

An appeal

- by -

Stefan Skjaevestad
(the "Employee")

- 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: Ib S. Petersen

FILE No.: 2001/442

DATE OF HEARING: August 20, 2001

DATE OF DECISION: August 21, 2001

DECISION

APPEARANCES:

Mr. Stefan Skjaevestad	on behalf of himself
Mr. Doug Reid	on behalf of United Automotive Distributors Ltd. ("United" of the "Employer")

OVERVIEW

This matter arises out of an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on May 15, 2001. The Determination concluded that Skjaevestad was not owed anything by the Employer on account of overtime wages.

FACTS AND ANALYSIS

As the appellant, Skjaevestad had the burden to persuade me that the Determination is wrong.

Skjaevestad, who worked for the Employer from June 1997 to April 2000, as a car audio and security installer, filed a complaint with the Employment Standards Branch regarding overtime. He was paid at the rate of \$14.00 per hour plus commission. According to the Determination his complaint consisted of two parts: work on Saturdays and work during lunch breaks. The first part was settled and the Employer agreed that overtime wages were owed for work on Saturdays. The Delegate determined on the balance of probabilities that there was insufficient evidence to support a claim for overtime based on work during lunch breaks. The Employer did keep records of hours worked, including overtime hours. The Delegate noted that neither the Employee nor the Employer kept records of the time worked during breaks and Skjaevestad worked alone, without direct supervision, as a mobile installer. Skjaevestad did not advise the Employer that he regularly worked through meal breaks. As well, it would appear that the Delegate considered the Employer's Company Policy to the effect that overtime required written authorization. In short, the delegate determined that the Employee was not entitled to additional overtime wages.

At the hearing, a number of witnesses testified on behalf of Skjaevestad and United. Skjaevestad, his sister, and two former employees testified on his behalf, and Reid (the owner of the business) and a current employee testified on the Employer's behalf.

Skjaevestad and his witnesses testified that there was a meeting in March 1998 where Phil Mang, the manager of the radio department, asked the installers not to take lunch breaks. Reid was present at this meeting. Skjaevestad said that Mang had told the installers that "you guys can

take lunch all day long, don't stop work." The witnesses also spoke to the work day, which, they said, was from 8:00 a.m. to 4:30 p.m. The witnesses also stated that the Employer "never ensured that they got meal breaks" and that the Employer did not post a schedule of breaks. Skjaevestad said that while he did eat lunch, he did so "on the fly."

In cross examination, Skjaevestad and his witnesses agreed that they never brought the work during meal breaks to the attention of Reid. It was also clear from their cross examination that employees had not been shy in raising matters they felt were important to them with the Employer. Skjaevestad explained that he did not raise the issue with Reid because he was not "fully aware of his rights at the time." However, Skjaevestad admitted in cross examination that he informed the Employer of other overtime hours and that he was paid for these hours. There was a period during which there was a dispute between the Employer and the employees about the appropriate rate for these hours but that was "straightened out." Skjaevestad admitted that he submitted overtime hours to the Employer and was paid for these hours.

Jesse Gillespie, an installer with six years employment with United, also referred to the March 1998 meeting. He denied that employees were told that they could not have lunch breaks.

Reid explained that employees were well paid through their hourly rate, overtime and commission payments. He stated that if he had known that Skjaevestad regularly worked through his lunch break, he would have told him to take his breaks. The Employer did not know and, therefore, had no opportunity to verify if the Employee worked the hours claimed. The Employer stated that it had been placed in an impossible situation to try to do so after two years.

I am of the view that the Employee has not discharged the burden on the appeal and it is dismissed. I largely agree with the Delegate's conclusion that there is insufficient evidence to support the claim for additional overtime. The only evidence supporting the claim for work during breaks is Skjaevestad's testimony and that basically boils down to a bald assertion that he worked through lunch every day. There is no documentary evidence to support the claim. In the circumstances, I find it hard to accept that he did the work, and that he did not claim for that time, if he did the work. Skjaevestad did, in fact, submit overtime records to the Employer and was paid for overtime during his employment. His pay stubs indicate that he was paid for overtime hours. There was little before me to suggest that Skjaevestad and other employees were reluctant to bring such matters to the attention of Reid. I do not find Skjaevestad's explanation that he was not fully aware of his rights credible until he complained to the Employment Standards Branch. The Determination states that his complaint had two components, one of which was the failure to pay for work performed during meal breaks. I also consider, as did the Delegate, that Skjaevestad was aware of the Employer's overtime policy.

On a final note, there is no reference in the Determination to the assertion that the Employer--Phil Mang--in March 1998 instructed installers not to take lunch breaks. In any event, in the circumstances of the Employer actually recording and paying for overtime, and Gillespie's

testimony, in particular, and the preponderance of the evidence before me, I do not accept the evidence that installers were instructed as alleged.

In short, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 15, 2000, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal