

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 -

Corona Home Products Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No: 1999/780 & 1999/781

DATE OF HEARING: February 18, 2000

DATE OF DECISION: March 10, 2000

DECISION

APPEARANCES:

Eric Yu	For the appellants
Anna Wong	Interpreter for Yu
Mike Dick	
Greg Dick	Representing Greg Dick

Scott and Penny Thorbeck, two witnesses for the appellants, attended the hearing but they were sent home by Yu and, as such, I did not hear from them.

OVERVIEW

Amy Mark, a director/officer of Corona Home Products Ltd., pursuant to section 112 of the *Employment Standards Act* (the “Act”), has appealed a Determination by a delegate of the Director of Employment Standards (the “Director”). The Determination is dated December 6, 1999. It is against Corona Home Products Ltd. operating as Thunderbird Bath & Kitchen and Canadian Independent Distributors (also known as C.I.D.) (“the employer”, also, “Corona”) and it orders Corona to pay Greg Dick \$6,731 in overtime wages and interest.

Eric Yu, another director/officer of Corona, has also appealed the December 6, 1999 Determination against Corona.

Corona is apparently bankrupt.

A hearing was held for the purpose of hearing from both Mark and Yu. Only Yu attended the hearing. Yu advised me that he was representing both himself, Mark and Corona. The appellants’ claim is that the Determination is wrong in that it overstates the number of hours worked by Dick. The appellants claim that it is highly unlikely that it would have taken Dick as long as he claims to make trips to the Okanagan and Vancouver Island. They question whether the record of total hours worked on which the Determination relies is credible. And they complain that Dick took much too long in making many of his deliveries.

ISSUES TO BE DECIDED

It is the number of hours worked by Dick which is at issue. The appellants, in that regard, claim that the Determination should be varied if not cancelled for reason of what is said to be several errors of fact, and the reason that Dick’s record of total hours worked is just not credible.

FACTS

Dick was employed by Corona from April 14, 1998 to June 17, 1999. There is agreement on that but little else.

Dick made pick-ups and deliveries in the lower mainland, to Vancouver Island centres and in the interior of the province. He was required to work overtime. According to Yu, Corona's arrangement with Dick was that all overtime would be paid at the driver's straight-time wage rate. Dick denies that he agreed to work at straight-time rates. As I will later explain, I need not decide whether there is or is not an agreement between Corona and Dick which called for the payment of overtime wages.

According to the appellants, neither the record of total hours worked by Dick, nor Dick himself, are credible. As such, my task in this case is to assess in part what is credible, what is likely to be the truth in all of the circumstances, while keeping in mind that it is possible for witnesses to testify in all sincerity, yet be mistaken or untruthful: That the passage of time and the introduction of self-interest can have that effect [489535 *B.C. Ltd. d.b.a./ Chalet Bakeries* (1996) BC EST # D219/96, also *Faryna v. Chorny* (1952) 2 D.L.R. 354 (BCCA)]. I have done that and find the following:

- As Dick worked on his own much of the time, it was left to him to keep a record of the hours that he worked. He did that on sheets which were provided by Corona. Every two weeks he passed his record on to Corona's payroll department and he was paid on that basis.
- Dick had to keep log books, as all long haul truckers must do. When his log books are compared to the above record of work (the "record of total hours worked"), they appear to indicate that Dick did not work so long as claimed. I find, however, that the log book actually confirms the record of total hours worked. The two records are consistent with one another except for what is the only difference between the two records. The log books are the driver's record of a truck's use. It is not a record of all of the driver's work. It does not include stacking pallets, building skids, loading and unloading the trailer and making the load secure. That only shows up on the record of total hours worked.
- Yu complains that Dick misrepresented the amount of time that it took to get from the ferry terminal to Corona's Annacis Island depot, and from that depot to ferry terminals and Kelowna. Yet I find that he fails to provide any reason why I should disbelieve the record of total hours worked and the logs. The hours logged by Scott Thorbeck, who drove in Dick's absence, are consistent with Dick's record of work. The driver that replaced Dick worked fewer hours overall but that is explained by the fact that Thunderbird was not anywhere near as busy as it was when Dick did the driving. On longer trips, there is not any great difference between the trips of the drivers.
- I must accept, no clear evidence to the contrary, that Dick did in fact leave for ferry terminals and the Okanagan when he did, at 3:30 a.m. in the case of trips to the Okanagan. The appellants have not provided any evidence to show that Dick did not in fact leave for the Okanagan as the record of total hours worked shows. And I find that Dick's explanation of

having to wait outside of the ferry terminal if one was to catch the first ferry is both reasonable and likely. The same can be said for his explanation of why he left on trips to the Okanagan at 3:30: That he was told to leave at that time during the course of his training and that he was not late directed to leave at some different time.

- Yu disputes whether Dick should actually be paid for his lunch. Dick, on the other hand, says that he ate his lunch on the run. I find that Corona either told Dick not to stop for lunch or agreed to a paid lunch. Corona's own evidence is in support of that. I am, moreover, given no reason to think that Dick did in fact take proper lunch breaks.

Yu argues that Dick was overly slow and inefficient. He has not provided evidence which shows that.

ANALYSIS

The Determination relies on the record of total hours worked. Corona itself accepted that record. It paid Dick on that basis. It is only when faced with a Determination that calls for the payment of a substantial amount of overtime wages does it begin to pick at that record.

Mark, Corona and Yu complain that there are many reasons to believe that the record of total hours worked is not credible. I have examined the records which the appellants have put before me in depth and at length and I have found that the record of total hours worked has not been shown to be wrong in any important way. Indeed, I find that both Dick and the record of total hours worked are credible.

As Yu presents matters to me, he asks that the Tribunal alter the Determination so that it reflected what Dick's work would be if he had gone about each and every one of his trips in the most efficient way possible. That is to ask the Tribunal to invent a record and vary the Determination on that basis. I will not, as I may not, do so. But it does not matter whether Dick was a good driver or a bad driver, whether Dick was or was not overly slow and inefficient. That is irrelevant. The *Act* requires that employers pay for each and every hour worked. It does not allow for a reduction in pay on the basis of productivity or the lack of it.

Section 4 of the *Act* specifically prohibits any attempt to waive the minimum requirements of the *Act* through or by agreement.

- 4 The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

Even if Dick had agreed to work overtime for straight time wages, it would remain that he is entitled to receive the basic, minimum working conditions of the *Act*. An agreement which provides for anything less than that is null and void. Overtime wages must be paid for all work beyond 8 in a day and 40 in a week. (Sections 43, 49, 61 and 69 are provisions relating to collective agreements and they have no application in this case.)

In summary, the appellants have for various reasons argued that the Determination is wrong in that it relies on a record of work which overstates the hours worked by Dick. I have examined each of their claims and found that they have not shown that the record of total hours worked is wrong in any important way. They have failed to show that the Determination should be varied or cancelled for reason of an error in fact or in law.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated December 6, 1999 be confirmed in the amount of \$6,731 and to that amount I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal