

**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 -

Robber Stoppers (V.I.) Ltd.  
("Robber Stoppers")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** James Wolfgang  
**FILE NO.:** 1999/245  
**DATE OF HEARING:** July 15, 1999  
**DATE OF DECISION:** August 5, 1999

**DECISION**

**APPEARANCES**

Scott Valliere                    for Robber Stoppers

**OVERVIEW**

This is an appeal by Robber Stoppers pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) from a Determination dated March 31, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). The Determination found Robber Stoppers had violated Sections 16, 20, 45, and 58 of the *Act* and ordered them to pay Ernest Smith (Smith) \$3,528.48.

Robber Stoppers is appealing on the grounds the information supplied to the delegate was misleading, certain facts were not considered, and the delegate failed to conduct a thorough investigation.

I took evidence from Scott Valliere. Neither Smith or the delegate attended the hearing.

**ISSUES TO BE DECIDED**

Was Smith ever employed by Robber Stoppers as a salesperson and is he owed any money?

**FACTS**

Robber Stoppers employed Smith as an installer for about 2 years until December 31, 1997. He left to take another job as the number of assignments or contracts he was receiving had dropped.

Robber Stoppers is a franchise entry prevention company installing items like window bars and safety doors on buildings. They locally employed 2 sales staff and 2 installers. The installers were paid on a “piece work” basis for each piece of equipment or system they installed.

Smith had worked for the owner of Robber Stoppers as a carpenter and a foreman for seven years in another business. They were quite satisfied with Smith’s performance in that capacity. Work had slowed in the construction industry and the owner of the construction company purchased a franchise for Robber Stoppers. Smith then went to work for the new company as an installer.

When Smith was first hired he attended a training session to learn the installation techniques. He also attended one home show in Vancouver at company expense to learn more about the business and a local home show to promote the product. He was not paid for any of these events. Robber Stoppers claim all employees were encouraged to participate in these shows but were not assigned to attend and were not paid. Smith was the only employee to attend the Vancouver show.

Smith asked Robber Stoppers if he would receive commission on any sales he might make while working as an installer. The company indicated anyone who made a sale or established a lead would be paid. This would include “up-sales” as well as new orders.

Smith claims Robber Stoppers indicated to him he was to be both a salesperson and an installer. Smith reports one of the salespersons had a disagreement with the owner when he was told Smith was a salesperson. He also claims the other salesperson was aware he was a salesperson and an installer. The delegate confirmed he had contacted some of the businesses listed by Smith and they had agreed Smith had visited them as a salesperson.

Robber Stoppers take the position Smith was never employed as a salesperson and that installers were expected to try and sell upgrades or make sales for which they would be paid commission.

According to the Determination, Smith was employed as a salesperson and had started to establish a sales program for the mid-island area in October of 1997. He reviewed the businesses that he believed were the most vulnerable to break-ins and developed a list of companies to contact as potential customers. He then claims he contacted some of these companies over the next 3 months. He claims he worked 120 hours in October, 160 hours in November and 144 hours in December making contacts and trying to sell installations.

Robber Stoppers agree the amount of work being given to Smith as an installer was sharply reduced. As a result, they claim Smith undertook other contract work as a carpenter. When contacted by Robber Stoppers for work, Smith would often indicate he was not available immediately but would do the installation in the next day or so. They also claim some of the companies Smith claims to have contacted as a salesperson were places Robber Stoppers had dispatched Smith for material while working for them as an installer.

Robber Stoppers claim Smith was never told to become a salesperson and he had never indicated to them that he was developing a sales program. There was no discussion between Smith and Robber Stoppers about a sales territory as the existing area was currently divided between the two sales staff.

Robber Stoppers state no sales were made, no estimates given and no leads reported in the three-month period Smith claims to have been working as a salesperson. No time sheets were given to the company or other indication that Smith was working as a salesperson. Robber Stoppers indicate the first time they were aware that Smith was claiming to be doing sales was when the delegate interviewed them about the complaint.

Further they believe all the companies Smith has reported could have been canvassed by a salesperson in one to two weeks.

### **ANALYSIS**

The work available for Smith as an installer was being reduced because the owner began doing more of the installations personally. He could not live on the amount of work assigned by the company. Robber Stoppers claim Smith started doing small contract work for other people while waiting for work at Robber Stoppers to improve. At the same time Smith claims he started to develop a sales plan.

He did not share his ideas with the other sales staff, which might be understandable, but, more importantly; I believe he did not inform his employer of his sales plan. It is difficult to understand why a person would go into a venture such as this without the knowledge or authority of the employer. Robber Stoppers claim they were unaware of Smith's plan until after he had left the company and filed a complaint with Employment Standards. This is a critical element of this case.

Smith claims to have worked on his sales plan for 424 hours over a three-month period without getting any leads, doing any estimates or making any sales. If Smith were acting as a salesperson for this period of time without any success it would seem reasonable that he would be discussing his sales technique with the company to try and improve his record. I am also reasonably sure no company would allow a salesperson to work for three months without showing any sales before trying to establish where the problems were.

It is also very difficult to accept that Smith would wait for over three months and until after he had quit the company to make a claim for wages. One would expect some form of claim would be presented to the company before then, either for wages or expenses.

Smith indicates he developed his list of potential customers from visits and names taken from the telephone directory. We have no evidence as to how many of these places were actually visited by Smith however we are aware of the results.

I accept that Smith was attempting to make sales. The question is whether he was doing so at the direction of Robber Stoppers. We have only hearsay evidence from Smith that the other sales staff were aware Smith was a salesperson for the company.

Without reliable evidence to establish the amount of sales work actually performed and that this was sanctioned by the employer I cannot support the finding of the delegate that Smith was employed by Robber Stoppers as a salesperson and is entitled to be paid minimum wage, statutory holiday pay or vacation pay for the period in dispute.

Smith did indicate he attended a training session and two home shows with the approval of Robber Stoppers but was not paid for that time. When performing any work for the

employer, including attending training sessions and shows, an employee is entitled to be paid.

In his submission to the delegate, Smith included a list of people that he indicates should be subpoenaed to a hearing. It is the responsibility of the complainant to develop his case; including arranging for any witnesses he feels may be beneficial to his position. If any refuse to attend they can be subpoenaed, however the request must come from the complainant to the Tribunal. Smith did not attend the hearing nor did he provide any written submissions.

Complainants who fail to attend these hearings do so at their own peril. The decision is based on the best information available, in this case, the direct evidence of Robber Stoppers and the written submissions of Smith to the delegate.

I find Smith is not entitled to be paid the \$3,528.48 as provided in the Determination, however, Smith is entitled to be paid minimum wage for the time he spent in training and at home shows when attending with the approval and knowledge of Robber Stoppers. The matter is referred back to the Branch for investigation and determination of the proper amount to be paid.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination in this matter, dated March 31, 1999 be referred back to the Director of Employment Standards to determine the amount to be paid to Smith for the time spent in training and at home shows when attending with the approval and knowledge of Robbers Stoppers, including interest under Section 88 of the *Act*.

**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**