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-

Specialty Motor Cars (1970) Ltd.
("Specialty" or the "employer")

-and-

Russell David Reid
("Reid" or the "employee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE Nos.:	98/580 & 98/592
DATES OF HEARING:	December 8th and 22nd, 1998
DATE OF DECISION:	February 2nd, 1999

DECISION

APPEARANCES

Gregory Heywood	counsel for Specialty Motor Cars (1970) Ltd.
Michael Korbin	counsel for Russell David Reid
Adele Adamic	counsel for the Director of Employment Standards
Donna Cummings & Graham Moore	also appearing for the Director of Employment Standards

OVERVIEW

I have two appeals before me brought by Specialty Motor Cars (1970) Ltd. ("Specialty Motors" or the "employer") and Russell David Reid ("Reid" or the "employee"). Both parties have appealed, pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on August 19th, 1998 under file number 003653 (the "Determination").

The two appeals were heard together over two days, December 8th and 22nd, 1998. Counsel for the Director, Ms. Adele Adamic, appeared solely for the purpose of making submissions on a preliminary evidentiary point. Ms. Donna Cummings otherwise represented the Director on December 8th; Mr. Graham Moore represented the Director on December 22nd.

THE DETERMINATION

The Director's delegate determined that Specialty Motors owed its former employee, Reid, the sum of $7,532.53 on account of unpaid wages, principally overtime pay, concomitant vacation pay and interest. Further, by way of the Determination a penalty, in the amount of $0, was also assessed pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

The delegate found that during the material period--August 4th, 1995 to August 5th, 1997--"Reid did not take a one hour meal break each and every day as advanced by Specialty" but rather that "he took on average two breaks a week with the occasional break on a Saturday". The delegate proceeded to calculate Reid's unpaid wage entitlement based on his having had two 45 minute meal breaks each week (weekdays) and a further 45 minute meal break once each month (on a Saturday). Reid's claim for statutory holiday pay was dismissed on the basis of a written agreement between the parties whereby statutory holiday pay was stated to be included in Reid's commissions.

ISSUES TO BE DECIDED

Specialty Motors' principal ground of appeal is that the delegate erred in finding that Reid did not receive an unpaid one hour lunch break each working day. Reid appeals the dismissal of his claim for statutory holiday pay.

At the outset of the appeal hearing, counsel for both Reid and the Director objected to the employer calling three witnesses, relying on the Tribunal's decisions in *Tri-West Tractor Ltd.* (B.C.E.S.T. No. D268/96) and *Kaiser Stables Ltd.* (B.C.E.S.T. No. D058/97). After hearing submissions from all three counsel and testimony from Ms. Cummings, the investigating officer, I reserved decision on the evidentiary point. I advised the parties that I would hear the three witnesses' testimony but would rule on the admissibility of that evidence in my written decision. It is to this evidentiary issue that I now turn.

ADMISSIBILITY OF EMPLOYER'S EVIDENCE

The employer wishes to call three witnesses--all Specialty employees--to testify about the frequency and duration of Reid's meal breaks while he was employed by Specialty Motors (the central factual issue in this appeal). As noted above, the counsel for both Reid and the Director object to my hearing these three witnesses and base their objection on the *Tri-West Tractor/Kaiser Stables* principle.

The Tri-West/Kasier Stables Rule

In *Tri-West* the employer sought to justify its termination of the complainant on the basis of some information that had, apparently, not been given to the Director's delegate during the investigation of the complaint. The adjudicator ultimately held that evidence in question--a two-page memorandum prepared by the employer's accountant--did not prove that the employer had just cause for termination. However, in any event, the adjudicator held that the evidence was inadmissible because:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it...The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

While it might be said that the foregoing finding was *obiter dicta* in *Tri-West,* the admissibility of evidence was the key issue in *Kaiser Stables* where the employer based its appeal on evidence not provided to the investigating officer. At the appeal hearing, an objection was raised as to whether

or not the employer could present certain evidence and the adjudicator ruled that the evidence was inadmissible. It should be noted that in *Kaiser* there was a consistent and willful refusal by the employer to participate in the delegate's investigation--the employer repeatedly ignored letters, telephone calls and faxes from the delegate.

