, she told Misener "if you want a ride, come to the office."

Misener gave evidence that when she was first employed, McKellar told her to be at the office at 8:30 a.m. She also testified that she recorded her hours of work in a calendar. Misener does not deny that she was late on occasion, but disputes McKellar's testimony that she arrived on time only once during her employment. Misener also testified that "...there was never any discussion about not going back to the office at the end of the work day. According to Misener, "sometimes the last client's home was in Ladner."

Maid West's office is located on 132nd Street, Surrey. Most of its client's homes are in Surrey, but some are located in Fleetwood, Langley and White Rock. The employees travel between 25 km and 54 km per day(round trip).

Under cross-examination, Misener testified that she and her co-workers normally departed the office at 8:45 a.m. and that "...about half the time I ate lunch in the car at the side of the road. On Thursday and Friday we had no lunch break - that was Carol and Pat's team."

McKellar did not refute that part of Misener's evidence.

McKellar also testified that employees take rest breaks and meal breaks as they travel between clients' homes.

In the Reason Schedule attached to the Determination, the Director's delegate made the following findings:

The employer had provided a summary of the hours recorded and paid by Maid West and a comparison of the hours claimed by the complainant (Misener).

A review of the two sets of records discloses that the discrepancy in start time is almost always one-half hour to forty minutes. This is because the employees would convene at the employer's premises and (Misener) recorded this as the commencement of employment, whereas the employer considered the commencement of employment to be the time at which the employees arrived at the first house to be cleaned.

In this regard, I prefer the viewpoint of (Misener) who has stated that the employees were expected to meet at the employer's premises so that they could travel together as a team. I have, therefore, relied upon the start times provided by (Misener) in completing my calculation.

With regard to the end times, the times recorded by the employer are the time that the house cleaning is completed. Misener's records once again indicate the end time to be the time at which all travel has been completed and (she) is dropped back at the employer's premises. In these instances, I have taken the position that (Misener) should be paid up to the time of return to the employer's premises. Similarly, the Calculation Schedule does not treat the time between cleaning assignments as eating breaks but as a part of the working day. The breaks were not scheduled to occur at the same time each day and varied in length according to the demands of the employment schedule.

There are number of occasions on which the records of the employer and (Misener) vary quite sharply with a difference of up to an hour. In these instances, I have preferred the record of the employer with a one-half hour adjustment for average end of day travel time.

These findings led the Director's delegate to prepare a schedule of hours worked by Misener which shows that Misener worked 241 hours during her period of employment. The schedule of hours shows that Misener worked on 38 days, of which 25 days have an 8:30 a.m. start time.

ANALYSIS

Section 1(1) of the *Act* contains the following definitions:

“**wages**” includes ...salaries, commissions or money paid or payable by an employer to an employee for work.

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

Section 2(b) of the *Act* sets out one of the purposes of the *Act* as being to “...promote the fair treatment of employees and employers.”

According to the Court of Appeal for British Columbia, this *Act* is remedial legislation and, consistent with Section 8 of the *Interpretation Act*, it should be given “...such fair, large and liberal construction as best insures the attainment of its objects.” [*Helping Hands Agency Ltd.*, BCCA, Vancouver Registry No. CA018751, 1995] The Court went on to state, at page 8 of *Helping Hands*;

“when the full context of the *Act* is examined it is clear that a major purpose of the legislation is to give protection to employees for the payment of their wage”

Our court of Appeal took direction from the Supreme court of Canada [*Machtiger v. HOJ Industries Ltd.*, 1992, 91 DLR (4th) 491 (S.C.C.)].

I approach my analysis of this appeal with those principles in mind.

“Travel time” is not defined in the *Act* or *Regulation*.

Many employers, particularly those in the forestry and construction industries, establish a “marshalling point” from which they transport employees to the work location. In such circumstances, employees are paid wages for time spent travelling between the “marshalling point” and the work site. When employees are not required to meet at a marshalling point, and they have a practical alternative means of getting to the work site, they are not paid wages for travel time.

This reflects a reasonable, pragmatic approach to the interpretation and administration of the *Act* so as to “best insure the attainment of its objects.”

Although Maid West did not describe its office as a “marshalling point” for its employees, I am persuaded by Misener’s evidence that it was a *de facto* “marshalling point.”

When I consider all of the evidence, I find that I agree with many, but not all of the findings made by the Director’s delegate. I do not agree with his finding that Misener’s normal start time was 8:30 a.m. The evidence given by both Misener and McKellar was that Misener normally departed the office at approximately 8:45 a.m. Therefore, the Determination should be varied to show Misener’s “start time” as 8:45 a.m. on those 25 days where it shows an 8:30 a.m. “start time.”

Section 32 of the *Act* states:

- (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 find that the evidence shows that Maid West did not comply with Section 32(1) of the *Act*. Therefore, Section 32(2) applies and I concur with the findings made by the Director's delegate on this point.

I also find that it was reasonable for the Director's delegate to rely on Maid West's records where they varied "sharply" from Misener's and to adjust them to reflect travel time. In my view, this approach is consistent with one of the purposes of *Act* - to promote the fair treatment of employers and employees.

ORDER

I order, under Section 115 of the *Act*, that Determination No. CDET 004416 be varied by reducing the total number of hours worked by Misener from 241 hours to 234.75 hours to reflect my finding about her "start time." Vacation pay in accordance with Section 58 of the *Act* and interest in accordance with Section 88 of the *Act* are due and payable.

Geoffrey Crampton
Chair
Employment Standards Tribunal