

An appeal

- by -

Derek Meshard Hines
("Hines")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: James Wolfgang

FILE No.: 2000/764

DATE OF HEARINGS: February 24, March 14 and 20, 2001

DATE OF DECISION: May 4, 2001



DECISION

APPEARANCES:

Derek Hines	for himself
Alex Landels	for Derek Hines
Doug Campbell	for Derek Hines
Pauline Laffin	for Derek Hines
Adel Kercso	for Brinks Home Security Canada Ltd.
Ron Berry	for Brinks Home Security Canada Ltd
Wendy S. Morrison	Counsel for Brinks Home Security Canada Ltd

OVERVIEW

This is an appeal by Derek Hines (“Hines”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination dated October 17, 2000 by the Director.

According to the Determination, Hines was claiming overtime pay in the amount of \$40,734.36 and car expenses in the amount of \$32,255.20. There was a further claim by Hines of office expenses for the use of his home as an office. The delegate for the Director found Hines was not owed any further wages, as his records were inconclusive as to the hours of overtime he had worked, if any. The delegate also found that Hines had been reimbursed for car expenses as per their agreement, and therefore no additional money was owed.

The Determination does not deal with the question of expenses for the use of his home as an office. Brinks claim that item was not raised until after the Determination was issued. Hines claims the matter was before the delegate at the time of his complaint and was under active review when the Determination was released.

The Director did not supply the Tribunal with any of the documents supplied to the delegate by Brinks Home Security Canada Ltd. (“Brinks” or “the employer”) in support of their position that Hines was not owed any money for overtime or car expenses.

Hines claims the company kept no records of hours worked and he had supplied the delegate his personal day timers for the 3 years of his employment, therefore his records should prevail, at least for the 2 year period of his claim.



Hines claims Brinks offered, through the delegate, a settlement of \$2,000 in recognition of overtime worked on trade shows. Hines rejected this offer.

Brinks admit their record keeping of hours worked was not in compliance with Section 27 of the *Act*. In their submission to the Tribunal they state:

Indeed, a review of the Determination clearly shows that the Director's delegate was very cognizant of the fact the employer's records were not in perfect compliance with the *Act*.

Brinks claim they did track sales and "activities" to the extent they feel they could disprove Hines' claim.

Hearings were held on February 21, March 14 and 20, 2001. I took evidence under oath from all parties in attendance.

The delegate for the Director did not attend the hearings.

ISSUES TO BE DECIDED

Is Hines entitled to daily and/or weekly overtime?

Is Hines entitled to any additional money for automobile expenses?

Is Hines entitled to any money for the use of his home as an office?

THE FACTS AND ARGUMENT

At the outset of the hearings Brinks argued Hines had failed to establish proper grounds for an appeal. They cited several EST decisions to establish it is not the intention of the Tribunal to rehear the complaint. I am inclined to accept the appeal on the approach taken in *D. Hall & Associates Ltd.*, BC EST#D354/99 where the Tribunal observed:

".... It is obvious that there is a sensitive balance to be struck between interest of ensuring that the process of adjudication moves quickly and with finality and the interests of ensuring that applicants are not effectively denied access to the process by an overly technical application of the rules..."

Without going into further detail, I will allow the appeal to proceed. The thrust of Hines' appeal is based on the fact the delegate did not investigate the complaint properly, failed to give due consideration to his evidence and that the employer's records were not suitable for determining if overtime had been worked.



Hines was a commission salesperson for Brinks from September 15, 1996 to November 5, 1999 working on Vancouver Island. His territory ran from Duncan to Bowser and included Port Alberni. For a period, from May 01, 1998 until May 1999, he was Senior Sales Representative on the island, which also included Victoria. He indicated all sales staff were sent to “Brinks University” in the U.S.A., for sales training. They were provided with training that outlined the procedures they should follow in making contacts, selling and reporting.

Hines claims he worked out of his home, as there was no Brinks office in Nanaimo, the nearest being in Burnaby. He was required to carry a pager and was expected to answer the pager calls as soon as possible as there was no indication of the nature of the call. It could be a routine message from the sales manager or a customer appointment booked by the telemarketers.

When Brinks terminated Hines he went to the Employment Standards Branch (“Branch”). He was told he probably had a claim and to submit it to his former employer first. He prepared a detailed claim, which was rejected by Brinks in a letter dated January 13, 2000. The letter, from the Director, Human Resources, indicated Hines had not raised the issue of overtime with them while employed. The letter also stated the number of hours of overtime claimed was “entirely inconsistent with our records regarding your sales calls”. It finally stated: “In any event, because you are classified as a “commercial traveler”(sic) and therefore generally exempted from the overtime requirements of the *Employment Standards Act*, you are not entitled to any overtime pay”. Hines points out that this letter does not claim he did not work overtime, only that he was not entitled to be paid for it.

Hines contacted the Branch who advised him they were of the opinion he was not a “commercial traveller”. He then filed a complaint with the Branch. He believes there was not a proper investigation of his complaint by the delegate before the Determination was issued. Hines claims the delegate did not talk to any of his witnesses, did not give him answers to his inquiries on Sections of the Act, and refused to review his other evidence as “it would take too long”.

In his appeal, Hines responded at considerable length to the Determination. He indicated the sales staff were not paid for statutory holidays until he raised it in January 1997 and then only after some insistence. It was two or three months later, following a complaint by another sales person, that Brinks determined the sales staff were entitled to minimum wage. When the decision to pay minimum wage was made Brinks sent out a memo to all sales staff indicating they were to be paid minimum wage of \$7.00 per hour for 40 hours per week based on a bi-weekly pay period for a total of \$560.00. Based on this Hines believed he was being paid for 8 hours per day 5 days per week not including overtime. He claims the matter of excessive overtime was raised both by he and other sales staff on several occasions without any relief.

Hines claims the Determination is in error, both in law and in fact. The Determination makes reference to the company’s “daily activity records”, however, according to Hines there were no “daily activity charts”, the company did attempt to keep a record of appointments worked. This was to track a sales person to see if they were “closing” (making the sale). This was directly



related to the pay structure for the telemarketers. He claims there was never a request for any hours worked, either for sales appointments or for the other work the sales staff performed, even after it was determined the sales staff were entitled to minimum wage.

He claims only a 3 month period of copies of his day planner was included in the Determination when he submitted day planner records for the entire 2 year period. This was later corrected by the delegate, who supplied copies of the day planners for the two-year period.

At the hearing Hines objected to the fact he had not been supplied copies of any of the material Brinks had supplied to the delegate from which she made her Determination. Hines claims he had requested a copy of his file from the delegate on several occasions and never received it. Brinks supplied copies of the “Daily Appointment Result Log” dating from February 16, 1998 to September 24, 1999 at the hearing. The log listed the name of the salesperson, the name of the customer, generally the source of the contact (Head office, telemarketer or self generated) and a code to indicate the result of that contact, whether it be a sale, cancellation, reschedule or no show etc.

This document is used for two purposes, to monitor the activity of the telemarketers and to provide sales information to the general manager, and sales manager, to evaluate the performance of the sales staff. The General Manager, Adel Kercso, (“Kercso”) indicated these reports were only as reliable as the information supplied by the sales staff. Kercso stated Hines was one of the sales staff who would not always telephone in the information required to maintain proper records.

Brinks also supplied the Sales Activity Chart for Hines from February 1998 to November 1999. This is a summary of the monthly sales activity on a daily basis and is developed from the Daily Appointment Result Log. They further supplied the payroll records for Hines for the period January 03, 1998 to December 19, 1998.

Sales staff would receive information or appointments in a number of ways.

1. Self-generated calls were from contacts made directly by the sales person with possible customers,
2. From the appointments booked by the Burnaby marketing staff and
3. From the Head office marketing staff in the U.S.A.

The sales staff were expected to report their activity to the Head office and to the Burnaby office.

Hines hired Pauline Laffin (“Laffin”) as a telemarketer to book appointments with potential clients. She was employed by Brinks, as a contract telemarketer, from May 1998 for about 18 months. Hines and the other sales staff would call in their availability and Laffin would book appointments for them. Laffin tracked the appointments and reported to Burnaby to avoid double



booking a salesperson for a specific time. Laffin indicated the closest time booked between appointments would be 2 hours if they were in the same area. She did admit she had booked appointments of 1 hour on occasion. Laffin agreed appointments were booked for more than 5 days per week and, in addition, evening appointments would also be booked. She admitted she did not book Hines for appointments every day and was not directly aware of all of the duties of the sales staff. Hines admitted the sales staff did less “cold calling” after Laffin was hired.

Brinks argued Laffin was not an “employee” of the company.

In addition to making sales calls on homes and businesses, Hines claims he was required to perform a number of other duties. They included doing sales reports, attending home and trade shows, contacting and coordinating with the telemarketing staff, attending company meetings, cold calling on potential customers, meeting RCMP community liaison officers, doing follow-up on installations and doing “cloverleafing”. (This is hand billing in a neighbourhood after making a sale) He claims, with the exception of doing shows and company meetings, these activities were not normally recorded in his day planner. He claims the company general or sales meetings were scheduled without regard to the hours or days worked by the sales staff before the meeting.

Hines had a list of prepared questions which he asked each witness which included the amount of time to make a presentation to a customer, scheduling, attendance at various meetings, hours worked per day and whether they worked in excess of 8 hours per day and 40 hours per week.

The witnesses for Hines, who were former sales staff, gave evidence they all worked in excess of 8 hours per day and for more than 40 hours per week at times. They specifically indicated sales meetings in Vancouver would last over 8 hours, including travel time. Brinks questioned the relevance of the evidence of these witnesses as one had worked for Brinks for less than 1 year and the other was on leave during most of the time of Hines’ claim.

The Determination stated:

It should be noted at this time that the Employer did not keep track of this employee’s (or any other sales representatives) daily time records. The Employer felt that this was not necessary, as the sales representatives set their own hours. The employer did, however keep track of, and charted the employees(sic) daily activities with respect to appointments being booked and cancelled.(emphasis added)

The Determination further states:

The Complainant’s original spreadsheet was based on a rough estimate of hours worked each day. It appears that the Complainant guessed how many hours he worked each day. He did not write in the hours worked at the time they were actually worked. Nor did he calculate in all of his cancelled appointments. He calculated eight hours for days when he made one phone call, and he appears to have generously appointed himself hours for meetings when there were no start or finish times recorded.



The Complainant requested that he be given the opportunity to reconfigure his original overtime calculations. I advised him that 90% of the days were in question, and it would be inaccurate, and extremely time consuming for all parties to try to reconstruct exactly which hours he worked each and every day for two years, especially considering that his original records had already been submitted. There would be no accurate way in which the employee could recall which days he did reports, how long his phone calls were, how long he was at each appointment, etc.

Hines claims the Sales Activity Chart was incorrect, particularly in respect to self-generated sales. He admits he did not always report sales as required.

Hines admits the hours shown as worked per day in his day timers were not always marked on that day. He also admits he was under the impression if he made one telephone call per day he was entitled to eight hours credit for that day as he felt he was “on call”. He indicated he could correct that error as all his sales activities were recorded in his computer and, given time; he could accurately produce the proper number of hours worked per day. He agreed there were days in which he did not work 8 hours and days he did not work at all. He claims he did not claim time worked for any days he did not do some work.

When Hines began to do home shows and trade shows he would do the set-up, attend the shows and do the removal of the display. He later changed that so he could share time with another sales person when doing shows to reduce the hours worked. He claimed he tried to keep the sales appointments on Sunday to a minimum however the home shows normally covered Sunday work.

Brinks called a current sales person as a witness who had worked with Hines. His evidence was somewhat different than the evidence of Hines. He claims he does cold calling of 1 to 2 hours at a time but not every day. He indicates the amount of time allocated by Brinks of 1-½ hours for a presentation and 1-½ hours for travelling time for each call is generous. The telemarketers seldom book him appointments back to back at opposite ends of his territory. The time to reach Port Alberni and Duncan is one hour each way but the majority of his calls are in the Nanaimo area. He claims he seldom works in excess of 8 hours per day and works less than 8 hours on most days. He does admit to working in excess of 40 hours per week however he attempts to limit the weekend work to Saturday and keep Sunday free. He admits he does work on Sunday occasionally. He claims he is satisfied with the amount of money he receives for auto expenses. He also works out of his home and uses that as a business expense on his income tax.

Brinks' policy on travel expenses was to pay \$15.00 for each sale finalized. Sales staff were not paid anything for appointments, which did not result in a completed sale. Mileage was paid at the rate of 40 cents per mile for attending staff meetings and out of town home or mall shows. While employed as a Senior Sales Representative Hines had a different salary schedule and was paid a fixed \$400.00 per month car allowance.



Hines claims the amount of money paid by Brinks for car expenses did not cover the actual cost of operating a vehicle. Many of the appointments did not result in sales and many had to be rescheduled for one reason or another. There was nothing paid for checking on the installation after a sale or any other business that did not result in a sale of a security system to a customer. Hines claims this was a source of problems for the Nanaimo sales staff as 70% of their sales were made outside of the Nanaimo area.

ANALYSIS

At the suggestion of the Branch, Hines supplied a 23-page list of daily hours for the 2 year period to the employer. Brinks rejected his claim in a letter from the Director, Human Resources, on two grounds. The first being, the claim was exaggerated and did not match their sales record tracking system. The second, he was classified as a “commercial traveller” and not entitled to overtime, if he did work any. Brinks claim the second point was not a major one and was not pursued during the investigation. I disagree; the reference to “commercial traveller” was an attempt to discharge any responsibility for the payment of overtime. It may be that it was not pursued during the investigation, as Brinks believed it would fail.

When Hines received that letter he went to the Branch and filed a complaint. He provided the same material that had been sent to Brinks in support of his complaint. The delegate discussed the complaint with Hines on several occasions but refused to meet with him so he could go over his records to verify his claim. I can agree with the delegate to the extent the day planners of Hines did not, in most cases, indicate start or finish times. However, Hines offered to substantiate or augment that information from his computer files and other sources. That offer appears to have been rejected by the delegate. Hines claims she told him, “It would take too much time”. If that happened, I do not believe it was the proper approach. I believe the delegate should have given Hines some time to see if he could, in fact, produce a more accurate diary of hours worked.

Hines stated in his appeal that:

I offered to support any part of my claim with further documentation, detailed explanation of a particular day, and witness statements supporting my claim none of which were followed up on by the investigating officer. I stated numerous times that I could prove my hours, whereas the company has no records whatsoever.

There has been the suggestion Hines’ appeal should not be allowed because he is attempting to present two different sets of records. I do not agree with that premise. Hines has repeatedly stated he is providing only one set of records that he is attempting to clarify.

There is no doubt the original claim by Hines may have been incorrect as he admitted claiming 8 hours for any day in which he made one telephone call or attended one appointment. The



delegate focused on that in the Determination. Brinks paid Hines and the other sales representatives at the rate of 40 hours per week for a two-week pay period of 80 hours. With the minimum wage of \$7.00 per hour that amounted to \$560.00 per pay period. They were guaranteed that amount and if their commissions were less than \$560.00 their pay was “topped up” to \$560.00. In a memo dated November 25, 1997 Brinks advised their sales employees, in part:

As per British Columbia Ministry of Labour and Employment Standards Act any company is required to pay minimum wage for Commissioned Employees. This minimum wage is \$7.00 an hour based on 40 hours per week for a total of \$560.00 per bi-weekly pay period.

If one does NOT earn more than \$560.00 in commissions, the minimum wage will come into effect.

There was no reference to hours worked per pay period and Hines took that to be the equivalent of a salary guarantee regardless of the number of hours worked. He was, in his mind, “on call” and therefore that would be the minimum payable. In fact, the General Manager indicated Brinks had paid minimum wage to Hines “1 or 2 times” when his commissions were below the threshold. Brinks did not inquire how many hours he had worked that pay period before paying him.

In an undated memo to Hines from the Assistant Office Coordinator she stated:

Please note that your pay stub is showing two entries for COMM.

Being as your gross income did not exceed the Biweekly Minimum Wage Amount (\$560.00) we have credited the difference to you. The Difference will always be the second “COMM” amount shown on your pay stub – until we set up an appropriate code for the entry.

YOUR EARNED AMOUNT	\$305.50
MINIMUM WAGE ADJ. AMT.	<u>\$254.50</u>
TOTAL	\$560.00

The difficulty here was the practice of Brinks to credit minimum wage for 40 hours per week regardless of the number of hours worked. It assisted in making the bookkeeping easier but failed to meet the requirements of the *Act*. Further, Hines took that to mean a guarantee of 8 hours per day and 40 hours per week, whenever he worked. On any day he worked less than 8 hours he simply posted 8 hours. That is the main point that must be reviewed. Hines must be allowed to attempt to create a spreadsheet that accurately reflects the hours he worked each day. Only when that has been completed, can a proper evaluation be done as to whether any overtime is payable.



If, as Hines has indicated, he has extensive records other than his day planners, it should be possible for him to produce that information, for most days at least.

I believe there is general agreement on the appointments shown on the Sales Activity Chart for Hines and his day planner. The delegate, in the Determination indicates:

I compared the Complainant's records to the Employer's sales activity chart. Generally, they were fairly consistent with each other, although there were times where the sales activity chart did not reflect what the Complainant had in his planner.

While Hines pointed out there were a number of errors between his records on appointments and Brinks' records, they were in the minority and were presented to discredit the accuracy of the records of Brinks.

The difficult area is not the appointments, but all the other duties Hines claims he performed and basically has no records shown in his day planners. In their submission to the hearing Brinks enclosed a letter from the General Manager to a Mr. Jeff Hunter in which she outlines Hines' duties as the Senior Sales Representative. They include:

- All Vancouver Island SSC's training
- Continuos (sic) Support of Vancouver Island SSC's
- By-weekly sales meetings
- Constant communications with branch & Island Techs
- Set-up and take down of all Consumer Shows
- Monthly visits to all applicable community policing stations
- Weekly and monthly reporting of Island Rep's activities

I will forward a full review along with more detailed breakdown of responsibilities after my meeting with Derek next week.

Hines claims he offered the 311 page Brinks Sales Employee Manual to the delegate to indicate the other duties they expected of a sales person however she declined to review it.

On the basis of probabilities, I believe Hines did all of the things he claims to have done. Whether he did them as often or if it took the amount of time he claims is another matter. For example, the sales person who was a witness for Brinks gives a different amount of time for travel to Duncan and Port Alberni than does Hines. Hines has indicated it takes 1 ¼ to 1 ½ hours each way from Nanaimo to both Duncan and Port Alberni. The other sales person indicates it takes about 1 hour each way. From personal experience I am inclined to agree with the Brink's witness on that matter.

Brinks claimed the reason they did not keep records on the hours worked by the sales staff was they had complete freedom to set their own hours. I am inclined to agree with Hines that the



sales staff did not have complete freedom to set their own hours of work. While they had some flexibility in working with the telemarketer on scheduling, to a considerable degree they were obliged to comply with the appointments arranged by, either the Burnaby or National office, or the Nanaimo telemarketer. The General Manager indicated if the sales staff refused too many appointments from the telemarketers they simply would not call that sales person, going to one they expected would take the appointment.

I do not agree with the delegate who indicated the “Employers policy is to allocate three hours for every sales appointment for the purpose of guaranteeing minimum wage for every pay period”. Hines denies that was the practice while he was employed and believes that may have been introduced at a later date. In the Brinks submission to the Tribunal dated December 4, 2000 it states:

Contrary to the Complainant’s position in his submission, the employer, Brinks, did track the employee’s appointments and other daily activities, such as scheduled home shows, and allocated an average amount of time to each appointment to assess the hours worked by the Complainant.

While I understand it was, at some point, the policy to allocate 1-½ hours for each appointment and 1-½ hours for travel time I do not believe it was related to the minimum wage issue. The time allocated, I believe, only related to spacing for booking appointments. We have no evidence the employer was aware or kept records of the hours staff spent in attendance at a home show, for example. The evidence was the 3 hours was a Vancouver Island provision and did not apply to all sales staff. I do not believe the two items are related.

The Determination indicates the current Brinks sales person interviewed by the delegate said some days he worked many hours and some days very few. According to Hines, the Brink’s sales person had indicated to the delegate that he worked about 50 hours per week. This he said was consistent with his claim. As the delegate did not attend the hearing we have no way of verifying if that was his evidence. In the delegate’s response to Hines’ appeal, there is no reference to that particular claim by Hines.

Brinks, in their submission to the Tribunal, indicate:

The Complainant cannot rely on Mr. Berry’s evidence that he worked an average of 50 hours/week at this stage an indication the Director’s delegate erred. Although not expressed in the Determination, the Director’s delegate was aware of the differences in total remuneration of the two different employees, and clearly concluded that the two employees had different work habits.

Contrary to that statement, there was no evidence from the delegate that any difference in work habits existed between the two employees. As indicated above, the delegate did not respond to the statement by Hines in that respect.



In dealing with the entitlement to overtime, if Hines had worked any, we must review the *Act*.

Section 16 of the *Act* states:

An employer must pay an employee at least the minimum wage as prescribed in the regulations.

Section 40 of the *Act* states:

(1) An employer must pay an employee who works over 8 hours a day

(a) 1 ½ times the employee's regular wage for the time over 8 hours, and

(b) double the employee's regular wage for any time over 11 hours.

(2) An employer must pay an employee who works over 40 hours a week.....

(a) 1 ½ times the employee's regular wage for the time over 40 hours.

Section 1 of the *Act* states:

1(1) "regular wage" means

(b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during the pay period,

The Determination did not address the requirement under Section 27 and 28 of the *Act* for Brinks to maintain proper records. Under Section 28 of the *Regulations* there is an automatic penalty of \$500 for each offence if there is a breach of either Section 27 or 28.

While I admit Hines' records are not the most reliable, as they do not indicate start and stop times, they must be considered in comparison with the records of Brinks. Brinks indicated their records were "not in perfect compliance with the *Act*" and the delegate recognized that point. What the delegate said was the "Employer did not keep track of this employee's (or any other sales representatives) daily time record". My interpretation of that is there were no records indicating the hours worked by Hines or any other sales person. The Determination, in the Employer's Position, goes on to say: "the Employer feels the employee's complaint is incorrectly recorded and grossly exaggerated". Exaggerated, possibly, but not necessarily without some merit.

Brinks spent a considerable amount of time attempting to discredit Hines' records but offered little evidence to show their information was any better. They claim the evidence Hines' witnesses gave was without relevance. The witnesses attended the hearing and were cross-examined on their evidence. I found their evidence to be credible for the period they were



employed. We heard no evidence to suggest the nature of the work had changed significantly over time therefore I believe that evidence has relevance.

I believe Hines worked overtime, both daily and weekly. I cannot say if it was as much as he claims and I suspect it may not have been, however I believe he should be allowed to attempt to prove his case. In the delegate's response to Hines' appeal, dated November 29, 2000 she states:

I felt that he could not accurately, by memory, go back each day for 2.5 years and tell me exactly his hours of work. Certainly one could make a very rough estimate how many hours Mr. Hines worked. It is apparent from his records this is what he did.

Hines produced a 23 page daily spread sheet listing each day and the hours worked from September 16, 1996 until November 5, 1999, his last day of work. (For the purpose of his complaint the only relevant time is the 2 year period before his termination, November 5, 1997 until Nov. 5, 1999) One can question the accuracy of those records however I do not believe them to be a rough estimate. Hines claims he has telephone records, logs and computer files which will prove his case. If he cannot then his claim will fail.

Hi-Rise Salvage Ltd. BC EST#D 293/97 states, in part:

In several previous decisions this Tribunal has found that where the employer has not kept accurate records of the hours worked the evidence of the employee should be preferred and that any partial records should be accepted unless there is substantial credible evidence to establish the facts alleged by the employer. (emphasis added)

The matters of the hours of work and overtime are referred back to the Director with instructions. Hines is to be given a period of time, possibly 30 days, to establish if he can produce a more accurate record of the hours he has worked per day. I would suggest he do this for a trial period of possibly 60 or 90 days. If he can produce credible records the two-year period is to be reviewed.

In respect to the car allowance, I believe Hines made a mistake in his calculation of the amount of money Brinks paid for business meetings and out of town trade, home and mall shows. He indicted he received 40 cents per mile (as a US company they paid in miles). He converted the mileage payment to kilometres and claimed they owed him 67 cents per kilometre. I believe he used the wrong conversion factor of 1.609 when he should have used .6214. That would mean he would be paid 25 cents per kilometre not 67 cents. That would change his claim, if correct, from the \$32,255.20 he had identified to the delegate to what I calculate to be \$6,419.78. This would be in addition to the \$9,081.47 already received in car allowance. (Brinks indicate their calculation to be \$6,688.43 based on Hines' 1998 and 1999 income tax, Calculation of Allowable Motor Vehicle Expenses. This does not take into account the two months Hines worked in 1997 and the fact these are income tax amounts, not a claim for mileage)



Contrary to the Determination, I do not accept the amount of \$15.00 per finalized sale was by agreement between Hines and Brinks. The employer, I believe, unilaterally determined that amount. Section 21(2) of the *Act* requires that an employee must not bear any of the employer's business cost. Based on the evidence of Brinks, the \$9,081.47 received for mileage claimed of 62,005 km results in a mileage rate of .1464 cents per km. This appears to be below the amount of reasonable mileage payable by most employers when employees are required to use their own vehicle. The Tribunal has found the cost of supplying the tools is not an expense of doing business, however the operation of that equipment is a business expense and should not be borne by the employee. This matter is referred back to the Director for investigation as to whether the .25 cents per kilometre as claimed is a reasonable amount to be allowed.

In respect to the claim for expenses for using his home as an office, Hines claims this was part of the original complaint. Hines indicated he had raised it with the delegate who said she would get back to him on that matter and to send her what he had. Hines indicated he sent the information to her and, I believe he did send the material. Hines has been most careful in attempting to provide all of the information requested on all of the other items therefore, on the basis of probabilities; I believe he did so in this instance. However, unless there is some reliable evidence that this was before the Director at the time of the complaint it must be treated as a new claim and would be rejected. If there is reasonable proof the issue was before the Director it should be investigated by the Branch at the time of the matter of overtime and vehicle expenses.

ORDER

In accordance with Section 115 of the *Act* the Determination issued by the Director dated October 17, 2000 is hereby cancelled and the matters outlined above are referred back for investigation as outlined above.

JAMES WOLFGANG

**James Wolfgang
Adjudicator
Employment Standards Tribunal**