Subsequent decisions of the Tribunal have adopted the approach taken in *Kaiser Stables*, namely, in the face of a concerted refusal to participate in an investigation, the employer will not be permitted to rely on evidence that was available and that could have been presented to the investigating officer. In my view, the principle espoused in *Kaiser Stables* is a sound one and entirely consistent with two of the *Act's* stated purposes--the encouragement of open communication between employers and employees and the fair and efficient resolution of disputes arising under the *Act* [see subsections 2(c) and (d)].

However, it should also recognized that the *Kaiser Stables* principle relates only the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigating officer. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and, in my view, an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such nondisclosure. I do not intend the foregoing to be an exhaustive listing of all relevant criteria.

In the present appeal it is clear that the investigating officer did not have the benefit of the evidence of the three employer witnesses who now wish to testify before me. The employer could have, but did not, submitted for the delegate's consideration the employees' affidavits (all sworn on September 4th, 1998) that were subsequently filed with the Tribunal along with the employer's notice of appeal. In my view, however, this is manifestly not a case where the employer simply "sat in the weeds" and refused to meaningfully participate in the delegate's investigation. Indeed, quite the opposite, the employer took an aggressive and determined position throughout. Of particular importance, in my view, are three documents:

- a letter dated May 8th, 1998 from Mr. Heywood (employer's legal counsel) to the Director's delegate;

- a letter dated May 22nd, 1998 from Mr. Heywood to the Director's delegate; and

- a memorandum dated September 29th, 1998 from Ms. Donna L. Cummings (the Director's delegate) to the Tribunal Registrar.

On May 8th, Mr. Heywood wrote to Ms. Cummings stating, in part:

> "...we have reviewed Mr. Reid's assertion that he did not receive a regular meal break when employed with our client. Our client simply does not accept that assertion. We have reviewed the allegation with a number of sales people and they

> all recall Mr. Reid regularly taking his hour break...Let us know how you would like to proceed."

Ms. Cummings' September 29th memorandum states that on May 13th, 1998 she left a voice mail message for Mr. Heywood "requesting that he provide the names of witnesses along with telephone numbers". On May 22nd, Mr. Heywood wrote to Ms. Cummings setting out his position that her investigation ought to be held in abeyance pending the outcome of Reid's "wrongful dismissal" lawsuit filed in the B.C. Supreme Court. Mr. Heywood's May 22nd letter continued:

> "In the event you choose to investigate this file, over our objections, we can arrange interviews with employees who have witnessed Mr. Reid's lunch hours, at our offices at a mutually suitable time."

The May 22nd letter concludes: "We look forward to hearing from you". Thus, certainly the *thrust* of the employer's position was well-known to the delegate prior to the issuance of the Determination, albeit perhaps not the specific evidence upon which that position was founded. In addition to the foregoing, I have had the benefit of Ms. Cummings' *viva voce* evidence. Ms. Cummings testified that she has no present recollection of the matters but that her notes indicate she left a telephone message with Mr. Heywood on May 13th, 1998 requesting a list of employer witnesses; she took Mr. Heywood's May 22nd letter as his reply. She acknowledged that the employer produced all relevant employment records as requested and that she never considered the May 22nd letter to be a "refusal" to produce evidence; further, she never indicated to Mr. Heywood that his May 22nd response was somehow inadequate or nonresponsive. Finally, Ms. Cummings stated that she did not take up Mr. Heywood's invitation to interview the employees because, in her view, their evidence would not have been "neutral"; that the witnesses would only tell her "what the employer wanted me to hear"; that because they remained on the employer's payroll they would "shade their evidence to protect the employer"; and that the employees would "simply say what the employer had already told me about the lunch breaks".

In light of the foregoing, I cannot conclude that this is an appropriate case to exclude the evidence of the three employer witnesses on the basis of the *Tri-West/Kaiser Stables* rule. In my opinion, the employer clearly crystallized its position and made an unequivocal offer--which the delegate essentially ignored--to make the witnesses available to be questioned by the delegate.

The delegate, of course, was under no particular obligation to obtain the witnesses' evidence in the manner suggested by the employer; the delegate might well have simply told Mr. Heywood that she wished to interview the employees away from the employer's workplace and outside the presence of the employer's legal counsel. There is, of course, "no property in a witness" and had a final demand been made for the names of the witnesses, I am of the view that the employer would have refused that demand at its peril. But that is not the situation here. Indeed, in some rather incomplete manner it could be said that the evidence of these three witnesses was, in fact, before the delegate and thus *Kaiser Stables* has no application whatsoever. In any event, my view is that the employee's and Director's objection is not well-founded; accordingly, I find that the evidence of the three employees is properly before me.

FACTS AND ANALYSIS

As noted above, the Director's delegate calculated Reid's wage entitlement on the basis of his not having had a regular daily meal break; the delegate found that Reid took only two 45 minute meal breaks each week and an additional 45 minute meal break (on a Saturday) once each month. The employer contests these findings of fact.

The Employer's Evidence

The employer called three witnesses: Ross Keegan ("Keegan"), Jack Mocarski ("Mocarski") and Jeremy Tomlinson ("Tomlinson").

Keegan, the employer's controller, stated that during the relevant time period he had lunch with Reid 2 to 3 times per week and that they most often left the premises to eat at one of several local restaurants; these lunches including walking time to and from the restaurant typically occupied about 50 minutes. On other days, he recalls seeing Reid eat his lunch in the staff lunch room. In cross-examination, Keegan acknowledged that over the course of the year, he and Reid ate out about once a week and occasionally twice per week. Keegan also acknowledged that from time to time Reid was disturbed during their luncheons by a call on Reid's cellular telephone from someone at the dealership. Keegan also stated that on the days that Reid lunched in the company lunch room, he was frequently interrupted by a telephone call of a business nature. Keegan, for his part, only ate his lunch in the company lunch room about once a week.

Mocarski currently holds the position formerly held by Reid. The dealership is a busier operation today as compared to when Reid was the business manager. Even so, Mocarski testified that he is able to take a daily lunch break of between 45 to 60 minutes. Mocarski says that he saw Reid and Keegan leave the premises together for lunch 2 to 3 times each week and that they occasionally ate their lunch together in the company lunch room. In cross-examination, Mocarski admitted that he and Reid were usually only scheduled to work on the same day about 3 days each week and that he does recall seeing Reid eat his lunch in the company lunch room. Finally, Mocarski stated that he is often on the telephone or otherwise dealing with customers during the noon hour period and that if there is a customer to be attended to, he always defers his lunch until after he has dealt with the customer--and, of course, it is in his financial interest to do so since sales commissions (from vehicle sales as well as selling undercoating, extended warranties and the like) represent over three-quarters of his total compensation.

Tomlinson has been employed with Specialty as a sales representative since May 1996. From that date until Reid's employment ended on September 4th, 1997, he observed that Reid and Keegan left the premises for lunch about 2 to 3 times each week; he was unable to estimate the duration of their luncheons. In cross-examination, Tomlinson reduced his estimate regarding Reid and Keegan's off-site luncheons to 1 to 2 times each week.

The Employee's evidence

Reid testified on his own behalf; he also called one witness, Douglas Ballard, a former employee. Ballard's testimony was that Reid ate his lunch in the company lunch room 2 or 3 times each week

(often in company of Keegan) and that he recalls Reid going off-site for lunch about once a week. He does recall that Reid did have lunch, either on-site or off, every day. The typical lunch break was about one-half hour.

Reid's evidence is that he typically took about 45 minutes for lunch each day; sometimes he ate in, other times (once or twice each week) he and Keegan went off-site for lunch. In total, Reid estimated that he and Keegan had lunch together about 3 times each week. At a later point in his testimony, Reid stated that his "on-site" lunches lasted no more than 30 minutes and that he was frequently interrupted during his lunch breach by a telephone call.

Findings

Despite being invited by both the employer and Reid to set aside the delegate's finding regarding the frequency and duration of Reid's lunch breaks, I am of the view that neither party has presented a sufficiently compelling case justifying such action on my part. While it is clear that Reid did take a lunch break each day, a meal break can only be characterized as noncompensable time if it is of at least 30 minutes uninterrupted duration--if an employee is required to be available for work during the meal break, that break is counted as working time [see section 32(2)].

