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 -

Nove-Isle Foods Ltd.
("Nove-Isle")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Paul Love
FILE NO.:	98/351
DATES OF HEARING:	August 26, 1998 & September 10, 1998
DATE OF DECISION:	September 21, 1998

Appearances:

Peter Ramsey, Esq. for Nove-Isle Foods Inc.
Phillip Dockerill, Esq. for Davis Chevrier,
Leanne Halliday and Jennifer Bjarnason
Ian McNeil, for the Director of Employment Standards

DECISION

OVERVIEW

This is an appeal by Nove-Isle of a Director's Determination which found the employer liable to pay an extra ½ hour for all shifts worked by the employees, as they were required to be available during their meal break. On the whole the evidence did not support a finding of a requirement by the employer to be available. It is clear that the employees did remain at the workplace because of a food benefit offered, and because there was no attractive place proximate to the work place for them to spend their breaks. Employees did help other fellow employees during their break, but this was not at the direction of the employer.

ISSUES TO BE DECIDED

Did the employer require the employees to work during their meal break?

Was an interrupted break a ½ hour meal break within the meaning of the *Act*?

FACTS

The employer carries on the business of operating a number of Subway franchises in the Nanaimo area. Davis Chevrier, Leanne Halliday and Jennifer Bjarnason were all employees ("employees") who worked creating sandwiches, primarily at the Woodgrove location ("store"). In the Determination, the Director's delegate held

that the employees were required by the employer to be available for work during their ½ hour meal break. After reviewing the work schedules provided by the employer, the Director's delegate concluded that the sum of $3,299.18 was owing to the employees.

At this hearing the following witnesses testified on behalf of the employer: Noreen Fitzpatrick (owner of Nove-Isle), Camille Blake (Woodgrove location manager), Todd McDonald (son of Ms. Fitzpatrick), Emily Wright (employee) and Leonard Thompson (area manager). On behalf of the employees the complainants Leanne Halliday, Davis Chevrier and Jennifer Bjarnason gave evidence as well as Mark Merrick. While the Director's delegate was present and participated during the course of the hearing he elected to give no evidence. He was not required by any of the parties to give evidence.

The salient portion of the Determination is stated eloquently as follows:

> Although the Employer insists that the Manageress, Camille Blake never told them that they were not allowed to leave the restaurant, I believe she told them indirectly or implied that they were not allowed to leave. She has acknowledged telling the staff that she 'preferred' they not leave during their break. A statement like that coming from a Manageress conveys a clear message to the employees that they were expected to stay in the restaurant. In the absence of any other clear instructions, I feel it is reasonable for the Employees to assume from the words used by Ms. Blake, that they were required to be available for work during their lunch break and thus that break must be counted as time worked by the Employee.

The Woodgrove store is located on the four lane Island highway on the outskirts of north Nanaimo. There are some commercial developments in and about the location of the Woodgrove store. There are only two locations where an employee could reasonably attend during a half hour break other than at the place of business, namely a Payless Gas Station which had a store, and a restaurant known as Ricky's. Leanne Halliday testified that neither of these locations were a place where she would have liked to have spent her break.

The employer offered a food benefit to its employees. If an employee worked longer than a 5 hour shift, this food benefit consisted on a 12 inch sandwich. Employees working for less than a 5 hour shift were entitled to a 6 inch sandwich. The employer did not require that the employee accept the food benefit. The employer required that if an employee took advantage of the food benefit that employee was required to consume the food on the premises.

The purpose for the employer's rule was that the benefit was a personal benefit of the employee, and was not to be shared with family or friends. Secondly, before the rule arose there was some unreasonable abuse of the privilege by employees. It is not alleged by the employer that the employees involved in this appeal were involved in that allegation. Almost all the time the employees took advantage of the food benefit. There were one or two weeks when the food benefit was suspended due to an allegation by the employer that employees had abused the benefit. During the period of suspension the employees remained at the work place during their break.

There was a conflict in the evidence concerning whether the employer required the employees to stay in the premises during a break. The employer had a written policy statement specifying that employees must take a 30 minute break after working for 5 hours. There is no written policy statement that the break was required to be taken in the store or that the employees were confined to the store during their meal break. The employer's evidence as stated by all its witnesses was that the employees were free to do what they wished on the break.

The evidence before the Delegate from Todd McDonald was that he preferred the employees at his franchise to stay in the premises during their break. I note, however, that Tod McDonald is not an owner of Nove-Isle, and had no supervisory authority with regard to these employees. He had a separate Subway franchise - Nove Isle Todd Inc. What his preference was in relation to his own separate franchise is not of importance in this matter. His attendance at the meeting on behalf of his mother may well have lead the officer to an erroneous conclusion with regard to the practice at the locations owned and operated by Nove-Isle.

Camille Blake, the employer's manager at Woodgrove indicated at a meeting with the Director's delegate that she also preferred, from a customer relations view, for the employees to remain at the store. There is no cogent evidence that she communicated this preference to employees at any time during their period of employment, other than by exhorting them to ensure customer service.

The employer did not schedule breaks. The employer said that its business was variable and sometimes difficult to predict when the customers would come to the restaurant. The employer left it to the common sense of the employee as to when to take a break. It was the employer's preference as expressed by a manager, Camille Blake, that the employees take their break in a manner which did not interfere with service of the customers. When an employee did not receive a break, the employers policy, was that the employee was to note "no break" on the schedule. If the employee noted "no break" on the schedule the employee would be paid for an extra one-half hour. All the employees were aware of this policy. The employer paid in these circumstances without question.

There may well have been a breach by the employer of the terms of the *Act* with regard to the scheduling of the breaks. The evidence of the employer is that the employer was not aware that the *Act* requires the employer to schedule breaks. It is clear that the employer took a common sense approach towards breaks. Ms. Camille Blake, a manager at Woodgrove stated that the general guideline on night shift was "that you would hope that they wouldn't take it during the dinner rush, but after 9:00 pm". She stated also that sometimes employees left the store on their meal break.

I find from the evidence before me that on most evenings the employees were able to take a break, and if they were not able to take a break they were paid accordingly. There was no documentary evidence before me of instances where an employee enjoyed a break of less than 30 minutes, and did not extend the break to a full 30 minutes.

I am satisfied on the evidence adduced that the employees remained in the store during their meal break almost all the time while working the evening shift. I am satisfied that there was no setting of an attractive nature, proximate to the store, where the employees would have spent their break in any event if they chose to leave. There was evidence from Ms. Halliday that Ms. Bjarnason lived a short distance away, by automobile, from the store. There was, however, no evidence from Ms. Bjarnason indicating that she would have spent her breaks at home. Further, there was no evidence of any automobile ownership or use by Ms. Bjarnason.

None of the employees ever asked and were refused permission to leave the store. On one occasion it appears that Ms. Bjarnason left the store, without asking for permission,

to get cigarettes. She also had her mother bring her a change of clothes and aspirin for a headache on another occasion.

The employees were all youthful employees. The manager at Woodgrove, Camille Blake, was at least 15 years older than the employees in this case. There was no evidence before me, however, that this was the first job for any of the employees. One of the employees, Ms. Bjarnason, had a sophisticated knowledge of her rights pursuant to the *Act*. After she was disciplined by way of a warning for locking up the store and leaving early, she filed a complaint with the Employment Standards Branch alleging a number of breaches of the *Act*. The remainder of the employees followed suit. Ms. Bjarnason filed her complaint on June 5, 1997. She was disciplined and quit the day before her complaint. Ms. Halliday filed her complaint on June 26, 1997. Mr. Chevrier filed his complaint on October 1, 1997. At is clear that each of Mr. Chevrier and Ms. Halliday have communicated with Ms. Bjarnason about the facts of this case.

I am not satisfied from the evidence before me that the employees were given orders or directions by the employer to get up and serve customers during their meal break. I am satisfied that there were no employer directions that an employee must remain in the work place during the meal break. I am satisfied, however, that the employees did get up and serve customers during their break, if it was busy. Apparently all the claims arise from evening shift work, when there were only two employees on duty at any given time. I am satisfied that there was a preference by the employer that the employees remain in the restaurant during their break.

I have rejected the testimony of Ms. Bjarnason in this case. She testified that there were directions from the employer that she had to assist and could not leave during a meal break. Her testimony is in conflict with that of Leonard Thompson, and Camille Blake. This evidence did not fit in with the evidence of the other employees or the employer. I note that some of Ms. Bjarnason's evidence, in particular the evidence concerning directions given by Camille Blake, was not put to that witness during cross-examination.

When considering the evidence of Ms. Bjarnason, it was my view that she was very much an advocate rather than a disinterested witness. I note that Ms. Bjarnason resigned after she was disciplined. I note that she also went to the extent of writing the franchiser or head office of Subway with her complaints. She used disparaging language when she described the employer. Unfortunately the testimony before me by Ms. Bjarnason represents the "crystallizing and hardening" of positions which arises unfortunately too

often in a litigated context. I am satisfied that it would be dangerous to place any weight on her evidence . In doing, so I have born in mind the case of Faryna v. Chorny, [1952] 2 DLR 354 (B.C.C.A.).

Of the complainants, Ms. Halliday appeared to me to be the most straightforward of the witnesses when she stated that she believed that the employer did wish her to stay during the break, but she cannot remember whether she learned of this policy from the employer, from other employees or by observing the conduct of staff. I did not find the testimony of Mr. Chevrier helpful on the issue of directions given. He appears to be unsure whether he learned of a policy to help out while on breaks from Ms. Halliday or from the employer. Mr. Merrick seemed unsure in his testimony whether the policy of the employer related to not leaving when consuming food or staying during a break. He does recall that "helping" was a matter of common sense when it was busy. He has been in the work force for a number of years, knew to raise concerns with the supervisor and agrees that he raised no concerns with the supervisor about the meal break.

Ms. Emily Wright, a continuing employee of Nove-Isle since 1993, testified that the employer had never told her that she could not leave during her meal break. She usually made her sandwich, ate it, read the paper and relaxed during her break. She indicated that there was no where to "hang out" in the area where the Woodgrove store was located. She would get up and help when it was really busy. Nobody asked her to do it. She felt sorry for people "doing it and going insane". A manager never instructed her to work during a break. In cross examination by Mr. Dockerill she stated that it was an accepted staff custom to help each other out. It was just common sense. She remained at the store because there was no place to go. She "didn't feel imprisoned there". She stated further in cross-examination that "We were not required to be there, it was my choice to stay there.". In cross-examination by Mr. McNeill she stated that she helped on her break. It was nothing anybody was expected [by management] to do. The other employees helped her when they were on a break. The employees extended their breaks. Most of the time there was an interruption to the break.

It is my view that the evidence of Ms. Wright is the evidence to be preferred as to the facts surrounding the issue of requirement to be available. While she is a continuing employee, and I have considered that, she appeared to give her evidence in a candid, straightforward and detached manner.

ANALYSIS

Issue # 1 Requirement to be available

The question in this case is whether the employer required the employees to remain available for work during their break. If the employer did require the employee to be available for work, then the employer is required to pay the employees for the break, whether they got a break or not.

Section 32 of the Act reads as follows:

> (1) An employer must ensure
>
> > (a) that no employee works more than 5 consecutive hours without a meal break
> > (b) that each may break lasts at least ½ 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.

In this case, the burden lies with the employer to demonstrate that there was an error in the Determination such that I ought to vary or cancel the Determination. This process is not a re-hearing of the matter on its merits. If this matter is equally balanced, then I should not disturb the Determination. I have determined, however, on balance that the employer's theory is more cogent than that of the employees' theory. I prefer the evidence tendered by the employer.

In my view a major error is that the Director's delegate did not consider the effect of the "food benefit" on the decision of the employees to remain at the store. I have no way of knowing whether the Director's delegate was informed of this fact by the complainants. The "food benefit" is not mentioned in the Determination.

In this case the Director's delegate did not find that there was any express direction to remain and assist during a meal break , given by the employer to the employees. In spite of the testimony of Ms. Bjarnason, which was presented at this hearing and which I have

rejected, I am not prepared to alter this finding. The question is whether a requirement can be implied from the circumstances.

Employer's Argument:

The employer's counsel argued that there is a distinction to be drawn between a requirement imposed by an employer on an employee to serve customers during a meal break , and a custom by employees to help each other during busy periods of a shift, even it that means a disruption to a meal break. Here the employer says the employees stayed to eat the free food, and because there was nowhere else for them to spend their break. The employer had a written policy to take breaks. The employer was not aware of any dispute or lack of understanding of the break policy by the employees. I consider this an attractive argument which is supported by the evidence.

Employee's Argument:

The argument of counsel for the employees is that actions speak louder than words. The employees never left the workplace during their break. It is argued that they never left because there was a requirement to remain, or one could imply a requirement to remain.

In my view, however, looking at the whole of the evidence, the more probable inference is that the employees stayed to consume the food benefit, or they stayed because there was no other reasonably attractive place close by for them to spend their break, other than in the employer's premises.

The employees further argued that the food benefit could not be substituted for the lack of pay. I agree with that proposition. This case is not, however, about the employer providing the food benefit in lieu of a meal break or requiring the employees to choose between a meal break or a food benefit. An employer is required to pay its staff in currency not food. The employer had a written policy statement that the staff were required to take a ½ hour break after 5 hours work. All the employees were aware of that policy. The food benefit is one explanation as to why the employees never left the store during their break.

The employees further argued that the food benefit rule was an enticement or an inducement to ensure that the employees remained in the store. There was evidence from

Ms. Fitzpatrick that other fast food restaurants require their employees to pay for all or a portion of the food they consumed. I am not satisfied that there was a deliberate intent on the employer's part to offer the benefit to induce the employees to stay at the workplace. There appears to be an element of employer benevolence in the policy, as well as an element of business reality. If an employee shared the food benefit with a friend, arguably there would be a loss of business to the employer, and a lack of accounting or financial control over the amount of food consumed by the employee.

The indirect effect of the policy, when combined with the employees' desire to take advantage of the benefit and the lack of other attractive sites to spend a work break, ensured that the employees chose to remain at the work place during the meal break.

It also apparent that the employees assumed that they were required to stay and assist during their breaks. There does not, however, appear to be any cogent evidence that the employer directed that they stay. There is a written policy to take breaks. The employees never raised this concern with their direct supervisor, Camille Blake. I cannot infer that the employer's actions amount to a requirement. The most probable inference is that the employee's helped each other, hoping to be helped in return.

In my view the Director's delegate erred when he construed the words of Ms. Blake as a requirement. The theory advanced is that an employer has a duty to tell the employees what they can and cannot do on their break. The omission to give a clear instruction to the employees that they could remain or leave the work place during their break amounts to a requirement or employer direction. I am not satisfied that an employer need take this "paternalistic" approach when dealing with employees. I am not satisfied that the employer was aware of any concerns regarding the meal break prior to the filing of the complaint by Ms. Bjarnason.

Conclusion:

I accept that there may be many circumstances, in the absence of an express employer direction, where the employer requires an employee to work and be available during a meal break. Such an example might be where the employer schedules only one employee to be on duty. The employee would be required, if the doors remained open, to be available. Because the employee must be available, the employer must pay the employee. The same inference need not be drawn where two employees are working in the same work place, and where the shift is not uniformly busy.

I have no doubt that the employer benefitted from employees getting up and serving customers during their break. Customer service would be maintained or enhanced. I think, however, the primary intent of the employee would have been to help a co-worker they perceived to need assistance. The employer need only pay for a foregone meal break if the employer has required that service. I am not satisfied that the evidence in this case amounts to such a requirement. The employer's policy was that employees were to take a meal break. The employee could schedule themselves to take a meal break when it was not busy. When it was too busy for a break, and thus there was a requirement to work, the employees were paid. There was no direction that the employees were required to stay in the premises during the break. In particular, I am not prepared to assume that an employer preference amounts to a requirement in the context of the facts of this case.

Issue #2: Is an interrupted break a meal break?

The oral evidence, appeared to be that if an employee rose during the break to assist another employee, on most occasions that employee extended the break to get a full 30 minutes. Mr. McNeill argued that an interrupted break was not a meal break within the meaning of the *Act*. No authority was cited on this point. It appears that any interruptions were as a result of an employee's decision to help, undoubtedly motivated by a desire for reciprocity or equal treatment by fellow employees during similar circumstances. Given that my finding on the first issue disposes of the appeal, it is unnecessary for me to rule on this point.

I note that in this case this investigation has arisen in part due to the unclarity surrounding whether staff could come and go during their break. Having participated in a 2 day hearing, one would hope that the employer would issue a policy or post a sign in the work place to clarify this point for future employees.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated May 14, 1998 be cancelled.

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Paul E. Love
Adjudicator
Employment Standards Tribunal