

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 -

Herbert Schutt and Judly Schutt Operating ABCO Building Maintenance
("ABCO")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Niki Buchan

FILE NO.: 97/110

DATE OF HEARING: June 24, 1997

DATE OF DECISION: June 30, 1997

DECISION

APPEARANCES

Herbert Schutt	Appellant
Judy Schutt	Appellant
William R.. Southward	Counsel for Appellant
Cory Kruger	for Himself
Shelia Scott	Witness
Murial Bartleeman	Witness
Dave Cahoon	Witness
John Bennett	Witness
John Paul McKinnon	Witness

OVERVIEW

This is an appeal brought by Herbert Schutt (“Schutt”) on behalf of Herbert Schutt and Judy Schutt Operating ABCO Building Maintenance (“ABCO”) pursuant to S. 112 of the *Employment Standards Act* (the “Act”) of Determination dated January 29, 1997 issued by the delegate of the Director of Employment Standards (the “Director”). The Determination finds that ABCO has not contravened Section 63(1) of the *Act* therefore Cory Kruger (“Kruger”) is not entitled to compensation for length of service. The Director did find that ABCO contravened Sections 31(1), 31(2), & 40(1) of the *Act* and ordered ABCO to pay \$ 5,436.11 to Cory Kruger (“Kruger”) for the additional hours that he worked and/or was required to be available for work, plus vacation pay and interest on that amount. The Director also ordered ABCO to cease contravening these sections of the *Act* and comply with the requirements of the *Act*.

This appeal involves only the allegations by Kruger that he worked up to 10 hours per day and was paid for 8 hours. He claims that his agreement with Schutt was that he would claim 8 hours and he would receive days off with pay, once a month for the additional hours.

The appellant denies there was such an agreement. He disputes claims that Kruger worked more than 8 hours per shift. He contends that he instructed Kruger to take 2 hour breaks during his 10 hour shifts the same as other employees. The scheduling was at Kruger’s discretion. He was paid for a 1/2 hour lunch break and 2 coffee breaks of 15 minutes per shift. He requests the finding that Kruger is not entitled to payment for the additional hours he worked and/or was required to work, plus vacation pay and interest on that amount be overturned and the amounts cancelled.

ISSUES TO BE DECIDED

1. Whether there was an agreement between Kruger and Schutt that Kruger would claim 8 hours per shift and receive days off with pay once a month for any additional hours he worked or was available for work ?
2. Whether Kruger worked or was required to be available for work in excess of 8 hours per shift ?

FACTS

ABCO has a maintenance contract for janitorial services at the Duncan Mall. The Reasons in the Determination set out that this contract requires a maintenance person be available as follows:

Sunday 10:00 AM to 5:30 PM
Monday, Tuesday, Wednesday & Saturday 8:00 AM to 6:30 PM
Thursday and Friday 8:00 AM to 9:30 PM.

Kruger was hired by ABCO as a janitor in December 1993 to work at the Duncan Mall. He worked in that capacity until his termination in October 1995. He is one of two ABCO employees located at the Duncan Mall. The daily diary submitted by Schutt indicates that Kruger initially worked the following shifts:

Sunday	10:00 AM - 6:00 PM (8 hours)
Mon.	4:00 PM - 12:00 PM (8 hours)
Tues.& Wed.	Off
Thurs.& Fri	4:00 PM - 12:00 PM (8 hours)
Saturday	8:00 AM - 6:00 PM (10 hours)

After mid-February 1995 his schedule changed to the 8:00 AM to 4:00 PM shift on Thursday and Friday.

The other employee of ABCO, John Bennett (“Bennett”), was hired 1 1/2 weeks before Kruger. The daily diary indicates he was initially scheduled the following shifts:

Sunday	Off
Mon.	8:00 AM - 4:00 PM (8 hours)
Tues. & Wed.	8:00 AM - 6:00 PM (10 hours)
Thurs & Fri.	8:00 AM - 4:00 PM (8 hours)
Saturday	Off

After mid-February 1995 his schedule changed to the 4:00 PM - 12:00 PM shift on Thursday and Friday

Throughout the diary there are indications that shifts worked would start or end earlier or later than the schedule above indicates. On occasion, they would start at 8:30 AM, 10:30 AM, or 4:30 PM and end at 3:45 PM, 4:30 PM, 5:30 PM, 6:30 PM or 11:30 PM. On some occasions there is an overlap of approximately 1/2 hour when the two employees were present.

Kruger's records on the file indicate that he from time to time worked one of the following schedules:

Thurs	4:00 PM - 12:00 PM	8:00 AM - 5:30 PM
Fri	4:00 PM - 12:00 PM	8:00 AM - 5:30 PM
Sat	8:00 AM - 6:00 PM	10:00 AM - 6:00 PM
Sun	10:00 AM - 7:00 PM	10:00 AM - 7:00 PM
Mon	4:00 PM - 12:00 PM	4:00 PM - 12:00 PM

On April 30, 1995, the Sunday schedule changed to reflect 6:00 PM as the end of the shift and no claim for overtime is reflected for Sundays after that date.

The payroll records indicate that Kruger was paid for an 8 hour shift that included a 1/2 hour lunch break and 2 coffee breaks of 15 minutes each. Except when he had unpaid time off or did not work a complete shift he was paid for a forty hour week plus vacation pay of 4%. He admits the payroll records are correct.

A 1/2 hour meeting was held by Herbert and Judy Schutt at sometime in 1994 or early 1995 to explain the shifts and time off for the employees of ABCO at the Duncan Mall. No witness could give the exact date of this meeting. The Mall manager and an owner of Co-Val Security Company were present as well as the employees, Kruger and Bennett. The Mall manager and Security representatives were present in order that all concerned would be aware of the shifts and procedures for taking breaks. Schutt explained that employees working a 10 hour shift were to take 2 hour unpaid breaks during the shift. The timing of the breaks was at the discretion of the employee. They were not required to remain in the Mall or be available for work during these 2 hours. As well, they were to be paid for a 1/2 hour lunch break and 2 coffee breaks of 15 minutes. Dave Cahoon, the Security person, agreed to mark spills that occurred while employees were on their break. He did this as a favor to Schutt but did not instruct his staff to do the same. At the time he was working a 7 day week. Dave Cahoon, Bennett, Herbert and Judy Schutt all agree that everyone understood these shifts and the procedure for taking unpaid breaks. Kruger agreed that this meeting took place and did not contest the evidence on what occurred at the meeting. At this meeting, Kruger did not complain that he did not have time to take the 2 hour breaks nor did he request any overtime payment.

Schutt attended at the Mall approximately every other day to observe employees and had other family members report to him on other days.

Bennett did not have an agreement to take time off in lieu of overtime. He took 2 hour breaks during his 10 hour shifts as well as his lunch and coffee breaks. He always had his lunch break before 5 hours into the shift.

Shelia Scott, who worked at Super Store in 1994 and 1995 frequently met Kruger for coffee breaks at the Ivy Room Restaurant in the Duncan Mall. Murial Bartleman, assistant manager of the Mall frequently saw Kruger either in the Ivy Room or McDonalds when she took her breaks. On occasions, usually more than once a week, she would have to go look for Kruger to clean spills. He was often talking to the greeter at Wal-Mart.

Bennett and Kruger had arrangements with Orange Julius in the Mall to wash their floors in exchange for free coffee. Kruger also had an arrangement with the Ivy Room Restaurant: he washed the restaurant floors in exchange for free meals.

Kruger took some breaks off the Mall property during his shifts. He was seen at the Dog House Restaurant, walking along the railroad tracks with friends, doing his laundry across the highway and having lengthy periods talking to the greeter at Superstore.

Kruger took unpaid vacation time at Christmas Season in 1994. At that time he did not request banked overtime pay which he now claims he is owed. He refused to take vacation time in 1995 because it would be unpaid time off. His vacation pay was paid at 4% each pay period. There is no company record indicating that Kruger had banked overtime or that he received any overtime payment or days off in lieu of overtime pay.

ABCO pays overtime in situations when an employee must stay late for an emergency or to clear snow. Two employees received overtime pay or time off in lieu of pay in such situations. This was an unusual occurrence.

ANALYSIS

The appellant argues that the documentary and oral evidence indicate that there is no agreement between Kruger and Schutt that Kruger would claim 8 hours per shift and receive days off with pay once a month for any additional hours he worked or was available for work. If there had been an agreement there would be a record of banked overtime and he would have requested time off before his termination. At Christmas 1994, one year after his employment began he took unpaid time off instead of requesting any banked overtime he would have had with an agreement in place. Bennett, who was hired shortly before Kruger, did not have an agreement to bank overtime except during the period he worked extra shifts while Kruger was away during Christmas 1994 or in an emergency situation. There is no evidence that ABCO had a policy for banking overtime other than in an emergency situation. I find that there was no agreement between Schutt and Kruger.

The second issue is whether Kruger worked or was required to be available for work in excess of 8 hours per shift. Certainly the evidence indicates that ABCO employees had some 10 hour shifts and were paid for 8 hours. Clearly they were given the responsibility

to take 2 hour breaks during the 10 hour shifts as well as lunch and coffee breaks. It is also clear that they were not required to be available to work or remain in the Mall during the 2 hour breaks.

The evidence reveals that Kruger did take breaks during his shifts for lunch and coffee. Witnesses also saw him taking breaks off the Mall property, doing his laundry, walking with friends, in a local restaurant and in lengthy discussions with the greeter at Superstore.

When asked to explain why he did not take time off for banked overtime if he had it, he responded that he did not have it but that he argued every day that he should be paid for 2 hours overtime. He claims that he refused to work any more overtime in April of 1995 and had his hours cut back. The only evidence of this is that his records show his Sunday shift reduced by one hour to end at 6:00 PM and there are no claims for overtime on a Sunday after that date. The ABCO records do not indicate that he was ever scheduled to work beyond 6:00 PM on a Sunday.

His claim is inconsistent with the evidence from witnesses about what took place at the meeting. At that time he made no complaint about shifts or lack of overtime payment. It is also inconsistent with evidence from Judy Schutt that he never complained about overtime or lack of overtime payment until after his termination.

Kruger admits that he took time off to do his laundry and to work for other merchants in the mall and he does not contest that he took lunch and coffee breaks. I am satisfied he was aware of the 2 hour break policy and that he was not required to be available to work in excess of 8 hours per shift. Nothing in the "Act" precludes an employer from instructing an employee to take breaks that split his shift. Section 33 only requires that a split shift must be completed within 12 hours of starting work. Since ABCO did not require him to be available to work and specifically instructed employees to take breaks he is not entitled to payment for overtime as required by Section 40(1) of the "Act". ABCO has not contravened Section 40(1) of the "Act".

ABCO obviously did not comply with Section 31(1) and (2) of the "Act" in that no notices were posted at the work place. The order that ABCO cease contravening and comply with these sections is confirmed.

ORDER

In summary, I order under Section 115 of the Act, the Determination dated January 29, 1997 be varied as follows.

The order that Herbert and Judy Schutt Operating ABCO Building Maintenance pay Cory Kruger \$5,436.11 for the additional hours which he worked and/or was required to be available for work, plus vacation pay and interest on that amount be cancelled.

**Niki Buchan
Adjudicator
Employment Standards Tribunal**