EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1996, C.113

- by -

F.S.I. Culvert Inc.
("F.S.I.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator:	Hans Suhr
File No.:	96/770
Dates of Hearing:	May 22, 1997 June 9, 1997
Written Submissions:	June 16, 23, 27 & July 10
Date of Decision:	July 25, 1997

DECISION

APPEARANCES

C.G. Harrison	counsel for F.S.I. Culvert Inc.
W.J. Matheson	on behalf of F.S.I. Culvert Inc.
R.W. Matei	on behalf of F.S.I. Culvert Inc.
M. Jones	on behalf of F.S.I. Culvert Inc.
Trina L. Conibear	on her own behalf
Jan Wright	on behalf of Trina L. Conibear
Adele J. Adamic	counsel for the Director of Employment Standards
Leilla Cuddeback	observer

OVERVIEW

This is an appeal by F.S.I. Culvert Inc. ("F.S.I.") under Section 112 of the *Employment Standards Act* (the *"Act"*), against Determination No. CDET 004880 which was issued by a delegate of the Director of Employment Standards on December 4, 1996. F.S.I. alleges that the delegate of the Director erred in the Determination by concluding that wages were owing to Trina L. Conibear ("Conibear"). The Director's delegate concluded that unpaid wages in the amount of $23,242.26 were owed to Conibear

Both F.S.I. and Conibear requested that a summons be issued to Jan Wright and, despite the lack of appropriate notice (4 business days prior to the hearing), the Tribunal granted this request. At the commencement of the hearing, due to a family medical emergency and with the consent of all parties, Jan Wright was excused from further attendance.

Counsel for F.S.I. raised a preliminary concern with respect to the attendance and role of the Director at this hearing. The position of the Tribunal with respect to this matter was succinctly set forth in adjudicator Thornicroft's decision on *BWI Business World Incorporated* BC EST #D050/96. I concur with that decision.

Conibear did not appeal the Determination, however, a number of submissions were provided prior to the hearing with respect to her concerns.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Is Conibear entitled to the additional wages ?

2. If the answer to No. 1 is Yes, what is the amount of those additional wages ?

FACTS

There was no dispute by the parties *at the time of the hearing* that:

- Conibear was employed by F.S.I. as a Technical Sales Representative from October 1, 1994 to July 2, 1996;
- Conibear signed an "Offer of Employment" letter from F.S.I. dated September 22, 1994 which included, among other provisions, that the *"normal work hours - Mon-Fri-8 am - 5 pm"* and that the *"annual pay rate - $50,400 plus incentive bonus"*
- Monthly attendance records indicate that Conibear worked a total of 4,534.5 hours during her period of employment;
- Conibear was excluded from Part 4 of the *Act* pursuant to Section 34 (1) (l) which provides:

> ***"34. Exclusions from hours of work and overtime requirements***
> *(1) Part 4 of the Act does not apply to any of the following:*
> *(l) a commercial traveler who, while travelling, buys or sells goods that*
> *(i) are selected from samples, catalogues, price lists or other forms of advertising material, and*
> *(ii) are to be delivered from a factory or warehouse"*

ARGUMENTS OF THE PARTIES

The parties submitted a great deal of written material and oral evidence over the 2 days of hearings and subsequent written submissions. I will not attempt to repeat all of it in this decision. I will however, note the material and evidence which, in my view, is relevant to the issue before me.

F.S.I. maintains that:

- the "Offer of Employment" of September 22, 1994 did not constitute a comprehensive contract of employment;
- Conibear received an additional sum of $630.00 per month for a "housing allowance";

- Conibear was well aware that the annual pay rate of $50,400.00 plus incentive bonus was because she was expected to work in excess of 40 hours per week;
- numerous discussions took place between Conibear and F.S.I. management with respect to the long hours necessary to perform the job;
- because Conibear was found to be a "commercial traveler" and therefore excluded from Part 4 of the Act (Hours of Work and Overtime) pursuant to the provisions of Section 34 (1) (l), "that is the end of the matter and the claim is dismissed";
- the calculations performed by the delegate of the Director are in error as those calculations were based on a 40 hour work week when in fact, the hours stated in the "Offer of Employment": are 8 am - 5 pm, Monday to Friday, for a total of 45 hours per week.

Conibear maintains that:

- she did not agree at any time that the amount of $50,400.00 was compensation for all hours worked;
- she raised the issue of compensation for the additional hours worked on a number of occasions during her period of employment;
- she did not put down the 1 hour per day for a lunch period on her attendance sheets even though she often worked during this lunch period;
- when she approached F.S.I. in respect to being compensated for the additional hours worked, she was first advised that as an 'Engineer in Training' she was excluded from the provisions of the *Act*, and, when she pointed out she was not registered as such in B.C.. F.S.I. changed their position and advised her that she was a "commercial traveler" and therefore not entitled to overtime pay;
- the "Accomplishment and Development Review" dated December 13, 1995 clearly notes that "Mark (Jones) her immediate supervisor will discuss the issue of hours worked with the General Manager to arrive at solutions";

Conibear also raised in argument a number of issues which were not raised during the hearing. Conibear now takes issue with the determination that she was a "commercial traveler". I will not consider any issues raised after the conclusion of the evidentiary portion of the hearing as it would be wholly inappropriate to do so.

ANALYSIS

I received evidence from Matheson, Matei, Jones and Conibear. The evidence provided by Matheson, Matei, Jones and Conibear, with the exception of the issue relating to hours of work and compensation, did not differ a great deal.

I must now determine if the "Offer of Employment" dated September 22, 1994 constitutes the entire contract of employment or if, as F.S.I. contends, that offer is simply a portion of the entire contract of employment. If I determine that the offer is only a portion of the contract of employment, I must then decide if any of the terms contained in that offer, such

as the "normal hours of work" provisions, had been changed after September 22, 1994 by agreement between the parties or could be inferred to have been changed by the practice of the parties.

With respect to the additional 500 hours Conibear worked, Jones testified that although Conibear submitted a monthly attendance sheet which indicated her hours of work, the first time he became aware of the "500 hours" was during the evaluation process of December 13, 1995. Jones further testified that he "couldn't give her time off for those hours but I would be discussing it with the General Manager (Matheson) and the Marketing Manager (Matei)". Jones further testified that he "brought them forward to the company and it was decided that she (Conibear) would not be paid extra as she was being paid a sum of money to do a job..." Jones further testified that he was not sure of exactly when this discussion took place but it was sometime after the evaluation form of December 13, 1995 was sent in to head office.

Matheson, Matei and Jones all testified that on numerous occasions they discussed with Conibear the number of hours necessary in order to be effective at her position.

There was no evidence however that Conibear was ever specifically told that her annual salary and incentive bonus was full compensation for all hours worked.

After careful consideration of the evidence provided, I am satisfied that while the "Offer of Employment" dated September 22, 1994 does not constitute the entire contract of employment between F.S.I. and Conibear, there was no "clear and convincing" evidence that the written terms of employment *with respect to the normal hours of work* as set forth in that document, (that is 8 am to 5 pm, Monday to Friday) had been changed.

I therefore conclude that the annual wage rate of $50,400.00 was compensation for the normal hours of work as stated in the "Offer of Employment" dated September 22, 1994.

There is no dispute that Conibear *worked* the hours submitted on the monthly attendance records.

The *Act* defines **'work'** as:

> ***"work** means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."*

'Wages' are defined in the *Act* as:

> ***"wages** includes*
> *(a) salaries, commissions or money, **paid or payable by an employer to an** employee for work, ..."* (emphasis added)

The *Act* does not provide for an employee to work for no wages, in fact, Section 16 of the *Act* provides that:

> ***"Employers required to pay minimum wage***
>
> ***16.*** *An employer must pay an employee at least the minimum wage as prescribed in the regulations."* (emphasis added)

I therefore conclude that Conibear is entitled to be paid for the hours worked in excess of the "normal hours" (45 hours less 5 hours [1 hour lunch per day]) as provided for in the terms of her employment contract at her wage of $50,400.00 per annum.

In order to arrive at the amount of wages to be paid to Conibear, I must determine her "regular wage" in accordance with the definition of **'regular wage'** set forth in the *Act* which states:

> ***"regular wage*** *means*
>
> .....
>
> *(e) if an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work*"

Conibears regular wage is therefore $50,400.00 ÷ (52 x 40) 2,080 = $24.23 per hour.

Conibear was paid for working 3,640 hours during her period of employment while in fact she worked a total of 4,534.5 hours.

I conclude that Conibear is therefore owed wages for the balance of the hours worked, calculated as 4,534.5(total hours worked) - 3.640 (hours paid) = 894.5 x $24.23 = $21,673.74 plus 4% vacation pay of $866.95 for a total of **$22,540.69.**

For all of the above reasons, the appeal by F.S.I. is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 004880 be varied to be in the amount of $22,540.69 together with interest calculated pursuant to Section 88 of the *Act*.

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Hans Suhr
Adjudicator
Employment Standards Tribunal

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