

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1996, C.113

- by -

David Horbach
("Horbach")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Hans Suhr

File No.: 97/835

Date of Hearing: March 2, 1998

Date of Decision: March 10, 1998

DECISION

APPEARANCES

David Horbach	on his own behalf
Marie Horbach	on behalf of David Horbach
Jodi O'Neill	on behalf of Murphy Jones Refrigeration
Irwin Murphy	on behalf of Murphy Jones Refrigeration

OVERVIEW

This is an appeal by David Horbach (“Horbach”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated October, 27 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Horbach alleges that the delegate of the Director erred in the Determination by concluding that Horbach was owed wages in the amount of \$53.04 from his former employer, Murphy Jones Refrigeration (“MJR”).

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Horbach is owed additional wages ?

FACTS

The following facts are not in dispute:

- Horbach was employed by MJR from mid April 1997 until May 13, 1997;
- Horbach filed a complaint alleging he was owed wages.

Horbach submits that:

- the records provided by MJR and considered by the Director are not actual payroll records but in fact are client billing records;
- he was not provided with an opportunity to review the client billing records and respond to them prior to the Determination being issued;
- the hours of work he kept in his daily journal are an accurate reflection of the hours actually worked;

- he was required by MJR to wait to be picked up for work each day and therefore he should be paid from the time he was picked up until the time he was dropped off;
- he performed work for which he was not paid and on at least 2 occasions he did not work when MJR alleges that he did.

Jodi O'Neill ("O'Neill") on behalf of MJR submits that:

- At the time of being hired, Horbach was provided with a time sheet to fill out and turn each pay period;
- Horbach never completed or submitted the time sheet;
- Horbach verbally submitted his hours to the bookkeeper;
- Horbach was paid in full for the hours he submitted;
- the reason that Horbach was picked up each day was so that Irwin Murphy ("Murphy") could provide instructions on how the upcoming work was to be done as Horbach was *in training* to become an apprentice;
- Horbach always received the breaks he was entitled to;
- Horbach understood from the time he was hired that this job was an "on call" type of job and not an 8 to 5 type of job;
- the reason Horbach was terminated was that MJR felt he was not suitable;
- the client billing records were supplied to the Director as they were the only records available which indicated the hours worked by Horbach.

Irwin Murphy ("Murphy") submitted on behalf of MJR that:

- the work on April 24/25 1997 performed by Horbach would have commenced approximately at 6 p.m. on April 24 and concluded at 11 a.m. on April 25;
- it is possible that the work by Horbach billed for as being done on May 2 and 3, 1997 was actually performed at some other time;
- he felt it was most practical for him to pick up Horbach each day so that the time spent travelling to the job site could be used to provide Horbach with information about each job.

ANALYSIS

The *Act* defines "employee" in Section 1 as :

"employee" includes

(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,

- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,*
- (c) a person being trained by an employer for the employer's business,*
- (d) a person on leave from an employer, and*
- (e) a person who has a right of recall;*

There is disagreement about when Horbach actually commenced employment with MJR. Horbach maintains that he accompanied Murphy to a job site on the evening of April 16, 1997 and assisted Murphy with a “leak search”. Murphy agrees that Horbach accompanied him and did assist however, Murphy contends that Horbach was being interviewed and was not working.

I conclude that pursuant to the definition of employee *(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,* Horbach was an employee on the evening of April 16, 1997.

The Act in Section 28 (d) requires that an employer keep records of “*the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis*”. For a number of reasons, MJR did not keep such records for Horbach. MJR did submit records which indicated the number of hours billed to their clients for work performed by Horbach, however, these records clearly did not reflect all of the hours that Horbach worked. Horbach however, did keep a daily journal which indicated the time he was picked up for work by Murphy, the time he returned home each day, the location of the job site and the nature of the work performed.

In the absence of payroll records being kept by MJR, I conclude that it is appropriate to consider the daily journal kept by Horbach as records of the daily hours worked.

The nature of the business of MJR is such that Murphy and Horbach would respond to problems at a client’s place of business and therefore time was required to travel between one job site and the next. Horbach was instructed by Murphy to be available at a designated pick up point at which Murphy would pick up Horbach and provide work instructions during the time spent travelling to the various job sites. This time spent travelling was under the direction and control of MJR and is therefore considered to be work and is to be paid for.

There was however, the occasion when Horbach was merely sitting and waiting for Murphy to provide him with transportation to his home after Horbach had filled out his TD-1 form and, the time spent waiting is not considered work as Horbach could have made arrangements and left on his own accord. There are also other occasions where Horbach and Murphy stopped to eat breakfast and those periods of time are also not considered to be work.

Based on the evidence provided I conclude that Horbach is owed wages by MJR.

I have reviewed the daily journal records provided by Horbach and have recalculated the wages earned as follows:

Date Worked	Hours Worked S.T.	Hours Worked 1 1/2	Date Worked	Hours Worked S.T.	Hours Worked 1 1/2
Apr. 16	4 *		Apr. 28	7	
Apr. 17	6		Apr. 29	5	
Apr. 18	7		Apr. 30	8	2
Apr. 21	7.5		May 1	8	
Apr. 22	7.5		May 2	2 ***	
Apr. 23	7.5		May 7	8	
Apr. 24	6		May 12	8	
Apr. 25	8 **	3 **	May 13	8	.5

* Horbach accompanied Murphy to a job site and assisted him. Pursuant to Section 34 (1) (a) Horbach is entitled to 4 hours pay for commencing work.

** Horbach went to work at 6 p.m. on Apr. 24 and worked until 11 a.m. on Apr. 25. This period of work straddled 2 days. *Day* is defined as “a 24 hour period ending at midnight” and, pursuant to Section 40 of the *Act*, only hours over “8 in a day” are paid for at the overtime rates of pay.

*** Horbach was waiting to be picked up by Murphy and was not. As Horbach had reported to work and no work was provided, pursuant to Section 34 (2) (b) of the *Act* Horbach is entitled to 2 hours pay.

Total Straight Time hours -	107.5	@ \$12.00 / hr.	= \$1,290.00
Total 1 1/2 Time hours -	5.5	@ \$18.00 / hr.	= \$ 99.00
sub-total			= \$1,389.00
4 % Vacation Pay			= \$ 55.56
Total Wages Earned			= \$1,444.56
less wages paid			= \$1,204.32
WAGES OWING			= \$ 240.24

The appeal by Horbach is allowed to the extent as outlined above.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated October 27, 1997 be varied to be in the amount of \$240.24 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of the issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal