

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 -

Newbrook Cleaning Services Inc.
("Newbrook")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO.: 97/494

DATE OF HEARING: September 23, 1997

DATE OF DECISION: October 6, 1997

DECISION

APPEARANCES:

John James Carter

For Newbrook Cleaning Services Inc

Gerry Omstead

For the Director

OVERVIEW

This is an appeal by Newbrook Cleaning Services Inc. ("Newbrook" or "the employer") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination (File No. 078064) dated June 06, 1997 by the Director of Employment Standards (the "Director").

The Determination found that Newbrook had contravened section 34 of the *Act* (minimum daily hours) by failing to pay an employee, Brit Walker ("Walker"), the minimum four hours per day as required. Newbrook has appealed on the basis that the Director's Delegate failed to take into account that Walker was scheduled on a split shift basis that complied with section 33 and that there was no failure to comply with section 34.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether the split shift formula presented to the Director's Delegate and at the hearing complied with section 33 and whether the employer had complied with section 34 of the *Act*

FACTS

Walker was employed as a cleaner by Newbrook from September 01, 1995 to August 15, 1996. According to the employer's time sheets and payroll records Walker was paid \$24.00 per shift. This was supposed to represent an hourly rate of \$8.00 based on work that might take three hours but almost always was completed in 2 1/2 hours. Walker would receive the \$24.00 whether he worked two hours or three hours but any additional work over three hours would be paid at \$8.00 per hour. John Carter ("Carter"), the president of Newbrook, confirmed at the hearing that Walker's rate was \$8.00 per hour and \$24.00 per shift.

On the face of it the work schedule of 3 hours at \$8.00 per hour per day does not comply with section 34. However, Carter presented a detailed schedule (22 pages) prepared for the Tribunal

showing how it was possible for Walker to have worked 2 1/2 hours on one evening and another 1 1/2 hours the following morning thereby using a "split shift" to comply with section 34.

Carter stated that Walker was usually given a particular worksite to clean. Walker was given the flexibility to either do the work in the evening after 4:30 pm or in the morning before 8:30 am. At weekends Walker could complete the work anytime after 4:30 pm Friday to 8:30 am Monday. Carter stated that this flexibility was for the benefit of the employee.

ANALYSIS

Section 34 of the *Act* requires the employer to pay an employee, except in certain circumstances, for at least 4 hours on any day the employee reports for work. "Day" is defined in the *Act* as a 24 hour period ending at midnight. Section 33 allows for a "split shift" provided that the whole shift is completed within 12 hours.

Carter confirmed at the hearing that Walker was paid \$24.00 per shift but claimed that theoretically Walker could have worked a "split shift" doing part of the work at night and part the next morning. Carter presented a detailed scheme which he claimed showed that the *Act* could have been complied with. However some of the scenarios which had the employee start work at 4:30 pm and finish at 8:30 am the next morning would not comply with section 33. In reality there was absolutely no record kept of what hours the employee worked on any particular day. The employer's records simply confirmed that almost consistently the employee was paid on the basis of \$24.00 per day - a three hour day at eight dollars per hour.

The onus is on the employer to keep accurate records of the hours of work including when the shift starts and ends (section 31(2)). The onus is also on the appellant, in this case also the employer, to satisfy the Tribunal that the Determination is wrong. No matter how I read the hypothetical "split shift" scheme the bottom line is that the employee was paid \$24.00 per shift whenever it was performed. The employer can not come to the Tribunal and claim that hypothetically the *Act* could have been complied with. The onus is on the employer to show that he has complied. I am not satisfied, on the basis of the actual company records and amounts paid to the employee, that the Determination is wrong.

ORDER

I order, under Section 115 of the *Act*, that the Determination is confirmed.



John Orr
Adjudicator