BC EST #D107/96

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 -

Victoria Single Horse Drawn Carriage Tours Inc.
Operating Victoria Carriage Tours
("VCT")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Carol Roberts

FILE NO.: 96/062

DATE OF HEARING.: May 10, 1996

DATE OF DECISION: June 10, 1996

DECISION

APPEARANCES

Dianne Donohue	For the Appellant
Mark Tatchell	For the Director
Roger McKay	Representing himself

OVERVIEW

This is an appeal by Victoria Single Horse Drawn Carriage Tours Inc. Operating Victoria Carriage Tours ("VCT"), pursuant to Section 112 of the Employment Standards *Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued December 18, 1995 (Determination CDET# 000476) wherein the Director found that the employer had contravened Sections 36 and 40 of the Employment Standards *Act* in failing to pay overtime wages and compensation for two employees, R. McKay and E. Bolen. The Director ordered that VCT pay $1,200.76 to the Director of Employment Standards.

During the hearing of the appeal in respect of Evyonne Bolen, the Appellant withdrew the appeal, and settled the claim to the satisfaction of the Director. As a result, this decision relates solely to the determination in respect of Roger McKay.

FACTS

Mr. McKay was employed with VCT from September 30, 1995 to October 16, 1995. His duties included light maintenance, minor repairs, ticket sales, driving carriages and stable hand. The Director found that McKay worked for 9 days without time off, and was not adequately compensated pursuant to Section 36 of the *Act*. That Section provides that an employee is required to have at least 32 hours free from work, or to be paid double the regular wage for the hours worked during that period. The Director, in the absence of any contrary evidence from the employer, accepted the employee's record of hours worked, which indicated that he worked 144 hours in a two week period, and ordered $908.92 based on Sections 36 and 40 of the Act.

Mr. McKay also lived in accommodations provided by the employer and rent was deducted from the wages. No dispute was taken to this determination.

ISSUE TO BE DECIDED

The issue on appeal was whether Mr. McKay in fact worked the hours determined by the Director, and therefore entitled to overtime wages.

ANALYSIS

The Director found that the hours claimed by the employee had been substantiated by the fact that the employer had agreed to pay him for 93.75 hours of work, with the additional hours being used to offset the rental of the accommodation. The Director determined that "Rent calculated by multiplying the monthly rent by 12 and dividing by 365 to get a daily rate of $16.44. The employee was there for 18 days and owed $295.92 for rent. The $295.92 was divided by $7.00, the hourly rate to get the number of hours that he had to work to pay off his rent, this totalled 42.5. Add this to the 93.75 already paid and you get 136.25 hours, close to the number of hours alleged to have been worked by the employee."

Having carefully reviewed the evidence and the submissions of the parties, I am unable to find that the Director erred in his Determination that Mr. McKay was entitled to overtime pay and deny the appeal.

Section 35(a) of the *Act* provides that an employer must pay overtime wages in accordance with Section 40 if the employer requires, or, directly or indirectly, allow an employee to work over 8 hours a days or 40 hours a weeks.

Ms. Donohue contends that Mr. McKay was not entitled to overtime wages as it was physically impossible for him to work the hours he claimed. She argued that Mr. McKay falsified his time cards, and that the bookkeeper erred in overpaying him.

Section 28 of the *Act* requires an employer to keep records of, among other things, the employee's wage rate whether paid on an hourly or another basis, hours worked by an employee on each day, and the benefits paid to the employee by the employer. The payroll records are to be kept at the employer's place of business and retained for seven years.

Although the Appellant submitted letters from three other VCT employees in support of her appeal, those letters do not provide any substantive evidence relating to the grounds of appeal. The employees gave opinion evidence regarding Mr. McKay, but contained little or no evidence of any personal knowledge of his hours of work.

I also heard from the Appellant's witness Randy Strange, who gave evidence regarding Mr. McKay's hours of work and duties. I did not find Mr. Strange to be a credible witness. He made argument rather than give evidence, and could not recall pertinent details on cross examination. I have largely discounted his evidence on this basis.

As the delegate for the Director stated, it is unfortunate that VCT did not keep accurate time keeping records. The Appellant relied upon the employees to fill in their own time cards. There was no direction provided to at least this employee on how and when to record his hours of work.

The bookkeeper, who is no longer employed with VCT, was not called to give evidence for either party.

In the absence of any substantive evidence to the contrary, I am unable to find that the determination of the Director is in error. The Appellant has failed to discharge the burden of establishing that the decision was wrong, and I deny the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that Determination CDET# 000476 be confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal

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