

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 -

TC Window Blinds Ltd.
("TC" or the "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/212

DATE OF DECISION: May 25, 2000

Decision

OVERVIEW

This is an appeal filed by Calvin Poon on behalf of TC Window Blinds Ltd. (“TC” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 3rd, 2000 under file number ER 096-796 (the “Determination”). I understand that Mr. Poon is the employer’s principal, if not sole, shareholder, officer and director.

THE DETERMINATION

The Director’s delegate determined that TC owed its former employee, Kwok Wah Law (“Law”), the sum of \$1,882.42 on account of 4 weeks’ wages as compensation for length of service (see section 63 of the *Act*). This latter figure takes into account both the sum of \$33.28 that the employer paid toward Law’s claim and interest calculated pursuant to section 88 of the *Act*.

The delegate held and, indeed, it is clear, that Law was entitled to 4 week’s wages as compensation for length of service. The employer laid off Law due to a “shortage of work” as recorded in the Record of Employment issued by TC to Law--note that the employer never made an allegation of cause--and after 13 weeks that layoff was deemed to be a termination effective as of the date of layoff [see section 63(5) of the *Act*].

However, after Law filed a complaint with the Employment Standards Branch, TC claimed that it was entitled to “setoff” wages that it paid to Law for his daily 30-minute lunch break. The delegate rejected this submission on two grounds: first, inasmuch as Law (and all other employees) were required to make themselves available for work during their lunch break (and, at times, worked during their lunch breaks), the daily lunch break was, in fact, compensable working time [see section 32(2) of the *Act*]; second, it was a term and condition of Law’s employment contract that he would be paid--as, it must be noted, he was--for his daily 30 minute lunch break. With respect to this latter point, Law’s employment contract was originally negotiated with a former owner of the business and when ownership changed, the term relating to Law being given a paid lunch break continued unchanged.

ISSUES RAISED ON APPEAL

The employer asserts that Law did not work during his daily lunch break. Secondly, the employer asserts that it was unaware of the fact that Law was being paid for his daily lunch break and that the employer never “implicitly agreed” to that practice.

ANALYSIS

This appeal is entirely without merit. Whether or not Law actually worked during his daily lunch break is not really the issue. Section 32(2) states that if an employee is required to be *available* for work, then the break is compensable. The employer has presented absolutely no *evidence* to

support its position that Law was not required to be available for work during the lunch break and, in any event, it is clear that Law had a *contractual entitlement* to be paid for his daily lunch break--this is evidenced by the fact that the employer actually paid Law for his daily lunch break both before and after the sale of the business. There is simply *no evidence* that this contractual term was ever renegotiated as between the parties following the sale of the business.

Finally, I find it curious, to say the least, that this claimed "setoff" regarding the paid lunch break was never raised during Law's employment and was raised only when Law filed a complaint for compensation for length of service--even then, this was not the first position advanced by the employer but seems to have been raised only when it became clear that Law was unquestionably entitled to compensation under section 63.

ORDER

Pursuant to section 114(1)(c) and 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of \$1,882.42 together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal