

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-

McIver's Appliance Sales & Service Ltd.

("McIver's" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/211

DATES OF HEARING: September 4th, October 20th
and October 21st, 1998

DATE OF DECISION: December 4th, 1998

DECISION

APPEARANCES

Larry Page	for McIver’s Appliance Sales & Service Ltd.
Ron Dickson	for Slavomir Zajaczkowski
Firoz Lalji	on his own behalf
Majid Haghshenas	on his own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by McIver’s Appliance Sales & Service Ltd. (“McIver’s” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 13th, 1998 under file number 004238 (the “Determination”).

The Director’s delegate determined that McIver’s owed the following unpaid wages (including interest) to three former employees (the “complainant employees”):

<u>Former Employee</u>	<u>Wage Entitlement</u>
Firoz Lalji	\$ 2,583.98
Slavomir Zajaczkowski	\$49,027.82
Majid Haghshenas	<u>\$30,343.67</u>
TOTAL	<u>\$81,955.47</u>

The appeal was heard at the Tribunal’s offices in Vancouver over three hearing days. On behalf of the employer, I heard testimony from Mr. Jack McIver, the employer’s president, director and principal shareholder, his daughter and officer manager, Ms. Karen Andrews, and Mr. McIver’s son and part-time employee Derek McIver. Each of the three complainant employees testified on his own behalf, Mr. Haghshenas testifying through a certified interpreter. The Director was not represented at the appeal hearing.

ISSUES TO BE DECIDED

In essence, employer's appeal raises two broad concerns with respect to the Determination. The first relates to the delegate's findings of fact and, in particular, the delegate's finding as to the number of hours actually worked by the complainant employees. The second concern relates to the formula utilized by the delegate to calculate the employees' respective "regular wages".

In its appeal documents, the employer also raised an issue with respect to section 77 of the *Act*--the employer's right to be given a reasonable opportunity to respond to the complaints during the delegate's investigation--however, the employer did not pursue this issue at the appeal hearing. Indeed, the employer, as well as the employees, all specifically asked, in the event I found the Determination to be in error, that I not refer the matter back to the Director but rather issue a final order with respect to the employees' various wage claims.

FACTS

The Employer's Evidence

McIver's sells, installs and services major home appliances such as washers, dryers, dishwashers, fridges and stoves. The company has been in business for over 30 years. At its current location there is a retail "showroom" as well as a repair and parts area. Some employees work in sales, others in the shop doing repairs and still others who primarily are "on the road" doing deliveries and service calls. Jack McIver is the driving force behind the business and he, even today, is involved in all facets of the business. His evidence with respect to each of the three complainants was as follows:

Majid Haghshenas - He was hired in early October 1995 at a monthly salary of \$2,000; his working hours were from 7 A.M. to 6 P.M. during weekdays and from 7:00 A.M. to 5:00 P.M. every second Saturday. He was entitled to two 15 minute coffee breaks (paid) and a 1/2 hour lunch break (unpaid) each day and he did take at least that amount (sometimes more) of "break time" each day. Haghshenas' duties were mostly in the shop but he, on occasion, did deliveries and service calls. Haghshenas' monthly salary was increased, effective December 1st, 1995, to \$2,500 per month. In February 1997, Haghshenas' method of compensation was changed from a monthly salary to an hourly rate (\$12) with "overtime" being paid at \$18 per hour.

Slavomir Zajackowski - He was originally hired in 1992 and worked for a time before "being asked to leave"; he returned to McIver's in early June 1995 at a monthly salary of \$2,500. Although nothing was expressly stated in June 1995, McIver was of the view that Zajackowski was returning on essentially the same conditions as were previously in effect, namely, a 7:00 A.M. to 6:00 P.M. workday each weekday with two paid 15 minute coffee breaks and an unpaid 1/2 hour lunch break; every second Saturday, Zajackowski was to work a 7:00 A.M. to 5:00 P.M. shift. He worked in both the shop doing repairs and "on the road" making deliveries and service calls. McIver testified that he scheduled Zajackowski's daily delivery and service call schedule so that there would time in the day to take lunch and the morning and afternoon breaks. Although Zajackowski did complain on a few occasions about not being able to take any breaks while on the road and about working overtime hours, these complaints only arose in the last few months of his employment, particularly after Zajackowski sought an increase in pay.

Firoz Lalji - McIver hired Lalji who only worked from January 4th to 30th, 1997; he was hired as a “shop foreman” and as a “backup” service technician in the shop. He was hired at a monthly salary of \$4,000 and was to work from 7:00 A.M. to 5 P.M. weekdays and those same hours on alternate Saturdays. McIver could not say whether or not Lalji did or did not take his breaks, including his 1/2 hour lunch break.

In cross-examination, McIver acknowledged that while he knew he was obliged under the *Act* to pay his employees at least twice a month, he only paid them once a month. He also testified that the monthly salary was a “melded rate” that included compensation for overtime hours. The coffee breaks were to be paid time; the 1/2 hour lunch break was to be unpaid time. McIver denied telling the employees to eat their lunch in the company vehicle while on the road but admitted telling them that this was his normal practice. McIver also admitted to saying to at least one employee that the pay and hours of work were fixed by him and that it was “my way or the highway” and that “if employees didn’t like it, they could leave”.

Karen Andrews has been the office manager for some 11 years and has worked for her father’s firm for some 15 years. One of her major responsibilities is to book work orders and service calls and direct the service technicians while they are on the road. She does not recall hearing any complaints from the service technicians about missed lunch or coffee breaks. While she cannot recall seeing Lalji take a lunch break, she does recall that Haghshenas and Zajackowski, at least on the days they worked in the shop, regularly took lunch breaks.

In cross-examination Ms. Andrews acknowledged that Zajackowski spent about 70% of his time on the road during the early period of his employment and that in the latter part of his employment he was on the road for most of the day. She also admitted that the service technicians’ daily “route sheets”--prepared the day before--were not always accurate due to cancellations and additions that frequently occurred during the course of a day. Typically, the last service call of the day would be set for 5:00 P.M. but occasionally as late as 5:30 P.M. After the last call, the technician would return the company vehicle to the shop, report in and then leave.

Derek McIver, for his part, was unable to testify in any meaningful way about the hours of work, or breaks taken, by the complainants. Derek McIver is a university student who works part-time during the school year and full-time in the summer. He did confirm that when he works as a service technician he always has enough time to take at least a 30 minute lunch break and his two coffee breaks.

The Complainant Employees’ Evidence

Majid Haghshenas was hired on October 10th, 1995 as a technician and for the first four months worked from 7:00 A.M. to 6:00 P.M. each weekday and every Saturday from 7:00 A.M. to 5:00 P.M. in exchange for a monthly salary of \$2,000. After the first four months, he worked every second Saturday. Shortly after being hired, Haghshenas complained to Jack McIver about his work schedule and in December 1995 his salary was increased by \$500 per month. Later, in February 1997, his method of compensation was changed from a monthly salary to an hourly rate of \$12 plus overtime and his workday was shortened, ending at 4:00 P.M. It was only in the last 3

months of his employment that he was paid any overtime wages. He spent most of his time (90%) in the shop but also made some deliveries and service calls. He also testified that the delegate must have misunderstood his position but that, in any event, he did receive a 1/2 hour lunch break each day. He does not contest the employer's time records as to his start and finish times each day. Thus, during the bulk of the time that he was paid a monthly salary, Haghshenas worked alternating work weeks of 52.5 and 62 hours' duration resulting in a weekly average of 57.25 working hours.

Slavomir Zajaczkowski began his employment relationship with McIver's in early December 1992 and spent the first 6 months of his employment repairing fridges. After 6 months, Zajaczkowski starting working on the road--at this point he was dividing his time about equally between the shop and delivery/service calls. After about 1 year, he spent most of his days on the road. His work continued more or less unchanged until he was laid off for a few months in early 1995; he returned to work in June 1995.

When he returned to work, he was paid a monthly salary--initially, \$2,500 but this salary was increased to \$2,800 in January 1996 and to \$3,000 in August 1996--and was expected to work 7:00 A.M. to 6:00 P.M. weekdays and 7:00 A.M. to 5:00 P.M. on alternate Saturdays. During the last two years of his employment, Zajaczkowski testified that he never returned to the shop to have lunch and due to the fact that he and Jack McIver were the only two service technicians on the road, he never had an opportunity to take his 1/2 hour lunch break but rather, as was Mr. McIver's practice, ate his lunch (he carried a packed lunch in a small cooler) in the company truck while driving between service calls. Even though Zajaczkowski's day ended at 6:00 P.M., when he returned to the shop he often had to spend a further 15 minutes or so on clean-up and paperwork. During the period June 1995 to June 1997 he never had more than a 15 minute uninterrupted nonworking lunch break and then only on 5 or so occasions. He was emphatic that he never had a clear 30 minute lunch break away from his usual work duties.

Firoz Lalji was only employed with McIver's during the month of January 1997--a total of 21 working days. He testified that he agreed with Jack McIver, at the time of hiring, that he would work weekdays from 8:30 A.M. to 5:00 P.M. mainly in the shop but also on the road if necessary and would be paid \$4,000 per month. He understood that he was to receive a 1/2 hour lunch break and two 15 minute coffee breaks. Jack McIver called him in to work on January 4th (a Saturday) commencing at 7:30 A.M. and he worked that day, with Mr. McIver, until 4:30 P.M. At the end of the shift, Mr. McIver indicated that he was "shortstaffed" and needed Lalji to commence work at 7:00 A.M. rather than 8:30 A.M. (still finishing at 5:00 P.M.) and also work the same shift on alternate Saturdays; Lalji agreed. Thus, Lalji agreed to alternating work weeks of 47.5 and 57 hours for a weekly average of 52.25 working hours.

Lalji testified that he was fired without cause on January 30th, 1997. Whether Lalji was terminated with or without cause is irrelevant insofar as the *Act* is concerned because an employer's obligation to pay compensation for length of service under section 63 of the *Act* is not triggered until "after 3 consecutive months of employment".

Lalji's evidence is that while he never was able to take his 1/2 lunch break on the road, he did take his lunch break when in the shop (a total of 5 to 10 working days were spent in the shop). Finally,

Lalji testified that the employer's time sheets--he is shown as "Phil"--accurately reflect his start and end times each day he worked in January 1997.

ANALYSIS

Calculation of Overtime Pay

Both Zajackowski and Lalji were paid a monthly salary during their entire tenure with McIver's; Haghshenas was paid a monthly salary from October 1995 until his method of pay was changed to an hourly rate effective February 1st, 1997. While the employer now acknowledges that it has some liability for the payment of overtime wages, it submits that the approach taken by the delegate in calculating the employer's liability was not in accord with the *Act*. I agree.

Based on the evidence before me, and on a balance of probabilities, I am satisfied that the employer's time records are accurate as to the shift start and end times of both Haghshenas and Lalji--both admitted as much. However, even though the employer's records may accurately reflect these two former employees' shift duration, the actual length of their typical working days, and the proper method of calculating their overtime pay, must still be addressed.

Section 32 of the *Act* directs an employer to "ensure" that an employee receives at least a 1/2 hour meal break after 5 working hours; this 1/2 hour break is noncompensable so long as the employee is not required to be available for work during the break.

Haghshenas acknowledged that he did take an uninterrupted 1/2 hour lunch break each day. Lalji acknowledged that he took an uninterrupted 1/2 hour lunch break on 5 to 10 of the 21 days he worked for McIver's in January 1997. The delegate proceeded on the assumption that these lunch breaks, admittedly taken, were not actually taken and thus the delegate overstated these two employees' working hours by 1/2 hour each and every working day for Haghshenas and by 1/2 hour on 14 days working days for Lalji (assuming the midpoint of Lalji's estimate as to the number of days he actually took a lunch break).

With respect to Zajackowski, I accept his evidence that during the last two years of his employment with McIver's he never had a 1/2 hour uninterrupted lunch break. I accept that due to the exigencies of the working schedule set for him, he--as did Mr. McIver--ate his lunch on the road while driving from one delivery/service call to the next. It should be recalled that section 32 places the onus on the employer to "ensure" that an employee receives a 1/2 hour meal break after 5 consecutive hours of work. There is nothing in the evidence before me that would permit me to reasonably conclude that the employer took steps to ensure (say, by formally scheduling the lunch break each day) that Zajackowski was able to have an uninterrupted lunch break.

The employer's position is that the work schedule itself provided enough flexibility so that Zajackowski could have easily taken a 1/2 lunch break most, if not every, day. I do not agree. I reviewed a number of Zajackowski's work schedules or "route lists" (and it must be remembered that these lists are, at best, only a rough estimate of Zajackowski's actual working day due to cancellations, additions and unforeseen traffic or problems on a given call) and on many days

Zajackowski could not have reasonably been expected to undertake the service calls listed, drive from call to call and still fit in an uninterrupted 1/2 hour lunch break. Thus, I accept the delegate's findings as to Zajackowski's "hours worked" as set out in the "calculation report" appended to the Determination.

Zajackowski testified that he understood his monthly salary was based on a 40-hour week and that he would be paid overtime for hours worked beyond 40 in a week. I do not accept Zajackowski's evidence on this point. Very clearly, Zajackowski understood that his working day began at 7:00 A.M. and ended at 6:00 P.M. Monday to Friday; he also knew he would be working a 7:00 A.M. to 5:00 P.M. shift every other Saturday. At no time did the employer suggest to Zajackowski--and Zajackowski never testified to this effect--that overtime would be paid over and above the monthly salary. The employer's position--legally incorrect though it may have been--was that the salary covered all of the hours set out in the work schedule. In other words, there was no agreement that the salary was given in exchange for a 40-hour week; to the contrary, the clear agreement was that the salary was paid in exchange for alternating work weeks of 52.5 hours' and 62 hours' duration. In fact, however, as I have found that Zajackowski worked throughout his entire shift and did not receive an uninterrupted 1/2 hour lunch break each day, his actual weekly working hours alternated between 55 and 65 hours per week (on average, 60 hours per week).

Of course, the employer's purported agreement with Zajackowski amounts to an attempt to contract out of the overtime provisions of the *Act*, something that cannot be done by reason of section 4 of the *Act*. Nevertheless, while the employer's obligation to pay overtime is crystallized, despite any agreement to the contrary, after 8 hours worked in a day or 40 hours worked in a week (see section 40), the overtime pay rate must be based on the employee's "regular wage" as defined in section 1 of the *Act*. The relevant statutory provisions are set out below:

1 (1) "**regular wage**" means

- (a) if an employee is paid by the hour, the hourly wage,
- (b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period,
- (c) if an employee is paid a weekly wage, the weekly wage divided by the lesser of the employee's normal or average weekly hours of work,
- (d) *if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work, and*
- (e) if an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work;

(*italics added*)

40 (1) An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38

- (a) 1 1/2 times the employee's regular wage for the time over 8 hours, and
- (b) double the employee's regular wage for any time over 11 hours.

(2) An employer must pay an employee who works over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38

- (a) 1 1/2 times the employee's regular wage for the time over 40 hours, and
- (b) double the employee's regular wage for any time over 48 hours.

When an employee is paid by the hour, the overtime calculation is based on that hourly rate but when, as here, the employee is paid a monthly salary, an hourly rate--the employee's "regular wage"--must be derived from the monthly salary. The delegate held that:

"A normal work week is considered to be no more than forty hours in establishing a salary employee's hourly pay rate, and in order to accurately address and pay overtime at the appropriate base hourly rate. Weekly overtime always starts after forty hours for an hourly paid employee and should be no different for those workers on salary."

While I have absolutely no quibble, subject to the section 40(3) of the *Act*, with the delegate's assertion that the obligation to pay weekly overtime is triggered after 40 hours in a week, I cannot agree with the delegate's stated view that the employee's salary must be presumed to be based on no more than a 40-hours work week when calculating the hourly wage upon which overtime pay will be based. Such an approach is not consistent with the clear statutory definition of "regular wage" noted above.

The calculation of overtime for employees who are paid a monthly salary is predicated on their "normal or average weekly hours of work". There is nothing in the definition of "regular wage" that suggests such normal or weekly hours cannot exceed 40; indeed, to accept the position espoused by the delegate in the Determination would be tantamount to re-writing the definition so that it reads as follows:

"(d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of *40 hours or the employee's normal or average weekly hours of work...*"

While it is open to the Legislature to redraft the definition as proposed by the delegate, it is not open to the delegate or this Tribunal to do so. I might add that the approach taken by the delegate

in this case is inconsistent with that taken by other delegates--see, for example, *Todd M. Simmons*, BCEST Decision No. D557/97. Further, this Tribunal has consistently held that there is no 40-hour "cap" on normal or average weekly hours for purposes of calculating a salaried employee's regular wage: see *RAP-ID Paper Vancouver Ltd.*, BCEST Decision No. D182/96 and *Kocohani Holdings Ltd.*, BCEST Decision No. D337/96.

In my view, there is absolutely no ambiguity regarding how a "regular wage" is to be derived for an employee who is paid a monthly salary; the "regular wage" must be based on the employee's "normal or average weekly hours of work". There is nothing in the definition that places a 40-hour ceiling on the normal or average weekly hours of work and, in my view, the delegate erred in so concluding. The employer asserted that the delegate's approach was incorrect and I should add, Mr. Dickson, on behalf of Mr. Zajackowski, conceded the correctness of the employer's position on this particular point.

Mr. Dickson does submit, however, that in calculating an employee's "hours of work" the paid "coffee breaks" ought to be excluded from the calculation. There is nothing in *Act* requiring an employer to give its employees any paid or unpaid coffee breaks. The only break mandated by the *Act* is the 1/2 hour meal break (section 32) which is an unpaid break only if the employee need not be available for work throughout the duration of the break. Even though McIver's may have indicated to its employees that they were entitled to a 15-minute morning and afternoon break, these breaks must be considered to be part and parcel of the employees' "hours of work" inasmuch as the employer retained the residual discretion to direct and control the employees even during their "coffee breaks" (and on occasion did so).

If the two 15-minute breaks were not considered to be part of the working day, then the employer's obligation to pay overtime would not be triggered until an employee worked more than 30 minutes after the end of a 8 and 1/2 hour "shift". If an employer is paying an employee for 8 hours in an 8 and 1/2 shift, then surely the entire 8 hours, including any paid "break time", must be considered to be working time because the employee remains subject to the employer's direction and control throughout the entire day save for the 1/2 hour meal break. Theoretically, an employer could allow, or even direct, an employee "do nothing" for an entire 8 and 1/2 hour shift; even so, at least 8 hours of that shift (the 1/2 hour meal break being excluded) must be characterized as compensable "working time" under the *Act*.

Conclusion

Bearing in mind the above-noted findings of fact and law, the three employees' respective "regular wages" for the periods in question--which must be determined in order to calculate the employees' overtime entitlements--are set out below:

Haghshenas:

- October 1995 to November 1995: $[\$2,000 \times 12] \div [52 \times 57.25] = \8.06 per hour
- December 1995 to January 1997: $[\$2,500 \times 12] \div [52 \times 57.25] = \10.08 per hour

N.B. that as and from February 1st, 1997, Haghshenas was paid at an hourly rate of \$12 and he does not claim any unpaid overtime after February 1st, 1997.

Zajackowski:

- July 1995 to December 1995: $[\$2,500 \times 12] \div [52 \times 60] = \9.62 per hour
- January 1996 to July 1996: $[\$2,800 \times 12] \div [52 \times 60] = \10.77 per hour
- August 1996 to June 1997: $[\$3,000 \times 12] \div [52 \times 60] = \11.54 per hour.

Lalji:

- January 1997: $[\$4,000 \times 12] \div [52 \times 52.25] = \17.67 per hour

Based on the above “regular wages” I have calculated the three complainants’ unpaid wage entitlements, including adjustments for overtime pay, vacation pay and statutory holiday pay, as follows:

Haghshenas: \$5,225.19 plus interest pursuant to section 88 of the *Act*.

Zajackowski: \$8,791.16 plus interest pursuant to section 88 of the *Act*.

Lalji: \$836.59 plus interest pursuant to section 88 of the *Act*.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied to reflect an amount payable by the employer to each of the complainant employees as set out above. In addition to the amounts set out above, each complainant employee is entitled to recover interest to be calculated by the Director in accordance with section 88 of the *Act*.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal