

An appeal

- by -

Derek Meshard Hines
("Hines")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/827

DATE OF DECISION: March 28, 2002

DECISION

OVERVIEW

This is an appeal filed by Derek Meshard Hines (“Hines”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Hines was employed as a commissioned sales representative with Brinks Home Security Canada Ltd. (“Brinks”) from September 15th, 1996 to November 5th, 1999 at which point he was terminated. Hines originally claimed over \$40,000 in unpaid overtime pay and a further \$32,000 (approximately) representing reimbursable vehicle expenses.

THE DETERMINATION

A delegate of the Director of Employment Standards (the “delegate”) issued a Determination, dated October 17th, 2000 (the “Determination”), dismissing Hines’ complaint on the basis that she was unable to “determine what, if any, overtime [Hines] worked during the period between 1997-1999”. The vehicle expenses claim was dismissed since Brinks paid Hines over \$9,000 on this account during his employment, an amount the delegate concluded fully compensated Hines.

THE ADJUDICATOR’S DECISION

Hines appealed the Determination and, following a 3-day oral hearing, the Tribunal adjudicator issued reasons for decision, dated May 4th, 2001 (B.C.E.S.T. Decision No. D213/01), cancelling the Determination and referring Hines’ claim back to the Director for further investigation.

Overtime pay

In his reasons for decision, the adjudicator noted that Brinks did not maintain any proper records with respect to Hines’ (or, indeed, any other salesperson’s) working hours and expressed some concern about the delegate’s unwillingness to personally meet with Hines so that the latter might clarify his claim and provide supporting documentation.

The adjudicator observed that Hines’ overtime claim may have been exaggerated, but it nonetheless might be meritorious. The adjudicator concluded:

“I believe Hines worked overtime, both daily and weekly. I cannot say if it was as much as he claims and I suspect it may not have been, however *I believe he should be allowed to attempt to prove his case...*

Hines produced a 23 page daily spread sheet listing each day and the hours worked from September 16, 1996 until November 5, 1999, his last day of work...One can question the accuracy of those records however I do not believe

them to be a rough estimate. Hines claims he has telephone records, logs and computer files which will prove his case. *If he cannot then his claim will fail.*”

(Adjudicator’s Reasons at page 13; underlining in original; my *italics*)

The adjudicator issued the following order with respect to Hines’ unpaid overtime claim:

“The matters of the hours of work and overtime are referred back to the Director with instructions. Hines is to be given a period of time, possibly 30 days, to establish if he can produce a more accurate record of the hours he has worked per day. I would suggest he do this for a trial period of possibly 60 or 90 days. If he can produce credible records the two-year period is to be reviewed.”

(Adjudicator’s Reasons at page 13)

Vehicle expenses

The adjudicator noted that Brinks’ policy was to pay travel expenses in the fixed amount of \$15 per sale and a further “40 cents per mile for attending staff meetings and out of town home or mall shows” and that “while employed as a Senior Sales Representative Hines had a different salary schedule and was paid a fixed \$400 per month car allowance” (Adjudicator’s reasons at page 7).

At page 14 of his reasons the adjudicator made the following comments:

“Section 21(1) of the *Act* requires that an employee must not bear any of the employer’s business costs. Based on the evidence of Brinks, the \$9,081.47 received for mileage claimed of 62,005 km results in a mileage rate of .1464 [sic, 14.64] cents per km. This appears to be below the amount of reasonable mileage payable by most employers when employees are required to use their own vehicle. The Tribunal has found the cost of supplying the tools is not an expense of doing business, however the operation of that equipment is a business expense and should not be borne by the employee. This matter is referred back to the Director for investigation as to whether the .25 [sic, 25] cents per kilometer as claimed is a reasonable amount to be allowed.”

Home office

Finally, Hines claimed that he sought compensation for use of a “home office” in his original complaint. This latter claim was not addressed in the Determination. The adjudicator held that if the “home office” claim was originally raised with the delegate then it ought to be investigated and determined.

THE DELEGATE'S REINVESTIGATION

The Director's reinvestigation of Hines' complaint (undertaken by a different delegate) resulted in an extensive report, dated November 16th, 2001, which was filed with the Tribunal on November 20th, 2001. This report, in turn, was forwarded to the parties for their submissions.

In the reinvestigation report, the delegate concluded that Hines' records as to his working hours contained many discrepancies and thus were not reliable. The delegate concluded:

“Due to the discrepancies between the entries in Hines' diary and his telephone records and that [sic] fact that the hours of work recorded in Hines' diary were revised each time he received additional information from external sources (Telus), the Director cannot rely on his records to establish a provable claim under the Employment Standards Act.”

(Delegate's report, page 3)

As for the vehicle expenses claim, the delegate noted that Brinks did compensate Hines for the use of his vehicle and specifically refused to address the question of whether Hines' claim of 25 cents per kilometer was justifiable:

“...Hines was unable to produce oil and gas receipts. The Employer compensated Hines for automobile expenses...”

When employees can show their employer has passed on a cost of doing business to them, the Director will recover that cost. The Director will make reasonable attempts to establish the amount of that cost, in the absence of receipts or other documents to substantiate the claim. The Director will not speculate, however, on whether \$.25 a kilometer is fair and reasonable compensation for using an employee's private vehicle for employment purposes.”

(Delegate's report, page 3)

The delegate did provide, however, in Appendix 4 to his report, a 2001 Canadian Automobile Association estimate showing that average annual vehicle operating costs amounted to 12.55 cents per kilometer as of January 2001.

Finally, the delegate rejected the “home office” claim: “The Director does not view employees working from their home as necessarily having a cost of doing business passed on to them.” I might note that the Tribunal has taken a similar view: *Bennett*, B.C.E.S.T. Decision No. RD234/01

FINDINGS

In my view, the evidence shows that Hines has been reasonably compensated for the operating costs associated with the business use of his vehicle even assuming his estimate of business driving miles is accurate.

His claim for compensation with respect to a home office is not tenable in light of *Bennett, supra.*, nor can Hines bring himself within any of the possible exceptions noted in *Bennett* (for example, a contractual entitlement to be reimbursed for the costs of maintaining a home office).

With respect to Hines' overtime claim, he was given an opportunity to provide corroborating evidence and was unable to do so. Accordingly, that claim must also fail. It should perhaps be noted that Hines never filed a claim for unpaid overtime until after his employment ended and, further, never kept contemporaneous records with respect to that claim. Clearly, Hines was not obliged to keep such records but the burden of proving an entitlement rested on his shoulders and he, quite simply, failed to discharge that burden.

SUMMARY AND ORDER

This matter was referred back to the Director for further investigation pursuant to section 115(1)(b) of the *Act*. Having reinvestigated the matter, the Director's delegate essentially reached the same conclusion as the original delegate, namely, that Hines was unable to show that he was entitled to any further compensation by way of unpaid overtime or by way of recovery of reimbursable business costs. I am not persuaded that the delegate's findings ought to be set aside.

Accordingly, this appeal is dismissed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal