

An appeal

- by -

Accutemp Refrigeration and Air Conditioning Ltd.
("Accutemp")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: James Wolfgang

FILE No.: 2001/159

DATE OF HEARING: June 27, 2001

DATE OF DECISION: August 14, 2001

DECISION

APPEARANCES

Ian Woods	representing himself
R. F. Mooney	representing Accutemp
Ian McNeill	representing the Director of Employment Standards

OVERVIEW

This is an appeal by Accutemp Refrigeration and Air Conditioning Ltd. (“Accutemp” or the “Employer”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* of a Determination issued by the Director of Employment Standards (the “Director”) dated January 29, 2001. The Determination found Accutemp had contravened Section 34, 35 and 40 of the *Act* and owed John Ian Woods (“Woods”) \$10,406.23 for statutory holidays, annual vacation, minimum wages for commencing work and overtime. A penalty of \$0.00 was imposed for violation of Section 34, 35 and 40 or any other section within Part 4 of the *Act*.

Accutemp claim the amount of the award in the Determination is overstated.

It should be noted the delegate found a considerable difference between the hours of work claimed by Woods to that of the Employer’s payroll records. The Determination relied on the Employer’s records over those of Woods.

In a letter dated March 12, 2001 the delegate indicated the statutory holiday pay in the amount of \$901.95 as outlined in the Determination was in error and had been paid by Accutemp. That matter is no longer before the Tribunal.

The appeal was heard by way of an oral hearing on June 27, 2001. Several witnesses testified under oath representing both parties as follows:

- Murray Holster for Accutemp
- Ian Ellis for Accutemp
- Terry Siklenka for Accutemp
- Murray Gradidge for Woods

An offer to mediate was rejected by the parties.

There was a subsequent submission received July 10, 2001 from Accutemp that was accepted by the Tribunal. Woods responded in a fax received by the Tribunal July 19, 2001. A later attempt by Woods to make a submission was rejected as being out of time.

ISSUE

Does Accutemp owe Woods the amount set out in the Determination for annual vacation pay, payment for minimum hours and overtime?

ARGUMENT

Accutemp is a heating, ventilating and air conditioning company operating on Vancouver Island and the lower mainland. They do HVAC and refrigeration work for commercial customers.

In an attempt to expand their company, Accutemp, purchased businesses in the mid-island area and hired each of the former owners. Woods owned one of the businesses that was purchased. Accutemp employed Woods as a Journeyman Technician from October 6, 1997 until November 18, 1999. As former owner operators, 3 technicians including Woods, in the “up island” area, requested a different set of working conditions than those in place in Victoria, Accutemp’s Head Office. That arrangement allowed for flexibility in hours of work and provided that most hours worked would be paid at the straight time rate.

There was an employment contract between Woods and Accutemp dated September 17, 1997 showing a start date of October 6, 1997. The contract does not make reference to overtime rates or the schedule of hours worked. A subsequent letter from Accutemp dated May 20, 1998 outlined new wage rates and other additional benefits agreed to by Woods and the others. Woods had a starting rate of \$26.23 per hour. He received two increases over the three years of his employment with an end rate of \$27.73 per hour.

According to Accutemp, each technician would send in his daily time sheets to Victoria and be paid based on the hours submitted. Based on the verbal understanding between the up island techs, there was little interest from Accutemp to closely monitor to ensure the hours claimed were actually worked. They relied on the honesty of the employees to claim only for the hours worked.

The technicians were to share “off-hours” call out duties. When there was a limited amount of work available they would be considered “on call” and carried a pager. The technicians were paid only for the actual hours spent on the call at straight time regardless of when the hours were worked to a maximum of eight hours. Overtime was paid if the customer agreed to the premium. The evidence at the hearing was that some customers apparently refused to pay overtime regardless of the time of the emergency.

Accutemp claim they had meetings with the “up island techs”, including Woods, in which they objected to the work schedules being worked by them. They claim they were trying to convince the techs to comply with the *Act* and *Regulation* and were receiving objections as the technicians felt they would lose their client base if they changed the way they serviced the customers.

Accutemp claim one of their major customers in Vancouver complained they were being billed for hours that they felt could not have been worked. This prompted an investigation of the two technicians who were working on the job, Terry Siklenka (“Siklenka”) and Woods. Siklenka admitted that Woods and he, while working together in Vancouver, would claim for working through lunches and for extra hours never worked. In a written submission dated March 16, 2001 and included as Exhibit “D” in Accutemp’s submission to the Tribunal dated June 12, 2001 Siklenka stated:

I have already made a full statement to Mr. Manj of Labour Standards about my activities during trips to the mainland as a technician for Accutemp.

During those trips, both myself and Ian Woods billed the company for hours not worked, including lunch breaks. We often billed for hours when we were at dinner and breakfast.

We organized our hours billed to ensure they were quite similar. Our working hours, while on the mainland, would usually start around 8:00 am and finish at 5:30 pm.

Ian often stated during our time together that he billed for hours not worked as often as he could because no one was able to confirm or deny his hours.

At the hearing Siklenka confirmed Woods told him he did this all of the time. The Employer warned Siklenka for falsely claiming extra hours but took no other action.

When Accutemp confronted Woods with this information they asked him to do the same as Siklenka, admit to making a mistake in claiming hours not worked and the matter would be forgotten. Woods denied falsifying his time sheets and claimed the other witness was lying.

In October 1999 Accutemp had a meeting with Woods insisting he comply with company policy and procedures, particularly in the area of accurate preparation of daily time reports and work orders. This was confirmed in writing on October 25, 1999. Accutemp indicate Woods left work on November 18, 1999 on stress leave. He did not return to work. In a letter dated January 25, 2000, Accutemp requested Woods obtain a letter from his doctor indicating he could return to normal duties. In a letter also dated January 25, 2000, to the EI office in Nanaimo, Accutemp advised they had refused a request from Woods to be laid off, as there was work available for him. Following that Woods filed a complaint with the Employment Standards Branch.

The delegate of the Director requested and received the time sheets and payroll records for Woods from Accutemp. Woods claimed the employer records were incomplete and he felt he should have been paid based on his time sheets. The delegate found a considerable difference between the time sheets and the payroll. He interviewed other employees and, based on that evidence, accepted the employer's records over those of Woods. Using those records, he made the Determination finding Accutemp owed Woods a total of \$10,406.23 including interest.

Accutemp argue Woods falsely reported hours worked while employed as a technician. They claim they have evidence of a number of times Woods had lunch with other employees and did not deduct the time from his time sheets. They also claim Woods inflated the number of daily hours worked. They have gone back and done a very extensive review of Woods' time sheets matching them with other information such as, the time stamped on ferry receipts, check-in and check-out times at motels, the time marked on restaurant receipts and gas station receipts.

The delegate questioned how the Employer could appeal a Determination that had used the Employer records in determining the amount of money owed. The question arose as to whether the submissions that had been made by the Employer since the Determination constituted new evidence that was not given to the delegate.

In a letter dated March 19, 2001 to the Tribunal Accutemp state:

We are a small firm and did not have the people resources to complete a review of our files in the short time allowed for the submission of the appeal form following Mr. Manj's determination.

The documents enclosed are the results of our review and are critical to the appeal process.

There have been several decisions by the Tribunal that deal with the admissibility of evidence from the employer that is provided to the hearing and available at the time of the investigation but not presented to the delegate. Accutemp argues this is not new evidence that was withheld but the result of a careful review of the same material supplied to the delegate to show obvious differences between Woods' time sheets and the profile of working time the Employer had developed. Accutemp claim they now have proof Woods did not or could not have worked all of the time he submitted.

The Tribunal accepted the appeal evidence submitted by Accutemp prior to the hearing. Accutemp further submitted 82 pages of a further review of Woods' time sheets at the hearing on June 27, 2001.

According to Accutemp's audit of their own records they indicate they overpaid Woods by 227.5 straight time hours. That amounts to an overpayment of \$6,147.12 they claim should be deducted from the amount awarded in the Determination. Woods responded to each of those time sheets at the hearing.

Accutemp submitted a number of written submissions from employees who claim they, on occasion, had lunch with Woods and his time sheet on that particular day showed no lunch break. Woods counters that evidence by claiming it would be difficult for a person to remember with whom they had lunch 2 years before in the normal course of working together. He also noted on several time sheets the total elapsed time from the start to the time he finished work would be more than he claimed. While he did not identify lunch on the time sheet the hours claimed would reflect an unpaid lunch break had been taken.

Woods claims he seldom took lunch breaks working straight through. He sometimes stopped at a fast food outlet and ate his lunch on the way to the next job. He claims on the days he did eat lunch, either alone or with other people he deducted that time from his time sheet.

Woods also claimed time and expenses for having meals with customers. He claimed this was a working meal and he was entitled to be paid. Accutemp have refused to pay for the time but were willing to accept the cost of the meals. In a letter dated July 3, 2001 from Gary McLeod, the Area Manager, stated the practice at the time Woods was employed was the cost of business meals would be covered however no time would be paid.

Accutemp objected to Woods' claiming travelling time on the ferry when his receipts showed he had a meal on the ferry. They felt this time should have been deducted from his time sheet as a meal taken.

Accutemp claim all employees in Victoria start work at 8:00 am at 3375 Whittier. This would include Woods while working in Victoria. Woods consistently claimed an early start of 7:30 am.

One of the problems is Woods claimed "home to home" pay when travelling while the company claim they only pay from the time the employee enters the ferry terminal or checks in to the airport etc. However, in a memo from Gary McLeod, Area Manager, sent to all "up island" techs, including Woods, it stated on "Emergency Service Duty: call-outs would be billed from home to home at appropriate rates". (emphasis added) While this was the practice for emergency call-outs Woods appears to assume it also applied to travel away from his headquarters area.

The normal policy of the Branch is not to calculate pay for travelling time to attend a place of work unless the travel is associated with the employee's work such as use of a company vehicle and/or the transportation of tools and material. Woods drove a company vehicle that contained tools and parts that were necessary for the performance of his duties. In this situation the delegate accepted the Employer records showing certain travel time was paid. The Employer now claim those records are flawed and attempted to correct the amount paid for travel to conform to their policy. I do not agree with Employer in this respect. There was no place of business in Nanaimo, such as a shop or office for Woods to report at the beginning and end of each shift. To the best of my knowledge, Woods did not claim travel time from home when he was working in the Nanaimo area. His claims were for times he travelled to Victoria or Vancouver.

There does appear to be some conflict in the hours claimed by Woods as the company has the times Woods checked out of the motel, times he caught the ferry and times on receipts for meals that conflict with the hours Woods claims to have been working. Woods explains that the hours on his time sheet did not always reflect the actual time he worked on a customers system, however he insists he worked before or after the hours indicted and he never charged a customer for time he did not work.

A number of the customers of Accutemp in Vancouver were banks and Woods claimed he would start work on their HVAC systems as early as 07:00 hours. When Accutemp checked with the customers they claimed no one could be working on their system without their knowledge. They had not opened the bank and no one had made arrangements to have access to the premises before normal hours on the days identified. Woods stated the HVAC units he worked on for the banks were located on the roof of single story buildings and were accessible by ladder before the banks opened for business. Therefore it was not necessary to make arrangements with the banks.

A former employee, as a witness for Woods, indicated there were many times he was required to be available in town from 8:00 am until 4:30 pm but was only paid for the actual time billed to the customer. He was also to be on call on alternate weekends and nights. He stated if a call came in after 4:30 pm on a day when he had been available but had no work he would only be paid at straight time until 8 hours had been worked.

Woods submitted other letters to the Tribunal from former employees of Accutemp, including a former service manager, which supported Woods' claim that they were only paid for actual hours worked when on call rather than the 4 hour minimum, working over lunch periods and having their time sheets altered in Victoria. There were time sheets that provided evidence Woods would work less than four hours on callouts during the day and was paid for the actual time worked rather than the four hour minimum for starting work.

At the hearing Accutemp accepted Woods' explanation on a few of the eighty-two time sheets and withdrew their objection to those.

THE FACTS AND ANALYSIS

It would be a simple solution to accept the Determination as it was made using the best evidence available at the time. However, I do not believe that can be done. The review by Accutemp of Woods' time sheets has shown a number of errors in the amount claimed by Woods however I do not accept Accutemp's calculation of the amount to be deducted from the Determination.

There is compelling evidence that Woods claimed for time not worked, however, I accept that Woods did work substantial hours in addition to the regularly scheduled hours, both on the Island and in Vancouver. Accutemp did not challenge the majority of Woods' time sheets, either because they had no evidence to refute them or they were a legitimate record of the hours worked. The difficulty is in determining the extent of the hours legitimately worked. As a result

of the doubt placed on Woods' time sheets they unfortunately are not of great value for that purpose.

Woods claims his time sheets were altered in Victoria and he was not always paid the amount he submitted. His net pay was deposited into his bank account in Nanaimo and he claims he never checked his payroll records until he was terminated. It is difficult to accept someone like Woods who had been in business would not bother to check his pay to ensure it was correct. Accutemp deny altering the time sheets however there are examples of occasions when the hours had been reduced on Woods' time sheets in Victoria due to what Accutemp called "unauthorized unbillable hours" claimed. We do not know if the delegate took into account the fact this would be a violation of the *Act* if Woods was at work and was denied pay because there was no "billable account".

It is also difficult to accept the number of days Woods' claims he worked through lunch without taking any time off. The majority of the occasions were not emergency calls but regular service calls. He was being paid by the hour so there was little benefit to him in not stopping for a break. This may have been a carryover from the time he owned his own business and was motivated to work as much as possible. The *Act* requires every employee to be given a break within 5 hours of starting work. Accutemp should have been aware of the number of time sheets being submitted by Woods with no lunch break indicated.

At the hearing, one of the witnesses for Accutemp claimed he had worked with Woods on several occasions in Vancouver and they had claimed to have started early, worked through lunch and had claimed to have worked extra hours when they had not. They consulted on how they would report the number of hours claimed so as to be consistent. He claimed Woods told him he had always done this when working away from headquarters.

I found that evidence to be creditable and accept he and Woods had claimed for hours not worked when they worked together. The witness admitted he did not know what Woods did when they worked separately.

There were several letters from Accutemp to Woods identifying the fact Woods was not submitting accurate time sheets. With all that controversy it is surprising Accutemp never checked Woods' time sheets more carefully as they have done now.

As one example, Accutemp seeks to reduce the number of hours claimed by Woods on 10/14/97 by 1.5 hours claiming he overcharged the company. Woods had gone to a lumber supply store for material and Accutemp's records show he purchased the material at 15:29. His last job had ended at 2:00 pm and Accutemp claim it did not require 1.5 hours to pick up some lumber. A review of that time sheet shows Woods started work at 9:00 am and ended work at 6 pm, a nine hour period. Woods however is only claiming eight hours pay for that day. It does not indicate if he took a lunch break or not however the total claim was for eight hours. There are a number of time sheets similar to the one above.

While Woods appears to have been guilty of falsely claiming for hours not worked there is also strong evidence to suggest Accutemp was in violation of the *Act* in several areas. They claim they attempted to get the “up-island techs” to follow the *Act* and *Regulation* but, as the Employer, there was an obligation to conform to the *Act*. Reducing wages when there was no account to bill the time is an obvious violation as was the failure to pay minimum pay for reporting for work and failing to pay overtime. By using the Employer’s payroll records legitimate claims for hours worked may have been overlooked by the delegate. Both sides appear to have come here with dirty hands. I am reluctant to order a full review of the case however I would like to be assured the delegate did not disregard legitimate claims for time worked.

I feel the eighty-two time sheets disputed by Accutemp at the hearing should be referred back to the Director for review. Some of these were withdrawn at the hearing and do not require further investigation. Where it is found that adjustments are needed, either upwards or downwards from the Determination amount that should be done. The remainder of the Determination is confirmed if it is established Accutemp’s payroll on which the Determination was based addressed all the violations of the *Act*. The exception is the statutory holiday pay amount that was withdrawn by the Branch.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated January 29, 2001 except as identified above. The investigation of the eighty two time sheets may vary the amount owed for minimum pay, overtime and vacation pay. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal