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-

Villa Agencies Inc., Go Transport Ltd., and Advanced Fleet Maintenance Ltd., (Associated Corporations)
(the Employer)

- of a Determination issued by-

The Director of Employment Standards
(the Director)

ADJUDICATOR:	Hugh R. Jamieson
FILE NOS:	1999/274 & 1999/ 275
DATE OF HEARING:	November 18,1999
DATE OF DECISION:	November 30, 1999

DECISION

OVERVIEW

This decision deals with an appeal by the Employer against a Determination issued by the Director on April 16, 1999, wherein it was found that the Employer owed $6,082.07 being wages, statutory holiday pay, vacation wages and compensation for length of service due to Mr. Kenneth Bergall (the Employee). The basis for the appeal is the Employer's contention that the Employee did not work all of the hours claimed and that the Employee was dismissed for cause, i.e., for drinking on the job.

It should be made clear for the record that there are really two appeals in one here that were filed by the Employer against this particular Determination. One was filed under the name of Mr. Mark Maarsman (file 1999/274) and the other in the name of a Ms. Vicki Gill (file 199/275). However, as the grounds for appeal are identical in both documents, they are being dealt with as one.

It should also be mentioned that this appeal is one of four filed by the Employer against four determinations issued on April 16, 1999, affecting different employees. All of these matters were originally scheduled to be heard on October 1, 1999, however, there was no time to deal with this particular appeal on that day and it was set over to be heard on November 18, 1999. The other appeals were heard on October 1, 1999, and dealt with in decision No. BC EST# D435/99.

ISSUES TO BE DECIDED

The issues here are whether the Director's Delegate erred in finding that the Employee worked all of the hours claimed and for which overtime wages were found due and, whether the Employer had just cause for discharging the Employee.

APPEARANCES

Mr. Mark Maarsman, for the Employer (by way of conference call).

Mr. Kenneth Bergall , for himself.

FACTS

The Employer is in the Overload Tractor business, leasing tandem axle tractors along with drivers to large National Carriers as well as to local Cartage Companies. The Employee was employed as a mechanic in the maintenance end of the Employer's operations from January 6, 1997 to January 14, 1997.

The factual basis for the finding that the aforesaid monies are due to the Employee are set out in the Determination under review as follows:

" Berghall began work with Advanced on January 6, 1997. He was paid $18.00 per hour. He maintained a calendar of hours worked and submitted this to his employer for payment. All hours worked were paid at the regular rate of pay. From April 1, 1997 to August 29, 1997 Berghall was paid as a "contractor" with no statutory deductions made. He continued to maintain a record of hours worked. On September 1, 1997 Berghall was again paid as an employee. His hourly rate was increased to $21.00. Berghall's duties did not change while he was considered a contractor. Berghall was returned to employee status because the employer became aware that Berghall would be considered an employee by both the Employment Standards Act and the Employment Insurance Act.

On November 20, 1997 Berghall was told to take time off by his doctor. A record of employment was issued indicating an unknown date of return. Berghall received a letter from his doctor allowing him to return to work dated January 14, 1998. Evidence has been supplied to support the complainants statement that the employer did not allow Berghall to return to work. The last day Berghall received pay was November 21, 1997. Berghall received a Record of Employment indicating there was a shortage of work. He also received a letter of recommendation from his employer dated January 22, 1998.

1. All hours worked were paid at regular rates.
2. The records did not show payment for statutory holidays.
3. The records did not show payment for annual vacation pay.
4. Berghall was laid off due to shortage of work and never returned to work. There is no evidence of payment of compensation for length of service."

In the appeal, the Employer submits that the Determination is based on incorrect information in that there was an agreement with the Employee that $18.00 per hour at straight time would be fair because of a disability suffered by the Employee that prevented him from doing a lot of things that the job required. This disability supposedly came about as a result of a motor cycle accident. The Employer also suggests that the Employee was not honest with his hours of work, claiming overtime but could not be found at work. Moreover, the Employer says that it was later discovered that the Employee had a serious drinking problem and that despite several warnings, he continued to drink on the job, failing to perform his duties due to his constant impairment.

THE HEARING

As indicated, Mr. Mark Maarsman, who is the Sole Director and Officer of two of the Employer's Associated Corporations, participated in the hearing by way of telephone conference. Through this media, he presented the Employer's grounds for appeal.

Evidence was also given on the Employer's behalf by Mr. Kevin Kraft, Dispatcher and Mr. Darren Hourie, Truck Driver. These witnesses did appear in person and their testimony basically went to support the allegations that the Employee exaggerated his hours of work and that he drank at work despite warnings by Mr. Maarsman. In regards to this last topic, Mr. Kraft testified that on his last day

of work, in January 1998, the Employee showed up for work staggering drunk.

The Employee denied the allegations about drinking on the job although he conceded that many of the guys, including Kevin Kraft and Mark Maarsman drank on the premises after work. He also admitted that he may have had a drink when he went to the maintenance shop in January 1998, to pass on some information to his replacement. However, he claims that he was far from being drunk. In any event, he pointed out that his last day of work was in November 1997, when he went on sick leave. He was therefore not working on that particular day in January.

Replying to the suggestion that he did not work all of the overtime claimed, the Employee was adamant that the hours recorded and paid for by the Employer were the actual hours spent on the job. He also explained that his job involved being away from the shop quite a bit on the mobile, picking up parts or attending to break downs. It was therefore impossible for people like Messrs. Kraft or Hourie to know whether he was working or not. In response to questions from me, the Employee did concede however, that the hours recorded on the calendar that had been supplied to the Delegate did not take into account time taken for meals or coffee breaks.

ANALYSIS

Dealing first with the issue of compensation for length of service and the Employer's claim to just cause for discharging the Employee, the starting point is to remind the Employer what was made clear in BC EST # D435/99 i.e., that the Tribunal's role in these appeals is restricted to reviewing the decisions arrived at by the Director's Delegate and to ascertain whether the Delegate erred inconsidering the material that was before her at the time the Determination was issued. New evidence cannot be introduced at the appeal stage of the process - see also *Tri-West Tractor Ltd.*, BC EST# D268/96*; Kaiser Stables Ltd.*, BC EST# D58/97; and *Specialty Motor Cars (1970) Ltd.*, BC EST# D570/98.

In other words, it is too late at the appeal stage of the process to start recanting on things like the reasons for termination of employment officially recorded in the Record of Employment when the Employee's employment ended in January, 1998. If the Employee had been fired for drinking on the job, that should have been recorded at the time. If warnings were indeed given about the consequences of drinking, this should also have been recorded in the Employee's file at the time.

However, the Record of Employment that was issued in January 1998, clearly indicates that the Employee was laid off because of lack of work. Moreover, the letter of recommendation given to the Employee by the Employer at the same time, also confirms lack of work as the reason for his departure. When asked at the hearing why he had issued a Record of Employment showing that the Employee had been laid off rather than discharged for cause, Mr. Maarsman said that he had done this as a favour to the Employee at his request. He said the same about the letter of recommendation he had given to the Employee when his employment was terminated. The Employee of course denied this.

Whether this is true or not, the consequences are the same. The Record of Employment and the letter of recommendation speak for themselves. They have to be accepted as being accurate when they were issued. These are what the Delegate's finding was based on when the Determination was issued and it is too late to go back on those documents now. In the circumstances, the Employer is stuck with them..

Accordingly, the finding of the Delegate that the Employee was laid off for lack of work and therefore entitled to compensation for length of service is upheld.

Turning to the issue of non payment of overtime as required by Section 40 of the *Employment Standards Act, (the Act),* and the Employer's submission that straight time wages were paid to the Employee pursuant to an agreement between them. This of course cannot be accepted. The payment of overtime wages is a basic minimum requirement set by *the Act*, which cannot be contracted out of. Section 4 of *the Act*, specifically deems any agreement to waive such minimum standards to be of no effect.

As for the other issue raised by the Employer as to whether the Employee actually worked the hours claimed, this turns on the same principle as the just cause issue i.e., the documentary evidence speaks for itself.

Starting from the premise that it is an employer's responsibility under *the Act*, to keep payroll records including the number of hours worked each day and also to provide statements of earnings to the Employee each time wages are paid. It goes without saying that these payroll records and the statements of earnings have to be accurate. Once something is recorded in these documents, it is difficult for employers to recant their verasity at a later date.

Against that backdrop, if one looks at the Determination that is under review, it can be seen that the Delegate's finding was based principally on payroll information supplied by the Employer. The payroll records provided to the Delegate show that all hours worked were paid at straight time. The daily hours paid for came from a calendar maintained by the Employee that was accepted by the Employer at the time as being bona fide. These hours correspondingly appear on the statements of earnings issued to the Employee when he received his wages.

In the given circumstances, it is rather late in the day for the Employer to now say that these hours that appear in the records and pay statements provided to the Delegate and which were paid for back in 1997, were not the actual hours worked. Even if the Employer could prove that the hours were exaggerated, which certainly was not accomplished by the testimony of Messrs. Kraft and Hourie, the aforesaid policy of theTribunal of not allowing parties to rely on new evidence at an appeal, prevents me from placing any weight on evidence of this nature. The proper time for the Employer to have provided this proof was to the Delegate during the investigation.

Taking all of the foregoing into consideration, the only aspect of the Determination that can be varied is the calculation of overtime wages by the Delegate in that there was no allowance made for rest periods for meals or coffee breaks. In this respect, the Employee agreed at the hearing that one (1) hour per day would fairly represent the time taken for this type of rest period. Accordingly, the calculation of overtime wages owing must be redone to reflect this one (1) hour per day during which the Employee did not work.

For the sake of clarity, this hour will be deducted firstly from any hours that were calculated at double time on any given day. If there was no double time hours worked, the hour will then come off of the time and a half overtime calculations. On any day where the Employee worked eight (8) hours or less, there will be no deduction.

ORDER

Pursuant to Section 115 of *the Act*, the Determination in question is hereby referred back to the Director for recalculation of the amount of overtime wages found due based on the foregoing formula. The Determination is confirmed in all other respects.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal