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 -

Twin Islands Management Ltd., operating
as Blenz Coffee
("Twin Islands")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator:	Paul E. Love
File No.:	98/350
Date of Decision:	October 6, 1998

DECISION

OVERVIEW

This is an appeal by Twin Islands of a Director's Determination, dated May 14, 1998 ordering that the Twin Islands (the "employer") pay to the employee, Shawn Mabey (the"employee") the sum of $1,478.01 for unpaid overtime pay, vacation pay, and statutory holiday pay. The employer also alleged errors generally with respect to the calculations of the Director's delegate for overtime pay, and other pay matters.

ISSUE TO BE DECIDED

Did the Director's delegate err in her finding of the amounts due and owing for overtime pay and other wage entitlements?

FACTS

The employer carries on the business of operating a Blenz Coffee Shop on West Broadway in Vancouver. Shawn Mabey was an employee, and worked for the employer from September 8, 1995 to September 22, 1996. The employee completed daily time sheets, which were used to calculate the wages owed for each pay period.

The Director's delegate determined on the basis of a review of the records that Mr. Mabey was entitled to unpaid wages for overtime, statutory holiday pay and vacation pay in the amount of $1,360.91, and interest in the amount of $115.16, for a total of $1,476.07.

The employer alleged that a number of calculation errors were made in the Determination. I quote from the Employer's submission:

> (a) Our work week runs from Thursday to Friday with bi-weekly pay periods. When calculated total weekly Hrs. the results are substantially different from the Calendar week calculations applied.
>
> (b) Hrs. worked on Stat. Holiday were paid by adding again ½ the Hrs. worked to the total Hrs. ie 76 Hrs worked, incl. 8 Hrs. on a Stat Holiday would result in 80 Hrs pay.
>
> (c) Errors were made in calculating time & half, see April 55, 96 for example.
>
> (d) The employee took his ½ Hr meal break when working 5 Hrs. plus resulting in 7 ½ Hrs. worked during an 8 Hr. shift. The fact that the employee was paid for 8 Hrs. does not entitle him to claim for time & half.

(e) During his employment the employee never made any claims nor raised the Question of Overtime, until well after he terminated his employment on his own accord. It is my believe that his unsuccessful attempt to colect Workers Compensation was the motivation for this claim.

(f) The Employee like everyone was on an honour system to post their Hrs each day. On many occasions he padded his Hrs. by ½ to 1 Hr. claiming that he was too busy to complete his chores on time. The hourly sales tapes tell a different story. In fact he was in a habit of sitting at a table with friends or his wife and got up only to serve customers.

Due to the fact that it is difficult to find suitable people for the evening closing shift, for safety reasons we preferred males, we tolerated this employees less than satisfactory conduct.

(sic)

The relevant portion of Mr. Mabey response to the employer's submission reads as follows:

1. 30 minute meal breaks were not taken by any employee for shifts under 8 hours in length.

2. During an 8 to 9 hour shift it was extremely rare that one would have an uninterrupted meal or coffee break. A few times while working a closing shift - because I would be working alone - due to how busy it was I wouldn't have time to take a meal break.

3. It was communicated upon employment by the Manager, Tyler Gardner, that because I would have to stay on the premises during breaks, and because they were quite regularly interrupted, breaks were going to be paid for by Twin Islands Management. It was also made clear at that time that while working alone I was to take my breaks when there was a slow period.

It is my finding of fact that the employer required the employee to be available during the meal break.

The Director's delegate prepared a detailed response to each of the employer's allegations. It is not necessary for me to set out the substance of the responses to dispose of this appeal. It should suffice to say that the Delegate's response to the employer's allegation was more detailed than the bare allegation raised by the employer in its written submission.

ANALYSIS

In this appeal, it is incumbent on the employer to show to a balance of probabilities standard that there are errors in the Determination such that I should vary or cancel the Determination. This is

an appeal, not a first instance finding of the facts. In essence the employer's submission amounts to a bare allegation that there was an error or errors in the Determination.

The employer has not demonstrated any error in the calculations, or the effect of any of its statements on the entitlement of the employee. In short, the employer has not demonstrated any proof of the errors it alleges were made in the Determination.

It appears from the evidence in this case, that Mr. Maybe was required to be available for work during his meal break. Under the s. 32(2) of the *Act* the employee is therefore entitled to be paid for the break.

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.

The employer has not demonstrated any error in the Determination on this point.

ORDER

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

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Paul E. Love
Adjudicator
Employment Standards Tribunal