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 -

Hands On Car Wash Inc.
("Hands On")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/161

DATE OF HEARING: September 13, 2000

DATE OF DECISION: October 12, 2000

DECISION

APPEARANCES:

on behalf of the Appellant	Nick Kozak
for the individual	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Hands On Car Wash ("Hands On") of a Determination which was issued on February 18, 2000 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Hands On had contravened the *Act* in respect of the employment of Jennifer Levesque ("Levesque"), and ordered Hands On to cease contravening and to comply with the *Act* and to pay an amount of $482.96.

ISSUE

The issue in this case is whether Hands On has shown the Determination was wrong in its conclusion that Levesque had been "shorted" hours and that she was entitled to be paid wages, and overtime pay where applicable, when she was required to wait at the work site.

THE FACTS AND ARGUMENT

Hands On is in the business of cleaning motor vehicles in Prince George. Employees clean the interior and exterior of motor vehicles. The business is affected by the weather. Generally speaking, sunny days are busier than rainy days. The spring and summer of 1999 was wetter than normal. The business was open from 8:00 am to 6:00 pm, Monday to Saturday. Frequently, the first customer in a day might not arrive until 9:00 or 9:30 am. If there was no work to do immediately upon their arrival, employees who had reported to the work place at 8:00 am were told to wait at the work site until they were needed.

Levesque was employed as a vehicle cleaner from March 30, 1999 to September 11, 1999, when she terminated her employment. She was paid at the rate of $7.15 an hour. In the context of the issue raised in the appeal, the Determination accepted the following allegations in respect of her claim:

- she was usually told the night before if she was to show up for work the next day, and if she was told to come to work it was usually 8:00 am

- if it was raining, she was told to phone in to work. She would have to stay at home and call the employer every hour, or wait for the employer to call her;

- when she showed up for work she was not allowed to leave, but was told to wait at the work site until things got busy;

- she sometimes waited in the staff room for 3 hours. She did not get paid for this time;

- when she had a break of ½ hour, the employer sometimes would put on her time sheet that she had taken a 1 hour break;

- . . .

- she kept a record of the hours she worked for the employer.

Many of the above allegations were disputed by Hands On. Levesque gave evidence at the appeal that confirmed the above facts. Mr. Kozak, on behalf of Hands On, had the opportunity to cross-examine her on that evidence and on other allegations of fact made by her. Her evidence, and the allegations she made during the investigation were not affected by the cross-examination.

In the Determination, the Director states:

> Based on the evidence provided by the parties, the statements of the witnesses and, on a balance of probabilities, I prefer the position of the complainants on this matter[1].

In this appeal, Hands On alleged the same facts that were, by inference, not accepted during the investigation:

- employees, including Levesque, were told to contact the employer before coming to work to find out if there was work available for them that day;

- some employees would, without being instructed to, come to the car wash and "hang around" to see if they were to work;

- no employees were called to work unless work was available; and

- employees were free to leave the work place if it was slow and return later in the day to see whether there was work available.

The Determination accepted that Levesque was told to report for work at 8:00 am unless it was raining, in which case she was to call in for instructions. The assertion that Levesque was told to call in before coming to work challenges the finding made in the Determination. On balance, Hands On did not establish that the findings of fact made in the Determination were wrong or unjustified. As well, Levesque told me the same thing in her evidence and that evidence was unaffected by cross-examination.

---

[1]The Determination dealt with complaints from several former employees of Hands On, most of which were resolved prior to the hearing on this appeal.

Hands On also made the same argument that was made during the investigation and which was analyzed and addressed in the Determination. Mr Kozak said that the amount of work available for its employees depends on the weather. The spring and summer of 1999 were wetter than normal and, as a result, there was less work than expected. He argued that Hands On should not be responsible to pay Levesque wages if there was no work for her to do when she reported to the work place. He says, he should have been able to place her (and other employees) on "stand-by", without pay, until she was required to clean a vehicle.

ANALYSIS

In the context of challenging the conclusions of the investigating officer about whether Levesque had been "shorted" hours, Mr. Kozak began an analysis of all the material that had been provided by Hands On and Levesque to the investigating officer, indicating other conclusions were possible. The material included Levesque's personal calendar (on which she kept a record of her hours worked), her summary, her payroll records and the employer's records. I asked Mr. Kozak whether the purpose of this analysis was to show there was some error in the conclusion reached by the investigating officer and included in the Determination. He indicated that he wished to point out discrepancies in the material. I allowed him to do so, but also pointed out that, ultimately, his burden was to show that the Determination was wrong.

It is not the role of the Tribunal in an appeal to reassess the information provided by the respective parties or to second guess the decision of the investigating officer to accept the information given by one party over that of another. In *Re Mykonos Taverna operating as the Achillion Restaurant*, BC EST #D576/98, the Tribunal stated that, consistent with the statutory objective of achieving efficient resolution of disputes under the *Act*, the Director has considerable latitude in deciding what information will be received and relied on when reaching a conclusion of fact in the context of an investigation and also noted that:

If that decision is sought to be challenged *on its facts*, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the *Act* (see *Shelley Fitzpatrick operating as Docker's Pub and Grill*, BC EST #D511/98). In this case, the question is whether the appellant has shown the decision is unfair or unreasonable.

At the end of the hearing all I had was Mr. Kozak's opinion about what information the investigating officer should have used from the material that was received. But looking at the areas in which Mr. Kozak indicated that opinion, I can't find the decision to rely on some information over other information was wrong, unfair or unreasonable.

Turning to the conclusion that Levesque was entitled to be paid wages for the time she was required to wait at the work site, I agree with the Determination. There is no dispute that Levesque was an employee and Hands On was her employer. The simple answer to this part of the appeal is that an employee is entitled to be paid wages by her employer, and an employer is required to pay wages to an employee, for work. In Section 1 of the *Act*, work is defined:

> ***"work"*** *means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*
>
> *(2) an employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.*

When Levesque arrived at the work place and was told to "stand-by" at the work place until things got busy, she was being placed "on call" in the usual and ordinary sense of that term. The location, the work place, was designated by the employer and was not her residence. For the purposes of the *Act*, there is no other conclusion than Levesque was, deemed to be "at work" during the time. She was entitled to be paid for that work.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 18, 2000 be confirmed in the amount of $482.96, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal