BC EST #D159/96

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1996, C. 38

- by -

All Brand Vacuums Inc.
("All Brand")

- of a Determination issued by -

The Director Employment Standards
(the "Director")

ADJUDICATOR: Alfred C. Kempf

FILE NO: 96/061

DATE OF HEARING: June 14, 1996

DATE OF DECISION: June 28, 1996

DECISION

OVERVIEW

This is an appeal by All Brand, pursuant to Section 112 of the *Employment Standards Act*, against a Determination of the Director of Employment Standards (the "Director") issued on December 22, 1995. In this appeal the primary issue is that the employer claims no overtime wages are owed to Donald Joseph Girard ("Girard").

Appearing for All Brand was Rick Marquardt who also gave evidence. Girard also attended and gave evidence. Norman Samson appeared on behalf of the Director.

PRE-HEARING AGREEMENT

Prior to the commencement of the hearing it was agreed that the determination was overstated by $3,111.69 due to a failure to take into account the full amount already paid by All Brand to Girard. This had the effect of reducing the amount of the determination from $5,230.93 to $2,118.23.

FACTS

All Brand employed Girard from April 15, 1994 to and including November 17, 1994.

Girard worked as a vacuum system installer and repairman. He also performed miscellaneous office and sales duties for All Brand. All Brand is in the business of selling and repairing vacuums and is also in the business of the installation of built-in vacuum systems.

Girard is a tradesman holding more than one trade certification.

When Girard and All Brand initially discussed Girard's employment there seems to have been some uncertainty as to Girard's starting wage. I am satisfied, however, that the parties settled into a compensation package which provided a wage for Girard while he was performing office or in-store sales functions of $7.50 per hour and $13.00 per hour while performing repair work in the field or installation work in the field. These rates changed on June 1, 1994 to $8.50 and $13.50 respectively.

I should note that there is a conflict in the evidence concerning whether Girard was to be paid on a piece work basis based on the number of inlets installed for his installation work. I have no doubt that All Brand would have preferred Girard to be compensated on this basis but I am not satisfied on the evidence that any agreement was reached in that regard. The evidence disclosed that in fact Girard submitted hand-written documents outlining his hours in the shop and indicating his hours

involved in installation. All Brand's evidence is that he was paid for these hours submitted albeit often with some reluctance or after some debate.

All Brand argued that the form of payment request from or by Girard could be taken to be a payment request for inlets installed and not for hours worked. However, comparison of the daily journal kept by Girard and the pay requests presented to All Brand clearly indicated that Girard was making a claim for hours worked as opposed to inlets installed. All Brand argued that Girard had not worked the hours he had been paid for and that such overpayment should be deducted from any amount Girard might be entitled to.

Girard gave evidence that he took breaks totalling 45 minutes per day and that approximately 15 minutes of those breaks were uninterrupted by the duties that he might be required to attend to from time to time. The time taken for breaks has not been deducted from the time submitted by Girard nor has it been deducted by the Director in the calculation of overtime owed. All Brand in paying Girard during the entire period of employment did not make any deduction from Girard for such break time. All Brand gave evidence that the journal kept by Girard was not brought into the office after approximately the second or third month of his employment. I am not satisfied that the journal would not have been brought into the office if All Brand had required it and I am not satisfied that much turns on this fact in any event.

All Brand did not pay Girard any overtime during the course of his employment.

ISSUE TO BE DECIDED

Should there be any deduction made from the overtime calculation made by the Director in respect to:

(a) the time for which Girard has been paid and with which the employer now takes issue with; and

(b) breaks.

ANALYSIS

Alleged overpayment

All Brand cannot deduct from any overtime entitlement the amounts he now says he overpaid Girard. The evidence is clear that there was some discussion with respect to virtually all wage payments made to Girard. Mr. Marquardt did not go so far as to say that payments were made under protest but he did say that he was wary and suspicious of Girard's claims. He nevertheless paid Girard's claims. Girard was entitled to believe that he earned his pay without fear of a claim by All Brand for overpayment.

Further, on the evidence I am not satisfied that Girard was overpaid in any event.

Breaks

Since All Brand routinely paid Girard's wages knowing he had taken breaks without deduction of time for those breaks it must be implied that the employment contract allowed Girard breaks with pay. All Brand was under the mistaken impression that Girard's employment contract did not require the payment of overtime wages. In the circumstances it would only seem fair that for those days that the Director has determined that overtime will be payable to Girard that there should be a deduction of one half hour per day representing uninterrupted break times.

ORDER

In summary, I order under Section 115 of the Act, the Determination CDET #000572 be confirmed subject to a recalculation of the overtime as directed above and subject to the pre-hearing agreement as to the reduction in the Determination.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal

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