

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C.38

- by -

Robert James Fine China Ltd.
Victoria Limited Editions Ltd.
Associated Corporations Pursuant to Section 95
("Victoria Ltd.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Genevieve Eden

FILE NO.: 96/449

DATE OF HEARING: December 5, 1996

DATE OF DECISION: December 9, 1996

DECISION

APPEARANCES

James Cassels President, Robert James Fine China Ltd. and Victoria Limited Editions

Gerry Omstead on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Robert James Fine China Ltd. and Victoria Limited Editions Ltd., Associated Corporations ("Victoria Ltd.") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination #CDET 003279 issued by the Director of Employment Standards on July 11, 1996. The Director's delegate found that Karen E. Curtis ("Curtis") was owed wages and vacation pay in the amount of \$2,025.54 including interest. The Determination was appealed on July 31, 1996.

A hearing was held in Victoria on December 5, 1996. Prior to the hearing date, Curtis notified the Tribunal that she would not be attending for medical reasons; a letter from her doctor confirmed that attendance at the hearing would not be in her best interest. Curtis was aware that the hearing would proceed in her absence. At the hearing, the Employer was advised that Curtis' written submissions would be considered as evidence.

FACTS

Curtis was employed by Victoria Ltd. as a Sales Clerk from July 19, 1994 to March 15, 1996. She worked in a number of location for the Employer. Victoria Ltd. operated at Fort Street and Tillicum Mall while Robert James Fine China Ltd. operated at the Douglas Street and Broad Street locations.

Curtis filed a complaint under the *Act* on March 15, 1996 alleging unpaid wages including overtime, statutory holiday and vacation pay, and failure to provide lunch breaks. On July 11, 1996, the Director's delegate, Gerry Omstead ("Omstead") issued a Determination which includes the following statements:

*The Company required Mrs. Curtis to keep a record of the daily hours of work and submit those records to the payroll department for payment. The records provided by the company clearly indicate the time the employee started and ended each day and whether or not a break was taken. The records also indicated that on most days Ms. Curtis did **not** receive a break, however a half hour was deducted ... No "hours of work notices" as per Part 4, Section 31 of the Employment Standards Act were provided by the company. The employer's representative, Marguerite, contends that there was a relief provided to Karen Curtis to take her breaks ... Ms. Judy Walters,*

past manager, stated that normally there was only one person scheduled to work at the Tillicum store and that no relief was sent around. Ms. Curtis claims that she was not provided breaks for most of the time she worked for the company. She claimed that when she worked in the Tillicum Mall location she normally worked by herself and no relief was possible.

The Determination concluded that the Employer contravened sections 31(2), 35, 40, 46, 47, 58 and 18(2) of the Act. Wages owing according to the Determination are:

<i>Gross wages owing (July 19, 1994 to March 15, 1996)</i>	= \$31,923.64
<i>Vacation Pay owing (4% x \$31,923.64)</i>	= 1,276.94
<i>Total</i>	= 33,200.58
<i>Less wages paid</i>	= 31,214.94
<i>Owing</i>	= 1,985.64
<i>Interest pursuant to section 88</i>	= 39.90
<i>Total Owing</i>	= \$ 2,025.64

EVIDENCE

While Curtis claims overtime is payable for the time she worked at the Fort Street location, it is not clear from her evidence, nor the Employer's, nor that of Omstead, when she worked at this location. Timesheets for the period July 1994 to September 1994 do not show the location worked, nor the specific start and finish times for each day, rather a total number of hours is merely shown at the bottom of the timesheets.

Curtis' timesheets do reveal that she worked primarily at the Broad Street location from October 1994 to April 1995. The timesheets for this location show a starting time of 9.00 a.m. (except for 2 weeks in December which show a starting time of 9.30 a.m.) and a finishing time of 5.30 p.m. The start time of 9.00 a.m. is consistent with a letter dated September 30, 1994 (which in the absence of evidence to the contrary, I assume also applies to the Broad Street location) from the Employer to Curtis which stated:

Dear Karen: To further clarify you are paid for 8 hours per day. Overtime is paid only when authorized by Judy or by myself. Your hours start at 9:00 -- no-one authorized you to come in at 8:30 a.m. Please sign the attached form and return to head office so this situation will not occur again. Thank you. Jim Cassels.

The attached form stated:

I, Karen Curtis, understand any and all overtime is not authorized and that any overtime I work will be non-compensated and if I work overtime it will be at my request not my employers. Signed: (With reservation) K. Curtis, Date: Oct 5/94

Curtis' letter to the Tribunal dated October 9, 1996 states that while she was ordered to complete her timesheets with hours worked from 9.00 a.m. to 5.30 p.m., she arrived at 8.30 -

8.45 a.m. daily to perform opening activities and was often busy until 6.00 p.m. or later. Specific dates and times of arriving early and leaving later were not submitted in evidence.

The timesheets also show a 30 minute break while working at the Broad Street location; this is recorded under the column "LUNCH TIME" on her timesheets. In her letter to the Tribunal dated October 9, 1996, Curtis confirms that she took the 30 minute breaks given that she worked with another person 60% of the time, but asserts it was rare they could leave the store to take breaks as she was expected to cover the desk and phones if the store was busy. However, specific dates were not submitted in evidence corresponding to a full or alleged partial lunch break.

Curtis' timesheets reveal that she worked primarily at the Tillicum Mall location from May 1995 to March 1996. Curtis' letter of October 9, 1996 to the Tribunal states that this store operates with a single employee except during the January sales week and noone came out regularly to provide lunch or bathroom breaks. The only overlapping shifts with another employee were Wednesday to Friday where another employee arrived at 5.00 pm. For the vast majority of this time, Curtis' timesheets show that she worked from 9.00 a.m. to 5.30 p.m. On no occasion does the time sheet show a break under the column "LUNCH TIME". Thus, Curtis claims she often worked 8 1/2 to 9 hours a day alone and was paid for 8 hours. According to Curtis, when Mr. Paterson who was supposedly designated as a floater, was paged to provide a lunch break, he was usually too busy or never showed up. Curtis submitted that no amendments were ever made to her timesheets during the entire time of her employ.

James Cassels (Cassels), President of Victoria Limited, testified for the company. His evidence was that the store hours at Tillicum were the same as that of the mall, that is, from Monday to Saturday the store opened at 9.30 a.m. Cassels noted that in Curtis' written submission of November 20, 1996 to the Tribunal she acknowledged that he discouraged her from opening early.

Cassels submitted in evidence alarm reports from the Alarmgard Group for the periods June 1, 1995 to August 31, 1995, November 1 to 30, 1995 and January 1 to 15, 1996. These reports show the dates and times an employee of the store disarmed the alarm for the Tillicum store. The employee was identified by code number only. Cassels noted examples where Curtis' timesheet indicates she started at 9.00 a.m. but the alarm report showed that the alarm was disarmed from 6 to 22 minutes later. Specific dates referred to were June 6, July 15 and 22, August 31, November 1, 8, 15, and 18, January 5, 9 and 12 and February 1. Accordingly, Cassels maintained that Curtis got paid for time she didn't even work. Curtis in her written submission maintained she did not intentionally falsify any documents and agreed that there were some differences between the time she started work and her timesheets explaining she sometimes didn't wear a watch to work and there was no timesource at the store.

Cassels also submitted letters from two employees who had worked with Curtis, Jean Aspin and Deanna Aspin. Deanna's letter includes the following statement:

Quite often my shift started at 5:00 pm to 9:00 pm. At those times Karen's shift would end at 5:30 pm. Karen would very often leave as soon as I arrived at 5:00 pm.

Karen would quite often leave the mall store open while she ran to the corner store or elsewhere in the mall.

Jean's letter includes the statement:

I had been employed with Victoria Ltd. Editions during the same period as Karen Curtis and worked various shifts that overlaped (sic) with Karens hrs. On several occasions she would leave before her shift was officially over.

Curtis' version of her leaving times is set out in her letter to the Tribunal dated November 20, 1996 which contains the following statement:

I agree there were times I left at approximately at 5.15 pm when Ms. Aspin(s) arrived at the Tillicum location - BUT - as indicated by Mr. Cassels own statements he deemed these as BREAKS - so how in ANY way could these be deemed as leaving work early when I was entitled to my lunch/restroom time ... Overall though, I did NOT leave until 5.30 pm and thus was at work usually 8 1/2 hours daily.

At the hearing, Cassels denied having made statements that Curtis' early leavings were deemed as breaks. Prior to the hearing, a typewritten document submitted to the Tribunal by Cassels entitled "Karen Curtis" and "Breaks Provided" shows the names of other employees having worked the same days as Curtis; this was submitted as evidence that Curtis did have breaks on these days since another employee was working. On cross-examination at the hearing, Cassels was unable to state what hours the other employees actually worked.

In response to a query on cross exam whether Curtis was provided with relief at the Tillicum store, Cassels responded "On most days, yes, I couldn't answer without bringing forward other people, other days she didn't get a break, it's quite possible". In response to a further query on cross exam about lunch breaks at Tillicum, Cassels responded "I can't say, I wasn't there".

Dan Paterson (Paterson), also gave evidence on behalf of the Employer. Paterson had been hired by the Employer at the beginning of 1995 in a security role. From June to September of 1995, he became a "general floater" covering breaks for employees. In September he was promoted to General Manager and assumed responsibility for scheduling in mid December. Paterson's evidence was that his scheduled hours for Curtis were 9.30 a.m. - 5.30 p.m. However, surveillance tapes (cameras had been installed for security purposes) he viewed over the period January to March 1996 revealed that Curtis left at 5.00 p.m. on an average of once per week. These tapes also showed Curtis walking out of the store and sitting on a mall bench for 10 to 15 minutes at a time over a period of three months according to Paterson. In addition, he asserted that over a two week period during March 1996, the tapes revealed occasions where Curtis and her husband were sitting on the mall bench outside the store for as long as half an hour.

Paterson testified that he "went to Tillicum on a few occasions to make sure she had a break". On cross exam, he asserted that during the period from June to September 1995 while he was a "general floater" or "joe boy" he would always be at Tillicum to relieve for lunch breaks if there was only one person working, and that there were only "two or three days during my time

where someone wouldn't have breaks". However, a facsimile sent to Omstead by Paterson dated June 22, 1996 includes the following statement:

Three days a week two people always overlap so there was never a question if they had opportunity to leave the store if they so desired if we were short staffed she may have on occasion had to eat on the bench. Theses (sic) days Karen always claimed for this time which we paid her for.

There is no reference in Paterson's fax to ever having relieved Curtis for breaks himself; nor is there any reference to the times the breaks were taken notwithstanding Omstead's written request of June 18, 1996 for information on who provided the breaks and the time they were taken.

Paterson stated at the hearing he never looked at Curtis' timesheets "all that much". At another point in cross exam, he stated he didn't question the timesheets because he didn't see them and "had nothing to do with paying or overtime or any financial stuff" and had no involvement.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the Determination is wrong in the calculation of wages owing Curtis.

ARGUMENTS

The Employer argued that the evidence revealed that Curtis falsified her timesheets on many occasions. Further, the letters from other employees confirmed that Curtis left early on several occasions. The timesheets had been proven to be not reliable and therefore, Curtis' evidence could not be accepted as correct and the Determination should be dismissed. Moreover, Curtis probably got paid for more time than she worked.

Omstead submitted that it was unfortunate that witnesses were not in attendance at the hearing as much of the evidence was hearsay with no opportunity for cross examination. He noted that the information provided to the Tribunal had a number of faults and he didn't know how much could be relied upon. There were lots of innuendos and third hand information. He submitted the videos had not been produced as evidence to determine the accuracy of the testimony.

In any event, Omstead argued that the requirements under the *Act* are that employers keep accurate records. Further, the timesheets clearly indicated that Curtis worked in excess of 8 hours per day and 40 hours per week. On occasion, she worked 6 days per week.

Further, the timesheets submitted for the other employees also show that when working at Tillicum, a starting time of 9.00 a.m. was sometimes was reported.

Omstead noted that the timesheets showed that when Curtis worked in different locations, she received a lunch break in the majority of cases, but no break was shown at Tillicum.

Omstead submitted that if I accept the alarm reports as evidence that Curtis started later than reported on her timesheets, the amount owing on the Determination would be incorrect and should be reduced. However, there would still be monies owed.

Further, the employer had an obligation to provide the records requested by the Employment Standards Branch and was given many opportunities to do so, but the alarm reports were submitted only after the Determination was rendered.

In reply, Cassels argued that he never had an opportunity to cross exam Curtis given her non attendance at the hearing.

ANALYSIS

The onus for proving that the Determination is wrong rests with the appellant, Victoria Limited.

Section 28 of the *Act* requires an employer to keep payroll records for each employee to include, inter alia, the hours worked by the employee on each day.

Section 31 of the *Act* provides that:

- (1) An employer must display hours-of-work notices in each workplace in locations where the notices can be read by all employees.*
- (2) An hours-of-work-notice must include*
 - (a) when work starts and ends,*
 - (b) when each shift starts and ends, and*
 - (c) the meal breaks scheduled during the work period*

Section 32 provides that:

- (1) An employer must ensure*
 - (a) that no employee works more than 5 consecutive hours without a meal break, and*
 - (b) that each meal break lasts at least a 1/2 hour.*
- (2) An employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.*

Section 40 sets out the overtime provisions. It would be I submit, contrary to the intent of the *Act* to permit an employer to avoid its statutory requirement to pay overtime wages because it has not kept daily work records.

In the absence of hours of work notices submitted in evidence by the Employer, I find that the Employer contravened section 31 of the *Act*. While the Determination did not deal with a contravention of section 28 of the *Act*, I note that payroll records also were not submitted in evidence; these are distinct from wage statements under section 27 which were provided.

Given a lack of evidence by the Employer to refute Omstead's calculations of wages payable while Curtis appears to have worked at the Fort Street location, that is July 1994 to September 1994, I am unable to conclude that the Determination is wrong with respect to gross wages owing during this period.

With respect to wages owing while at the Broad Street location for the period October 1994 to April 1995, I conclude that the evidence is more supportive that Curtis worked from 9.00 a.m. to 5.30 p.m. and took a 30 minute lunch break. This is consistent with her timesheets and the letter to her of September 30, 1994 stating a start time of 9.00 a.m. Her claim that she arrived at 8.30 - 8.45 daily and often worked until 6.00 p.m. or later, and that it was rare she could leave the store to take breaks, is not supported by specific dates, times, nor records provided by her. Accordingly, I am unable to conclude that the Determination is wrong with respect to gross wages owing during this period.

With respect to wages owing while at the Tillicum store location for the period May 1995 to March 1996, I conclude that, with the exception of late arrivals noted on the alarm report, that Curtis' hours were from 9.00 a.m. to 5.30 p.m. (except where noted otherwise on her timesheets) and that she was not provided with relief for her lunch break.

Curtis' timesheets show that for a vast majority of the time at Tillicum, hours worked from 9.00 a.m. to 5.30 p.m.; no hours of work notice, payroll records or other documents were submitted to the contrary. Further, since Curtis had been submitting timesheets from May 1995 at this location, I would have expected some written correspondence to Curtis, or other notice, that her start time was 9.30 a.m. but there was no evidence of this. Moreover, I note that timesheets submitted by the Employer for other employees show a start time of 9.00 a.m. at Tillicum on several occasions, for example:

J. Aspin: June 13, 14, July 5, 14, 17, 18, 29, 31

J. Detlor: July 12, August 19, 21, 22, 25, 26, 28

S. Teasdale: October 27, 28, November 3, 4, 13, 17, 24, 25, December 1, 2, 16, 17, 21, 23, 24, 26, 27, 29, 30

It is difficult to comprehend a required start time of 9.30 a.m. where three other employees have recorded start times of 9.00 a.m. on so many occasions.

While Cassels noted that Curtis' written submission acknowledged that he discouraged her from "opening" early, opening the store on time would not preclude her having to be there earlier to perform other activities.

For the following reasons, I also accept that Curtis was not relieved for a lunch break as required by the *Act*:

- 1) there was no hours of work notice indicating a scheduled meal break as required by section 31(2)(c) of the *Act*;
- 2) Omstead's Determination states that a past manager, Judy Walters, informed him that normally there was only one person scheduled to work at the Tillicum store and that no relief was sent around;

3) Curtis' timesheets show breaks taken at other locations she worked at but not at Tillicum; 4) the typewritten document entitled "Karen Curtis" and "Breaks Provided" shows names of other employees working the same day as Curtis; this was submitted as evidence that Curtis did have breaks on these days since another employee was working. However, on checking the actual timesheets of these other employees provided by the Employer, I find that the majority of times worked by these employees (65 of 92 reported days), were from 5.00 - 9.00 p.m. Accordingly, by the Employer's own evidence, the breaks provided to Curtis, at least on the majority of days, were at 5.00 pm. Further, according to the records submitted, there were only 7 dates on which Curtis and another employee worked approximately the same hours, that is from 9.00 a.m. to 5.30 pm. Other dates reflect only half a day worked by the other employees, either the morning or afternoon.;

5) Paterson's testimony at the hearing that he would always be at Tillicum to relieve for lunch breaks when required differs from his fax to Omstead prior to the hearing which contains no reference to his ever having relieved Curtis for breaks. Further, there is no reference on the document "Breaks Provided" to breaks having been provided by Paterson;

6) Cassels acknowledged on cross examination in response to a query about lunch breaks that he couldn't say as he wasn't there.

While the evidence reveals that there were times that Curtis left work before her 5.30 p.m. finish time, no dates were provided by the Employer as to when this occurred. Again, the onus is on the Employer to show that the Determination is wrong. Further, I would have expected the Employer to deal with what it now characterizes as leaving early at the time this occurred. Moreover, it is difficult to accept that this could be deemed leaving early since the evidence does not support that lunch breaks were provided to Curtis and the Employer's own evidence as noted in the document "Breaks Provided" is that often she was not relieved until 5.00 p.m.

I do not consider it appropriate to deduct times left before 5.30 p.m. and treat them as a meal break. The *Act* requires that a meal break be provided before more than 5 consecutive hours are worked. Moreover, no dates were provided by the Employer as to when these "early leavings" even occurred. Deductions cannot be made for unspecified dates and times.

I am not persuaded by Paterson's evidence that the videotapes revealed occasions when Curtis took breaks on a mall bench outside of the store. There was no evidence presented of the dates nor the times this occurred. For the Employer to make its case, specifics must be provided. Again, deductions cannot be made for unspecified dates and times.

Given inconsistencies in Paterson's statements before and at the hearing with respect to his providing relief to Curtis for her lunch breaks, I give little, if any, weight to his testimony.

In summary with respect to the time worked at Tillicum, I conclude that Curtis is to be paid from 9.00 a.m. to 5.30 p.m. on the days she reported these hours on her timesheets with no break for lunch; however deductions are to be made where there are differences in start times according to the alarm reports. These deductions are restricted to the dates presented in evidence at the hearing. Again, the onus is on the Employer to provide all the evidence to prove its case up to and including the date of the hearing.

Overtime, holiday and vacation pay are payable as required by the *Act* for the entire period of Curtis' employ.

Finally, I note a calculation error in the worksheets attached to the Determination for gross wages owing for the week of February 11, 1996. The figures add up to \$250.75 rather than \$357.00. Also it is not clear how the figure reported on the Determination for "wages paid" was arrived at. Omstead noted at the hearing that there could be an error in this calculation.

I note that Cassels impressed me as sincere with an intent to treat his employees fairly. He commented at some length on the importance of fairness and justice. It appears he went to some length to accommodate Curtis with respect to some personal difficulties he indicated she was experiencing. The recordkeeping is lacking however, and I must base my decision on the evidence before me.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination #CDET 003279 be varied. I refer this matter back to the Director for calculation of the quantum in accordance with this decision as set out in the Analysis.

Genevieve Eden
Adjudicator
Employment Standards Tribunal