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 -

Lordco Auto Parts Ltd
("Lordco")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/376

DATE OF DECISION: August 27, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Lordco Auto parts Ltd. ("Lordco") of a Determination which was issued on May 22, 1998 by a delegate of the Director of Employment Standards (the "Director"). In the Determination, the Director found that Lordco had contravened subsections 18(1) and 32(2) of the *Act* in respect of the employment of John Banman ("Banman") and ordered Lordco to cease contravening the *Act* and to pay an amount of $1284.15.

Lordco challenges the Determination in several respects. First, it argues Banman was a "commercial traveller" as that term is defined in the *Act* and as such was exempted from the overtime provisions of the *Act*. Second, it says there was no evidence that Lordco required Banman to work during his meal break while working as an outside salesperson. Third, it says there was no evidence that Lordco knew or condoned any overtime work as an outside salesperson, if in fact any overttime was worked. Fourth, it says the delegate was biased and that bias caused the delegate to accept the personal records of Banman over those of the company. Finally, it says the Director erred in failing to give consideration to an agreement reached in August, 1997 between Banman and Lordco regarding outstanding overtime pay.

In the appeal Lordco asks for an oral hearing and a suspension of the Determination pending the hearing. The Tribunal has reviewed the appeal, the supporting material and the material on file and has concluded this appeal may be decided without a hearing.

ISSUE TO BE DECIDED

The issue raised by the appeal is whether Lordco has met the burden of persuading the Tribunal that the Director erred in fact or in law in reaching the conclusions upon which the Determination is based.

FACTS

Most of the relevant facts are found in the following excerpts from the Determination:

> The employer operates an automotive parts store in Cranbrook, B.C. The complainant was employed from March 22, 1997 to September 27, 1997. The complainant was originally hired as a partsperson and then in mid-may, 1997 moved into a sales position.
>
> . . .
>
> . . . The Employee Attendance Record indicated the complainant normally worked 8 hours per day. The complainant stated that the attendance record was not a true reflection of his hours worked because the local manager, Kelly Bennett, completed the attendance record by indicating 8 hours worked each day, whether there were more or less hours actually worked.
>
> On April 8, 1998 a meeting was held with the local manager, Kelly Bennett. Mr. Bennett provided copies of weekly schedules and time sheets. Mr. Bennett stated that during

> March 22, 1997 and May 16, 1997 the complainant was not given a lunch break away from work. Mr. Bennett stated he would buy lunch and when he did this he required employees to stay over lunch and one-half hour was deducted from the employee's daily time.
>
> A calculation was completed from the information provided by the employer which was contained in the weekly schedules, time sheets and Employee Earnings Record. . . .
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> . . .
>
> The employer, Marlyn Coates, states that prior to leaving their employment, the complainant approached them regarding outstanding overtime and they paid him four days as banked time. . . .
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> . . .
>
> . . . The complainant acknowledges he received four days off and was paid for this time, however he indicates it was time that he requested off and does not recall it being considered banked time.

Other facts appear from the material on file.

The hours of work for Banman were scheduled by Lordco. Most particularly, for a period commencing May 17, 1997 and ending August 22, 1997 Lordco's records show Banman's regularly scheduled work day shift was 10 hours, from 8 to 6, and that he was scheduled to work that shift between 4 and 6 days a week during that period. The Director credited Banman with 9.5 hours of work for most of those shifts.

During the May 17 to August 22 period Banman performed what has been referred to as an "outside sales" function, which meant that he travelled throughout the Cranbrook region on behalf of Lordco.

Subsequent to its appeal, Lordco submitted a letter, dated June 17, 1998, over the signature of "Michael A. Silvaggro". In the letter, Mr. Silvaggro writes that Banman was at his home "on many different occasions" he was supposed to be doing sales. The letter does not specify either the dates or the duration of these "many different occasions". In submitting the letter, Lordco makes no submission about how this document should be dealt with by the Tribunal. The entire content of their covering letter says:

> Further to our appeal documents faxed on June 15, 1998, we wish to submit the enclosed letter dated June 17, 1998 from one of Lordco's business customers for consideration in our appeal. This letter was only just received and is in regards to the employee's attendance record.
>
> Please contact the undersigned should you have any questions.

I do not intend to give any weight or effect to this document.

Some delay was experienced during the investigation in acquiring relevant documentation from Lordco because the head office of Lordco was being relocated. A summary of the investigation and the resulting calculation was sent to Lordco on April 14, 1998 and a response was requested, but none was received.

ANALYSIS

The burden in an appeal to the Tribunal is on the appellant, in this case Lordco, to demonstrate on a balance of probabilities that the Determination is wrong in some material respect and ought to be varied or cancelled: see *World Project Management Inc.*, BC EST #D134/97. I shall deal with each of the arguments of Lordco in order.

Section 34 of the Regulations to the *Act* exempts certain persons from Part 4. Paragraph 34(1)(l) exempts a "commercial traveller":

34. (1) Part 4 of the Act does not apply to any of the following:

(l) a commercial traveller 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;

Ther are two aspects to the argument that Part 4 of the *Act* does not apply to Banman. The first is whether Lordco can show the work he performed is consistent with the criteria used to identify a "commercial traveller" who comes within the exemption. The second is to establish that Banman is a "commercial traveller" for the purposes of the *Act*.

The first response to the argument that Part 4 of the *Act* should not apply to Banman is that Lordco has not shown that the work Banman did is consistent with the criteria identified in the Regulation as applying to the "commercial traveller" exemption. In their appeal, Lordco states:

> 2. The Appellant's Cranbrook business is conducted in an 8400 square foot warehouse building.
>
> 3. As an outside salesperson, the employee called on customers throughout the Cranbrook territory each day. The employee received a car allowance and a company gas card. He had absolute control over his daily schedule as an outside sales person and was not required to report to any supervisors at any scheduled times.

Neither of those statements address the criteria listed in the Regulation that might show that Banman should be excluded from Part 4 of the *Act* under the "commercial traveller" exemption. There is no material or information from Lordco to indicate that his job consisted of buying or selling goods selected from some form of advertising material or, if it did, whether the job consisted only of buying or selling as described in the paragraph or if there was also some other significant aspect to the job (there is reference in the material to providing "quotations" and delivering parts). The question being whether the criteria listed are exclusive or inclusive.

On the second aspect of this argument, and even if I were to accept Lordco had established there were elements of the work performed by Banman that fit within the criteria listed in the Regulation, Lordco has not convinced me that Banman can be considered a "commercial traveller" for the purposes of the *Act*. Like most exemptions from all or part of the *Act*, the exemption from Part 4, Hours of Work and Overtime, for a "commercial traveller" will be interpreted and applied narrowly. Such an approach is consistent with the remedial nature of the legislation and with the main purpose of the *Act*, which is to set basic standards of compensation and conditions of employment for employees in the province.

I agree with the position of the Director that one of the factors identifying a "commercial traveller" under the *Act* is the degree of control the employee has over their own hours of work and work schedule. In my opinion, other factors identifying a "commercial traveller" are the transient nature of the location of employment and a corresponding physical isolation from the location of the employer. These factors underscore the rationale for exempting that employee from the hours of work and overtime provisions in the *Act*. The exemption is based on a common sense appreciation that if not exempted from Part 4, a travelling employee could claim wage entitlement, based on the broad definition of "work" in the *Act*, for virtually all waking hours spent "on the road" on behalf of their employer.

I do not accept the statement in the appeal that Banman had "absolute control over his daily schedule". It is clear from the material on file, specifically Lordco's own documents, that Banman's daily schedule was set by Lordco and was the same whether Banman visited customers in Cranbrook or Invermere. Banman worked at and from the warehouse location, reporting to that location at least once a day and occasionally would be required to remain in the warehouse to perform work assigned to him by his supervisor. The exemption is not intended to apply to an employee whose hours of work are scheduled and controlled by their employer and who works at and from a single location on a daily basis.

I conclude Banman is not a "commercial traveller" for the purposes of the *Act*.

The second argument raised by Lordco is that there was no evidence that Banman was required to work through his meal break while he was an outside salesperson. I do not understand why this argument has been raised,, as the Determination clearly indicates a one-half hour meal break each working day was deducted from Banman's scheduled hours of work as an outside salesperson when the overtime calculation was made. There is no basis for this argument.

Next, Lordco argues they neither knew nor condoned any other overtime hours for Banman as an outside salesperson. Again, I do not understand this argument as the overtime calculations made by the Director are based on the hours of work that Lordco scheduled and required Banman to work as an outside salesperson. It was accepted in calculating the overtime entitlement that Banman did not work the full scheduled shift on a few occasions and Lordco had maintained a record of that. However, unless Lordco can show Banman was blatantly defying the instructions of the employer implicit in his work schedule, which was to work from 8 to 6 on the days he was scheduled to do so, and they have not done so, it is obvious Lordco knew he was working overtime and the burden to show they did not have that knowledge or that knowledge should not have been imputed to them has not been met.

The fourth argument raised by Lordco is that the investigating officer was biased against Lordco. In *Michael J. Sept and Leanna Sept, operating Time-Out Enterprizes*, BC EST #D252/98, the Tribunal made the following statement in respect of how it would address allegations of personal bias arising in an appeal:

> Allegations that the judgment of an investigating officer acting on behalf of the Director in an Employment Standards matter have been influenced by personal bias and

> discriminatory conduct is a serious allegation. Such allegations impact significantly on the credibility of the individual and the Branch and in many cases, particularly in areas of the province where the individual is the only representative of the Director, can have serious consequences on both the ability of the individual to perform their job and on their career. Persons making such allegations to the Tribunal in support of an appeal that seeks to set aside a Determination in which the individual was involved must have clear and cogent evidence to support their allegations. This requirement is justified by the potentially serious consequences on the individual that such allegations can have.
> (page 3)

The basis of the allegation by Lordco of the bias of the delegate lies in its assertion that the investigating officer "refused to accept the time records of the employer" and accepted "as fact, the personal time records of the employee". In fact, that statement is incorrect. The investigating officer used Lordco's records to calculate the hours worked by Banman. If the investigating officer gave little or no weight to the time records, it is because those records were inaccurate and acknowledged to be so by Mr. Kelly, the local Manager, during the investigation. As a result, other records provided by Lordco were preferred and accepted. The investigating officer was entitled to do that and that fact does not establish personal bias. As there are no other facts upon which the allegation of bias is founded, Lordco has not met their burden on this point.

Finally, Lordco argues the Determination is wrong because it failed to give effect to what they allege was an agreement between them and Banman to accept four days off with pay for any outstanding overtime pay. It should be noted that until the appeal, Lordco had not taken the position that there was an "agreement" to give Banman four banked days for outstanding overtime worked, only that the payment of banked time should cover any overtime entitlement. This point was addressed in the Determination:

> The employer, Marlyn Coates, states that prior to leaving their employment, the complainant approached them regarding outstanding overtime and they paid him four days pay as banked time. The employer believes this payment should cover any overtime that was earned by the complainant.

The four days in question were included in the calculation as wages paid by Lordco.

As indicated above, Lordco has a burden in this appeal to show, on a balance of probabilities, the Determination is wrong in some material respect. If Lordco now alleges there was an agreement which was not given effect in the Determination and by which Banman gave up any claim he had to minimum statutory entitlement to overtime wages, that burden would require them to establish both the agreement and that the agreement has the effect claimed. It is appropriate to place that burden on Lordco as they say the consequence of the agreement is that Banman abandoned his minimum statutory entitlement to overtime wages. There is nothing in either the substance of the appeal, or in the documents supporting the appeal, from which I can conclude that burden has been met.

ORDER

The appeal is dismissed. Pursuant to Section 115 of the *Act*, I order the Determination dated May 22, 1998 be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal