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-

Victor Carpet Distributors Ltd.

("Victor")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/923

DATE OF DECISION: March 11th, 1998

DECISION

OVERVIEW

This is an appeal brought by Victor Carpet Distributors Ltd. ("Victor" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by the Director of Employment Standards (the "Director") on December 8th, 1997 under file number 046652 (the "Determination").

The Director determined that Victor owed its former employee, Kevin Weddell ("Weddell"), the sum of $5,435.93 on account of unpaid wages including unpaid overtime, statutory holiday pay and two weeks' wages as compensation for length of service. In calculating the monies owed to Weddell, the Director's delegate relied on the employer's payroll records which did not show that Weddell had been paid overtime or statutory holiday pay.

ISSUES TO BE DECIDED

In a one-page written submission dated December 18th, 1997 and appended to Victor's appeal form, the employer asserts that "Weddell did not attend the duties regularly" and that "the hours claimed are not the actual hours Kevin Weddell had worked". In essence, the employer simply denies that Weddell worked the hours he claimed to have worked. Further, the employer says that Weddell voluntarily quit his employment and, thus, is not entitled to any compensation for length of service.

FACTS

Weddell commenced his employment with Victor in early September 1996 and continued to work with the firm until he quit on or about March 10th, 1997. According to Weddell, and this is not contested by the employer, he was initially hired to work a 40-hour week from Monday to Friday and was to pursue floor covering contracts with residential contractors. Weddell was to be paid $2,000 per month.

Sometime in early October 1996, the employer unilaterally changed the terms and conditions of Weddell's employment. In a letter signed by Vinny Ahluwalia (one of Victor's principals) and given to Weddell, the employer required the he henceforth work an extra hour each weekday as well as a 9:00 AM to 5:30 PM Saturday shift. Nothing is mentioned in the employer's letter about Weddell receiving any additional pay or overtime as compensation for working the extra hours.

According, to Weddell, and again this has not been challenged by the employer, although he protested the change in his work schedule maintaining that the new schedule violated their original employment agreement, he continued to work for some four months until he found other alternative employment at which point he resigned his employment with Victor.

ANALYSIS

At the outset, it should be noted that Victor has not provided any documentary records to support its position that Weddell worked fewer hours than claimed. Indeed, Victor's *own document*, namely the undated letter given to Weddell in early October 1996, corroborates Weddell's version of the events.

By way of a letter dated December 23rd, 1997, Victor was put on notice that it was obliged to submit to the Tribunal all records and documents that supported its position on appeal. As noted above, no such records have been received. On the other hand, Weddell has submitted extensive documentary records to corroborate his position.

Quite simply, the employer has completely failed to meet its evidentiary burden of showing that the Determination is in error. There is nothing new in this; during the investigation of Weddell's complaint, the employer was given several opportunities to put its position forward, and to substantiate its position with appropriate documentation, and utterly failed to do so.

Further, I note that at least one of the arguments raised in the employer's December 18th, 1997 letter to the Tribunal--that Weddell quit--was never raised at any time during the Director's delegate's investigation of Weddell's complaint. Accordingly, consistent with previous Tribunal decisions such as *Kaiser Stables Ltd.* (B.C.E.S.T. Decision No. D058/97), the employer is now estopped from raising that argument on appeal.

Notwithstanding *Kaiser Stables*, In my view, the employer's October 1996 letter clearly constituted a substantial alteration of Weddell's terms and conditions of employment and, accordingly, the Director quite properly held that such action was tantamount to a termination (see section 66 of the *Act*) thereby triggering the employer's obligation to pay compensation for length of service or to give proper written notice in lieu thereof--neither of which was done in this case.

However, with respect to the *quantum* of termination pay awarded (as distinct from the employer's *obligation* to pay termination pay), I am of the view that the Determination is in error to the extent that Weddell was awarded two weeks' wages as compensation for length of service. Although Weddell would have been entitled to two weeks' wages under the former *Employment Standards Act* (having worked for six months) he is only entitled to one week's wages under section 63(1) of the current *Act.* Weddell is not entitled to the benefit of section 128(5) of the Act because his employment commenced *after,* not *before* November 1st, 1995.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination in this matter be varied to reflect the employer's liability for one, rather than two, week's wages as compensation for length of service. In all other respects, the Determination is confirmed. The Determination, as varied and

adjusting for vacation pay, is for the sum of **$4,644.01 plus accrued interest** to be calculated as and from March 11th, 1997 by the Director in accordance with section 88 of the *Act.*

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal