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 -

Southside Delivery Services Ltd.
("Southside" or the "employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 1999/619

DATE OF DECISION: December 15, 1999

DECISION

OVERVIEW

This is an appeal brought by Southside Delivery Services Ltd. ("Southside" 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 September 23rd, 1999 under file number ER050923 (the "Determination").

The Director's delegate awarded Southside employee, Geoff Lindo ("Lindo"), the sum of $1,582.30 on account of unpaid wages ($1,383.50), unauthorized deductions for telephone calls ($17.15), reimbursable laundry expenses ($71.25) and interest. Lindo's claim for compensation for length of service was dismissed since the employer did not follow through on a written notice of termination apparently issued to Lindo.

ISSUE TO BE DECIDED

In Southside's letter to the Tribunal dated October 17th, 1999 (appended to its appeal form), Southside states that it does not challenge the delegate's finding insofar as the $71.25 award on account of reimbursable laundry expenses nor the $17.15 deducted from Lindo's pay on account of telephone calls.

The employer does challenge the award made in favour of Lindo on account of unpaid wages. Specifically, Southside asserts that a 1/2 hour meal break was agreed to between Southside and the union (Teamsters, Local 31) representing its drivers (including Lindo); this agreement is formalized in Article 22, Section 2 of the parties' collective bargaining agreement:

> **"Section 2 - Work Time**
>
> Work time shall include but not be limited to fueling, loading, unloading and while in care and control of equipment, time spent on ferries (*excluding a one half-hour lunch period per trip*) and when employees are required to stay with equipment. Refer to wages in Appendix 'A'." (*italics* added)

FACTS

The relevant facts, reproduced from the Determination, are as follows:

> "Mr. Lindo...commenced employment with [Southside] in December 1990...as a truck driver...
>
> Mr. Lindo indicated that the company told him that whenever he took a trip to the Lower Mainland from Victoria and back via the ferry they would consider 1 hour of that day as break time. He indicated that the company told him 1/2 an hour was

considered a meal break on the way over while another 1/2 an hour was considered another meal break on the way back from the mainland.

Mr. Daniel Hamill, owner of [Southside] stated that when Mr. Lindo took a truck to the lower mainland which happened about a couple days per week the company expected the driver to take the breaks going and returning. He said that the company deducted the 1 hour per day from [Lindo's wages]."

The delegate held that Southside was not entitled to deduct the 1-hour meal break time for those days when Lindo made a return trip, via ferry, from Victoria to the lower mainland. The delegate, relying on the Tribunal's decision in *Interior Retread & Sales* (B.C.E.S.T. Decision No. 148/98), held that all of the employer-mandated 1/2 hour meal breaks were compensable because Lindo was required to travel via ferry and to be available to B.C. Ferries' personnel during the entire crossing [see section 32(2) of the *Act*]:

> "Mr. Lindo does not have an option in the travel arrangements. He must be with the vehicle. Responsibility for that vehicle follows Mr. Lindo wherever he goes on the ferry...
>
> As the employer has no control over the operation of the ferry, problems on the car/truck decks or emergency situations it becomes impossible for an employer to ensure that Mr. Lindo has an uninterrupted 1/2 hour break.
>
> Can the company consider part of the time on the ferry as a meal break without pay? I believe the answer is no. Under the provisions of the British Columbia Ferry Regulation the employees of the British Columbia Ferry Corporation can require the driver of a vehicle to obey the directions and instructions relating to the use and operation of the terminal or ferry. That driver would [con]sequently be considered to be on call and therefore considered to be working."

ANALYSIS

The first matter to be addressed is whether or not the collective bargaining agreement between Southside and the Teamsters union constitutes a complete defence to Lindo's unpaid wage claim. In my view, it does not.

Although a limited form of "contracting out" is permitted by way of the "meet or exceed" provisions of the *Act* (see sections 43, 49, 61 and 69), these provisions only apply when there is a collective agreement in force. In the instant case, the collective agreement provision relating to the 1/2 hour meal break on the ferries was not executed until October 14th, 1998 (and was effective as of October 1st, 1998) whereas Lindo's unpaid wage claim spans the period August 1996 to July 1998. Thus, even assuming that Article 22(2) of the collective agreement constitutes a lawful "contracting out" of section 32 of the *Act*--something about which I express no opinion--that particular collective agreement provision has no application to the unpaid wage claim now before me since there was no collective agreement in force when Lindo's unpaid wage claim crystallized.

Accordingly, given that the employer is not insulated from liability by reason of the October 14th collective bargaining agreement, the only remaining issue is whether or not the delegate correctly determined that the 1/2 meal break deducted on each one-way ferry trip was compensable time. As noted in the Determination, the Tribunal has already held that time spent waiting for, and traveling on, a ferry may be considered to be compensable working time (*Interior Retread, supra.*).

While on board the ferry Lindo was, if not actually *at work* throughout the entire trip (and I am of the view he was), nonetheless required to be *available for work* throughout the entire crossing and thus, pursuant to section 32(2) of the *Act,* the full duration of the ferry trip was compensable working time. In my view, it does not matter whether or not Lindo was actually summoned during his so-called "meal break" by B.C. Ferries' personnel to attend to some problem; so long as he was required throughout the entire crossing to make himself available should circumstances require (and he clearly was), no portion of the trip can properly be characterized as noncompensable "break time". Lindo's responsibility for the employer's vehicle and its contents continued uninterrupted throughout the entire ferry trip and, accordingly, so too did the employer's obligation to pay wages for the full duration of the voyage.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be confirmed as issued in the amount of **$1,582.30** together with whatever further that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal