

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 -

Rennie R. Bauchman operating as
R. Bauchman Contracting
("Bauchman")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 98/096

DATE OF HEARING: April 22, 1998

DATE OF DECISION: May 28, 1998

DECISION

OVERVIEW

This is an appeal by Rennie R. Bauchman operating as R. Bauchman Contracting (“Bauchman”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination which was issued on January 19, 1998 by a delegate of the Director of Employment Standards. The Determination requires Bauchman to pay to Clint Vesper the amount of \$2,469.22 (including interest to December 30, 1997) due to a finding by the Director’s delegate that Bauchman had not paid Minimum Daily Pay, Overtime Wages, Vacation Pay and Statutory Holiday Pay in accordance with the *Act*.

Bauchman’s appeal is based on its submission that Mr. Vesper has been paid all wages (including vacation pay and statutory holiday pay) to which he is entitled and any further payments to him would result in him being paid twice for certain entitlements. Bauchman also submits that its payroll records and an oral agreement with its employees support a finding that the Determination is wrong and should be varied.

A hearing was held at the Tribunal’s offices on April 22, 1998 at which time oral evidence was given under oath or affirmation

ISSUES TO BE DECIDED

Did the Director’s delegate err in determining that Clint Vesper was not paid for minimum Daily Hours, Statutory Holiday Pay, Overtime Wages and Vacation Pay in accordance with the requirements of the *Act*?

FACTS

Clint Vesper was employed by Bauchman from August 10, 1995 to July 6, 1997 as a “framer”. Bauchman is a framing contractor which is involved primarily in the residential construction sector and employs between 2 and 20 employees at any given time. Rennie Bauchman is the proprietor of the business and his wife, Linda Bauchman, maintains the business records (including its payroll records).

Mr. Vesper’s hourly wage rate was \$14.00 when he began employment and was increased in increments of \$1.00 per hour in October, 1995; September, 1996; January, 1997 and March, 1997. His hourly wage rate included 4% vacation pay which was paid to Mr. Vesper in each bi-weekly pay cheque as permitted under Section 58(2) of the *Act*. The statement of earnings which Mr. Vesper received with each of his pay cheques did not show his hourly wage rate but did show separate amounts for “wages” and “holiday pay” for each pay period and year-to-date.

Payroll records provided to the Tribunal by Bauchman show that Mr. Vesper’s total gross earnings were as follows:

	Wages	Holiday Pay	Total Earnings
1997	\$11,363.88	\$454.56	\$11,818.44
1996	\$18,065.52	\$722.62	\$18,788.14
1995	\$ 5,374.68	\$215.82	\$ 5,590.50
TOTAL	\$34,804.08	\$1,393.00	\$36,197.08

These amounts are not in dispute and the Calculation Schedule attached to the Determination show \$36,197.08 as the total wages paid to Mr. Vesper.

In calculating the total “wages” to which Mr. Vesper was determined to be entitled (\$37,119.28), the Director’s delegate showed in the Calculation Schedule various amounts totalling \$222.80 for unpaid “Minimum Daily Pay” and various amounts totalling \$1,248.58 for statutory holiday pay. An amount of \$1,484.77 (4% of \$37,119.28) is shown as his entitlement to vacation pay. These amounts suggest that the overtime pay determined to be owing to Mr. Vesper totalled \$843.82.

The Director’s delegate states, at page 2 of the Determination, that Bauchman provided two sets of records to him: “pay records” and “working records”. He explains that the “pay records” show the hours for which Bauchman paid wages to Vesper and the “working records” show the number of hours that Vesper actually worked. He then states:

The difference in the two records is 45 minutes per day for which Vesper was paid but did not work. Fifteen minutes of this time was to compensate him for Statutory Holidays. The other 30 minutes was for “perks” and doing a good job. When asked if the company was claiming Vesper was overpaid, Linda Bauchman replied in the negative.

Though not claimed by Vesper, the records of the employer indicate that at various times he worked less than and was paid less than the daily minimum of 4 hours. In the “working records”, in each and every case it is, allegedly, at the request of the employee or because of inclement weather.

Vesper provided no records that indicated he went home early and did not recall whether or not he requested to do so on a number of occasions.

Linda Bauchman testified that she did not maintain two separate sets of records. Rather, she testified she maintains all payroll records in one computer database and the “pay records” and “working records” (as the Director’s delegate describes them) are both extracted from the same database, albeit from different fields in the database. Mrs. Bauchman also testified that she believed the “pay records” provided all of the information which the Director’s delegate requested. However, after discussing the issue with the Regional Manager, Employment Standards Branch, she understood that additional

information was required and she submitted the “working records” to the Director’s delegate on January 7, 1998.

I am satisfied that Mrs. Bauchman did maintain all payroll records in one database and that the “pay records” and “working records” are extracted from the same database. Mr. Bauchman told his wife how many hours each employee worked at the end of each day and she recorded that information in the database. She would also make note of any unusual events such as inclement weather or power outages.

Two of Bauchman’s employees (Calvin Bruno; Carl Kuzma) testified that there was a verbal agreement under which they understood that Bauchman would deduct only 30 minutes for breaks each day although lunch breaks would typically last for at least 45 minutes and midmorning breaks would typically last for 30 minutes. Neither witness could recall attending a meeting at which these arrangements were discussed with or voted on by Bauchman’s employees. The witnesses recalled clearly that there were several occasions during their employment when “the entire crew” (including Vesper) finished work early due to poor weather conditions or due to power outages.

Mrs. Bauchman confirmed in her testimony that there was not a written agreement setting out the basis on which paid breaks would compensate for statutory holiday pay. However, she testified, “...there were discussions with the crew and everyone knew the system.”

Mr. Vesper’s testimony confirmed that his typical workday began at 7:30 a.m. and ended at 4:00 p.m. during which the morning break would last up to 30 minutes and the lunch break would last for approximately 45 minutes. On such days he was paid 8 hours wages (that is, only 30 minutes were deducted for breaks). He also confirmed that he could recall several occasions on which he finished work early due to weather conditions, power outages, court appearances and the birth of his son (on March 7, 1997).

ANALYSIS

Minimum Daily Hours

The Director’s delegate made the following finding and gave the following reasons for determining that Mr. Vesper was entitled to additional wages under Section 34 of the *Act - Minimum Daily Hours*.

A review of the **pay records** of the employer does not indicate a suspension of work for a reason completely beyond the employer’s control. There are 11 days in dispute. It is difficult to accept that the weather was inclement on April 26, May 16, Sept. 4, 1996 and Feb. 28, Mar. 1&7, 1997. Perhaps on the other 5 days it was but no evidence has been provided by the employer. If Vesper worked less than 4 hours because he was permitted to leave work **early**, his doing so was not “beyond the control of the employer”.

I disagree with the findings made on this point by the Director's delegate for three reasons. First, the "work records" which were submitted to him on January 7, 1998 (i.e. before he issued the Determination) provide a clear explanation of every occasion on which the number of hours worked by Mr. Vesper in a day amounted to 4 hours or less. On each occasion the explanation given is either poor weather or a power outage, except for March 7, 1998 where the notation reads: "Clint off early re: birth child no. 2". Second, the Director's delegate gives no reasons for concluding that it was difficult to accept that the weather was inclement on April 26, May 16, September 4, 1996 and February 28, March 1 and March 7, 1997". Third, Mr. Vesper's submission to the Tribunal acknowledges that he left work early to attend his son's birth on March 7, 1997. Also, Mr. Vesper did not refute the oral testimony of Carl Kuzma and Calvin Bruno that he left work early on several other occasions to attend to personal affairs or court appearances in addition to those occasions on which the "entire crew" worked less than 4 hours due to poor weather conditions or power outages.

For all these reasons, in my view, Bauchman is not required to pay Vesper a minimum of 4 hours at his regular wage on 10 of the 11 dates in question because "...the work was suspended for a reason completely beyond the employer's control" (see: Section 34(2)(a) of the *Act*) and Vesper left early voluntarily on March 7, 1997.

Statutory Holiday Pay

The Director's delegate determined that Mr. Vesper is entitled to Statutory Holiday Pay because there are no provisions in the *Act* or *Regulation* which permit the payment of Statutory Holiday Pay on each paycheque or to include it in the regular rate of pay for hours worked.

Part 5 of the *Act* requires an employer to pay statutory holiday pay to an employee who is given a day off on a statutory holiday and the requirements where an employee is required to work on a statutory holiday. I agree with the Director's delegate that there is no provision in the *Act* or *Regulation* concerning Statutory Holiday Pay which is similar to the provision in Section 58(2)(b), which allows an employer to pay Vacation Pay on each scheduled payday.

When I review all of the evidence I am unable to find, on the balance of probabilities, that there was agreement between Bauchman and Vesper whereby they agreed that he would receive paid breaks in return for statutory holiday pay. However, even if the evidence established that such an agreement existed, it would be unenforceable, in my view. I hold that view because Section 4 of the *Act* states:

Section 4, Requirements of this Act cannot be waived

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.*

Sections 43, 49, 61 and 69 of the *Act* deal only with the minimum standards for employees who are covered by a collective agreement and, therefore, are not relevant to the facts of this appeal.

For all of these reasons I find that the Director's delegate did not err in calculating Mr. Vesper's entitlement to statutory Holiday Pay under the *Act*.

Overtime Wages

The Director's delegate explains, at page 3 of the Determination, that when he compared Bauchman's "pay records" with Vesper's personal calendar he found that both were "identical". He also notes that:

Vesper indicated his hours had been reduced by 30 minutes each day for a lunch break. Therefore, it seems reasonable to read into the above statement that the "pay records" had been reduced by 30 minutes each day.

The Director's delegate goes on to provide, in detail, his reasons for finding that, on the balance of probabilities, the "pay records" should be preferred over the "working records" as a basis for calculating Mr. Vesper's entitlement to wages (including overtime wages). In summary, his reasons are as follows:

- A calculation based on "pay records" was sent to Bauchman on November 28, 1997.
- Linda Bauchman telephoned the Director's delegate on December 1, 1997 to advise him of the need to make corrections to the calculations by deducting 15 minutes from the hours worked on each day.
- A revised calculation was sent to Bauchman on December 9, 1997 along with a demand to deliver the "working records" to the Director's delegate.
- Following a telephone conversation with the Regional Manger, the "working records" were delivered to the Director's delegate on January 7, 1998 and reduced the hours worked each day by 45 minutes compared to the "pay records".

The Director's delegate concludes his reasons by noting:

If the "working records" had been available during the conversation of December 1, 1997 it would not have been necessary to ask for an extension

to produce the records. Nor would it have been necessary to ask (the Regional Manager) what should be included in the records.

As noted earlier, I accept Mrs. Bauchman's evidence that she maintained only one payroll database in her computer and for that reason, I also accept that the "working records" and the "pay records" are nothing more than two different reports which were generated from the same database. Thus, any delay in delivering the "working records" report to the Director's delegate can be attributed to:

- (i) her initial uncertainty about what information was required;
- (ii) the demands placed on her time immediately prior to the Christmas period;
- (iii) her father's surgery; and
- (iv) the business' financial year-end coinciding with the end of the calendar year.

However, in my opinion, the issue which must be decided in determining Mr. Vesper's entitlement to overtime wages is the number of hours that he actually worked on any given day or in any given week. I say that because an employee's entitlement to overtime wages is set out in Section 40 of the *Act*, which requires an employer to pay overtime wages to an employee who **works** over 8 hours a day or over 40 hours in a week. The question to be answered, therefore, is how many hours did Mr. Vesper work? Break time (whether paid or unpaid) is not work time and should not be included in calculating entitlement to overtime wages.

The evidence of both Mr. Bruno and Mr. Kuzma was clear: morning breaks lasted approximately 30 minutes and lunch breaks typically lasted for 45 minutes. Mr. Vesper did not refute that evidence and, in cross examination, confirmed the evidence given by Bruno and Kuzma.

For all of these reasons I find that the Director's delegate erred in concluding that the "pay records" should be preferred as a basis for calculating entitlement to overtime wages.

Vacation Pay

Section 58(1)(a) of the *Act* requires an employer to pay "...at least 4% of the employee's total wages..." as vacation pay. In the Calculation Schedule which is attached to the Determination, the total amount of wages earned (\$37,119.28) includes statutory holiday pay and various adjustments to reflect a minimum of 4 hours pay on 11 specific dates. These calculations, and the resultant calculation of 4% vacation pay, must be adjusted to reflect the findings which I have made above.

ORDER

I order, under Section 115 of the *Act*, that the Determination be referred back to the Director's delegate to recalculate Mr. Vesper's entitlement to wages in accordance with the findings of fact and analysis of the *Act* which are set out above.

Geoffrey Crampton
Chair
Employment Standards Tribunal