

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 -

Kaycan Ltee/Ltd
("Kaycan")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Paul E. Love

File No.: 97/765

Date of Hearing: December 17, 1997

Date of Decision: January 15, 1998

DECISION

APPEARANCES

Craig Munroe, Articled Student on behalf of Kaycan

Robert Patterson

OVERVIEW

This is an appeal by Kaycan Ltee/Ltd, under Section 112 of the *Employment Standards Act* (the (“Act”), of a Determination which was issued on September 24, 1997 by a delegate of the Director. Mr. Patterson filed a complaint which resulted in a Determination that he was entitled to overtime pay, for overtime worked during the daily lunch break period and in the weekend in the amount of \$2,983.80, inclusive of vacation pay.

A hearing was held at Nanaimo on December 17, 1997 at which time evidence was given under oath by John Weiring, Kaycan’s general manager. Evidence was also given by Robert Patterson, under oath, and by Rene Tomljenovich, a warehouse assistant. The Director’s delegate did not appear at the hearing. Kaycan appealed on the basis that it did not require or directly or indirectly allow the employee to work overtime. The employer further argued that, if I found an entitlement to overtime the overtime allowable was less than that calculated by the Director’s Delegate. The appeal was allowed in part, and the determination was varied.

ISSUES TO BE DECIDED

Was the employee authorized directly or indirectly to work overtime or allowed to work overtime?

What is the proper amount of the overtime claim?

FACTS

Kaycan is the manufacturer of vinyl and aluminum building products, primarily gutters and siding. It has 29 distributing warehouses in Canada and 25 more in the United States. It also was distributing Builders hardware including joist hangers and anchor bolts. The

product was produced in Montreal and would be shipped to Nanaimo for distribution on Vancouver Island.

Mr. Patterson worked for Kaycan from January 29, 1996 to September 30, 1996 as a warehouse supervisor at the Nanaimo warehouse. His usual hours of work were from 7:30 am to 4:30 pm. He was paid \$14.00 per hour. He was entitled to take 2 15 minute breaks per day and a 1 hour lunch break. At the time of hiring, John Weiring, the employer's general manager and sales manager of Kaycan told Mr. Patterson that customer service was important.

At all material times, Mr. Patterson, unlike other employees, did not own a motor vehicle, and took with him a bag lunch to work. The Kaycan workplace, while located in the City of Nanaimo is 10 or 15 minutes by car from downtown Nanaimo. Many of the employees would leave the warehouse over the lunch break by vehicle.

Mr. Weiring indicated that he became aware in June of 1996 that the employee was working overtime. He indicates that he told Mr. Patterson to take regular breaks and his lunch breaks. Mr. Weiring followed this up with a written memo, dated August 22, 1996, which was filed as Exhibit "2".

The memo, written to Mr. Patterson, directed this employee to reduce or eliminate lunch time overtime by staggering lunch coverage, because the employer had opened a warehouse in Victoria to service the Victoria market. of pay. After August 22, 1996, Mr. Patterson continued to work overtime because he felt it was necessary from a customer service perspective, and also necessary in order to ensure that orders were made, trucks were loaded and unloaded. The employee did not at any time after August 22, 1996 discuss the need for overtime with the employer.

On or about September 30, 1996, the employee was terminated, the employer alleging cause. The employer states that the employee was terminated for gross incompetence and for smoking marihuana during the course of his employment on the employer's property. Mr. Patterson says that he did not dispute the termination because he no longer wished to work for the employer. Mr. Patterson alleges that the employer dismissed him because he raised the issue of overtime with the employer.

It is unnecessary for me to make a finding in this case, as to whether the employer's decision to terminate amounts to just cause, because that issue is not before me. I find as a fact, however, that the employer did not terminate the employee because he raised the overtime issue. The employer felt that it was justified in the decision that it took to terminate Mr. Patterson.

During the course of the employment relationship, Mr. Patterson maintained a calendar, a copy of which was filed in these proceedings as Exhibit “4” . The employer does not seriously dispute the accuracy of the records kept by the employee. The employer has no records relating to overtime worked by Mr. Patterson. Mr. Patterson made daily notes which included the days on which he worked through lunch, the days he left early, and the days on which he worked overtime. Rene Tomljenovic, a witness called by Mr. Patterson, verified that Mr. Patterson regularly worked through his lunch break, and Mr. Tomljenovic felt guilty about that.

The calendar was canvassed in detail during the course of the hearing, and it appears that the overtime worked can be summarized as follows:

	Missed 1 hour lunch	Hours Taken off
January	1	
February	5.5	
March	5	
April	14	
May	17	1
June	12	8.5
July	17	8
August	17	
September	13	6.5
	100	32

During the relevant time period the employee also took 32 hours off of work (\$448.00). He worked a further 27.5 hours of overtime on the weekend.

Mr. Patterson kept his records at the suggestion of Keith Verall. Mr. Patterson says told him that Mr. Verall said that he was having a difficulty with the employer regarding the payment of overtime. This evidence explains why Mr. Patterson kept the records. I, however, do not accept this hearsay evidence for proof of any allegation that Verall was treated unfairly by Kaycan in regards to overtime. Mr. Patterson indicates that he approached Kaycan about 6 months after his starting date with regard to payment for overtime, because he thought it had to be cleared off every 6 months, and there was no opportunity to talk to John Weiring before this time period. He says that Mr. Weiring ignored his request for overtime payment, when he first raised the issue. On the next discussion with Mr. Weiring he advised Weiring told him that he was paid for days when he did not work all day.

At no time prior to the expiration of the six month period did Mr. Patterson advise Mr. Weiring that he felt it necessary to work lunch overtime to keep up with his work. He did not ask for a meeting to discuss the employer's verbal or written directions concerning lunch overtime. Mr. Patterson continued to work, after the employer gave its directions concerning lunch time overtime, because he wanted to do a good job for the employer, and he felt that customer service required this effort on his part.

The Director's delegate failed to interview the employer to determine its position on the issue of overtime. The Director's delegate concluded that 108 hours of overtime was worked over the lunch period (at time and a half) for a total of \$2,268.00. The Director's delegate also determined that 24.5 hours of overtime was worked for a total of \$514.50. The Director's delegate also calculated vacation pay of \$111.30. These amounts are clearly incorrect on the basis of Exhibit "4".

The employer indicated that the previous warehouse manager did not work through his lunch break. He also indicates that the subsequent warehouse manager did not work through his lunch break. It appears that Mr. Weiring did not tell the employee each and every day not to work his lunch break, because he spent 80 % of his time "on the road" selling the products of the employer. He said that he expected Mr. Patterson to follow the directions that he gave in regards to overtime. The employer also filed pay records for employees indicating that they did from time to time authorize overtime. It appears that the overtime claimed by Mr. Patterson was not authorized by the employer.

Mr. Patterson alleged that he was told by Mr. Weiring that he was to take any overtime worked off as time in lieu of pay. Mr. Weiring does not recall any discussions or written documents concerning the employee's allegation that overtime should be taken as time in lieu.

ANALYSIS

Issue #1: Was the employee authorized, or directly or indirectly allowed overtime

The *Act* reads as follows:

s. 35 An employer must pay overtime wages in accordance with section 40 or 41 if the employer requires or, directly or indirectly, allows the employee to work

(a) over 8 hours per day

The question in this case is whether the employer required or directly or indirectly allowed the employee to work his lunch break or other hours of overtime. This is largely a question of fact to be inferred from the evidence led.

Here it is uncontroverted that the employer gave oral instructions sometime in May for the employee to desist from working lunch time overtime. He also gave written instructions on August 22, 1996 not to work lunch time overtime. It appears that by at least June 1, 1996 Mr. Patterson was aware of his employer's wishes that he not work during his lunch period.

In this case, there appears to have been specific instructions given by the employer to the employee not to work during the lunch period. This would be a lawful instruction, within the purview of the employer to give. The failure of Mr. Patterson to follow the instruction takes this case out of the realm of an employer requiring or directly or indirectly allowing an employee to work overtime. Indeed, the failure of the employee to follow the employers instructions could be characterized as insubordinate conduct.

In this case the failure to follow the instructions appears to have been willful for the following reasons:

The employee chose to do the work because he really wished to make a go of it, and he felt it important to deliver quality service.

The employee did not, habitually leave the work place over his lunch period, and therefore kept busy working.

The employee did not take steps to stagger the lunch periods.

Mr. Weiring, was away from the workplace 80 % of the time on sales calls. The Nanaimo warehouse was a small work place. In my view, Kaycan, and in particular Mr. Weiring did what was reasonably necessary to ensure that Mr. Patterson did not work overtime, in that it gave him instructions to take his lunch break. Mr. Patterson failed to follow those instructions. Mr. Patterson, did not at any time raise with Mr. Weiring the necessity for him to work lunch breaks. He took this upon himself.

Therefore the employee is not entitled to payment for working his lunch for the period which commenced on June 1, 1996. He is not entitled to overtime for lunch hours worked because the employer expressly directed him not to work during the lunch period.

From January to June 1, 1996

With regard to the period of time before June 1, 1996, it appears that there were no directions given by the employer concerning lunch overtime. It appears that the employee had the calendar posted in a conspicuous place. I find that because the employer gave no directions concerning lunch overtime, it directly or indirectly allowed the employee to work within the meaning of section 35 of the *Act*. It would appear that after June 1, 1996, the employee knew that the employer did not wish him to work overtime during his lunch break.

Issue #2 What is the allowable amount of overtime?

I therefore find that the employee is entitled to lunch overtime for the period of January through to the end of May. This amounts to overtime for 41 shifts. Applying section 40 of the *Act* the applicable overtime rate is at 1.5 times the hourly rate of \$21.00 per hour. This amounts to \$861.00.

Additional Weekend Overtime:

The employer concedes that Mr. Patterson is entitled to overtime worked on the weekend. The amount due and owing to the employee. This amounts to 27.5 hours. Applying section 40 of the *Act* the applicable overtime rate is at 1.5 times the hourly rate of \$21.00 per hour. This amounts to \$ 861.00.

Vacation Pay

The employee is also entitled to 4 % vacation pay on the sum of \$1,438.50, or \$57.54.

Pursuant to s. 42 of the *Act* an employee can make a written request to bank overtime, and if that request is granted the bank has to be dealt with by payment or by time off, within 6 months of the overtime accruing. There were no documents introduced into events proving that the employee requested the bank. As the employer does not recall any discussions about taking time in lieu, I find that there was no banking of overtime established under s. 42 of the *Act*. I decline to reduce the overtime entitlement by the time taken off by the employee, because the employee did work in excess of 8 hours per day, overall, even taking into account the time off and lunch hours worked

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination of the Director's Delegate be varied and that the employer pay to the employee the sum of \$1,496.04.

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Paul E. Love
Adjudicator,
Employment Standards Tribunal