A consistent thread in the evidence is that Keegan and Reid regularly ate their lunch together off-site. While there is some dispute about the frequency of these sojourns, I cannot find that the delegate's determination that Reid took a 45 minute lunch off-site about twice a week (plus one further 45 minute meal break one Saturday each month) to be unreasonable. On these occasions, Reid may have been interrupted from time to time by a call to his cellular phone but I am satisfied that such calls were encouraged by Reid so that he would not jeopardize any possible commission earnings; I cannot find that it was the employer who required Reid to be "available for work" when he and Keegan took their lunch off-site.

As for the balance of the lunch breaks, I accept that Reid ate in the company lunch room; sometimes in the company of Keegan, other times alone, still other times in the company of other employees. It should be recalled, however, that it was the employer who arranged for a telephone to be installed in the lunch room, presumably so that employees on their meal break would be accessible. I accept that if a customer needed assistance while Reid was eating lunch in the company lunch room, the employer's expectation was that Reid would immediately render such assistance. I also accept that Reid was frequently interrupted by telephone inquiries while he ate his lunch in the lunch room--as was every past or present employee who testified before me. Undoubtedly, Reid tolerated (and perhaps even encouraged) such interruptions because he relied on commission earnings to such a large degree. However, the employer, too, benefited from Reid's efforts and I think it reasonable to conclude on the evidence that the employer, in fact, expected all of its employees--not just Reid--to deal with customer inquiries promptly, even if that meant interrupting or delaying a lunch break. As Keegan testified: "It was common to get calls in the lunch room; it was your decision to deal with it if customer came in". Mocarski testified that he regularly delayed or interrupted his lunch in order to deal with a customer.

I am of the view that both Keegan's and Mocarski's behaviour simply reflected a well-understood (though unwritten) employer expectation that "customers come first" and that customers should not

be kept waiting just so an employee could enjoy an uninterrupted lunch break. I do not say that there is anything wrong with such a service orientation; indeed, in today's economy such an orientation might be essential for business success. However, the fact remains that if an employer either directly or indirectly requires an employee to be available for work throughout his or her meal break, that break must be characterized as working time.

Accordingly, I would confirm the Determination as to the $7,532.53 found to be owing on account of unpaid wages and interest. However, I must also address the further matter of Reid's entitlement to additional monies on account of statutory holiday pay, *i.e.,* the basis for Reid's appeal. I now turn to this issue.

Statutory Holiday Pay

On February 14th, 1991 Reid signed a one-paragraph document headed "Agreement Re Statutory Holiday Pay" which stipulates: "It is agreed by both parties that STATUTORY HOLIDAY PAY is included in commissions earned as outlined in the Sales Department Pay Plan". The delegate, relying on this agreement, held that Reid's claim for statutory holiday pay (see Part 5 of the *Act*) was thereby barred.

Mr. Graham Moore, on behalf of the Director, submitted that the delegate's decision on this particular point was incorrect and thus supported Reid's appeal. Mr. Moore submits that the above agreement is nothing more than an attempt to "contract out" of the *Act,* something that is prohibited by section 4. While there is a provision in the *Act* that permits an employer and employee to agree that vacation pay will be calculated and paid to the employee on his or her scheduled pay day, there is no such similar provision regarding statutory holiday pay.

Presumably, the employer's position is that the agreed commission formula was "adjusted" upwards to account for holiday pay, however, there is nothing contained in the agreement (nor in the *viva voce* evidence before me) which suggests that such a *quid pro quo* was negotiated between Specialty and Reid in 1991. Further, I see nothing in Part 5 of the *Act* that would enable such an exchange (higher commission in lieu of statutory holiday pay) to be lawfully negotiated (see also *W.M. Schultz Trucking Ltd.,* B.C.E.S.T. Decision No. D127/97, *Bauchman,* B.C.E.S.T. Decision No. D222/98 and *Monday Publications Ltd.,* B.C.E.S.T. Decision No. D296/98).

Section 45(a) establishes a simple formula for determining an employer's statutory holiday pay liability; there is no evidence before me that Reid was paid "the same amount [as a regular work day]" for any of the statutory holidays in question. Although the salary component of Reid's pay was paid to him by the employer, Reid did not receive the (much greater) benefit of any commissions that would have ordinarily been earned on any other regular working day. Accordingly, this issue should be remitted to the Director for further investigation.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination be confirmed in all respects except with respect to the delegate's finding that Reid was not entitled to any further monies on account of statutory holiday pay; this latter matter is referred back to the Director for further investigation and, if appropriate, further determination.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal