Employment Standards TRIBUNAL

An appeal

- by -

Cambridge Exteriors Ltd.
("Cambridge")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2001/586

DATE OF HEARING: December 4, 2001

DATE OF DECISION: December 17, 2001

DECISION

APPEARANCES:

John Jurinak, President — for Cambridge Exteriors Ltd.

Michael Witt — on his own behalf

OVERVIEW

This is an appeal filed by Cambridge Exteriors Ltd. ("Cambridge") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). Cambridge appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on July 20th, 2001 (the "Determination").

The Director's delegate determined that Cambridge owed its former employee, Michael Witt ("Witt"), the sum of $3,051.76 on account of unpaid wages reflecting so-called "travel time" (calculated at the prevailing minimum wage rates), concomitant vacation pay and interest. Further, by way of the Determination, the Director also assessed a $0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

Mr. Witt's claims for overtime, compensation for length of service and storage fees were denied. The overtime claim was rejected because Mr. Witt was determined to be a "manager" [see section 34(f) of the *Employment Standards Regulation*] and thus excluded from the overtime pay provisions the Act. Witt's claim for compensation for length of service was rejected on the basis that Cambridge had just cause for dismissal [see section 63(3)(c) of the *Act*]. The claim for storage fees (of work material, namely, tar paper rolls) was rejected because the delegate determined that this claim did not reflect a claim for "wages". The delegate did not turn his mind to section 21(2) of the *Act* but, in any event, it appears clear that the storage of the rolls in question was not something that Cambridge required Witt to do.

Although Witt's wage rate was $22 per hour, the delegate calculated Witt's "travel time" based on the minimum wage since "there was no agreement between the parties as to the rate to be paid for this time" (Determination at page 4). In his submission to the Tribunal dated August 22nd and filed September 6th, 2001, Witt stated that he would "like to appeal the calculation of the wages that were awarded to me" because "I was employed as a site supervisor at a wage of $22 per hour, not at minimum wage". Witt says that he ought to have been awarded in excess of $9,000 on account of his travel time claim.

I indicated to Mr. Witt at the appeal hearing that his "appeal" was not properly before me. The appeal is not in the proper form. Quite apart from that formality, the appeal was not filed within the statutory time limit. Mr. Witt conceded before me that he would not have filed an "appeal" if the employer had not done so. Thus, in my view, this is not an appropriate case to exercise my

discretion under section 109(1)(b) of the *Act*. Further, and in any event, in light of my decision with respect to Cambridge's appeal, the matter raised by Mr. Witt in his appeal is moot.

This appeal was heard at the Tribunal's offices in Vancouver on December 4th, 2001 at which time I received the testimony of John Jurinak, on behalf of Cambridge, and Mr. Witt on his own behalf. No one appeared at the appeal hearing on behalf of the Director. In addition to the two witnesses' testimony, I have also considered the various documents and submissions submitted by the parties, and by the Director's delegate, to the Tribunal.

ISSUES ON APPEAL

This appeal raises the fundamental question of what constitutes "work" under the Act. "Work" is defined in section 1 of the *Act* as follows:

> *"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

Cambridge also challenges the quantum of the travel time claim asserting that Witt dramatically overstated his claim both as to the number of return trips actually made and with respect to the duration of a daily return trip.

FINDINGS

"Travel time" claim

The essential facts are not in dispute. Cambridge is a general contractor that was undertaking rectification work on a "leaky condo" situated in Pitt Meadows. The tar paper rolls used in the work are about 40 inches wide, well over 50 linear feet (neither witness knew the actual length) and weigh about 15 to 20 pounds each. In order to facilitate the work on site, the rolls are trimmed into shorter lengths and re-rolled.

Witt approached Cambridge and sought out work for his friend who would cut the rolls into shorter lengths. This friend had other employment and thus could not do the work on site during the normal workday. Witt proposed that the cutting and rerolling be undertaken in Witt's garage using Witt's tools (or the friend's--this was not clear) in the later afternoons or evenings. Cambridge agreed.

To that end, Witt transported a few rolls (3 to 5 according to Witt) at the end of each day from the work site to his home in Langley and returned the "cut" rolls to the work site each morning. Mr. Jurinak says that the rolls were delivered to Witt's home but there is no independent evidence before me (such as a delivery invoice) to corroborate that assertion. Witt says that he transported rolls between his home and the work site on some 173 days during the period from

March 3rd to November 24th, 2000. The delegate awarded Witt 338.75 hours of compensable "travel time" based on a daily return trip from Langley to Pitt Meadows of 2.25 hours.

Witt agrees that, but for the transportation of the rolls to and from his home, he was not entitled to be paid for "travel time". Witt also agrees that Cambridge provided him with a credit card and that he charged his gasoline expenses to that card during the period in question (approximately $650). Witt also concedes that this arrangement was in some sense a *quid pro quo* for transporting the rolls back and forth. Further, although Witt was obliged to record his daily working hours on a time card he *never* claimed "travel time" on his time cards nor did he ever demand, during his employment with Cambridge, that he be paid for travel time. The "travel time" claim was advanced for the very first time only after Witt's employment with Cambridge was summarily terminated for cause. Finally, Witt agrees that it was a very minor inconvenience to load a few tar paper rolls into his truck on those days when he transported rolls back and forth between his home and the job site.

In his original complaint filed with the Employment Standards Branch, Witt asserted that he was "*required* to bring home tarpaper to my home where a Cambridge employee would use my garage to break the rolls of tarpaper down into smaller, more workable rolls for the job site" (my *italics*). However, the evidence before me shows that this scheme was proposed by Witt in an effort to secure some additional paid work for a friend. There was no real benefit flowing to the employer from this arrangement and Witt, during the material time, appeared to be quite satisfied with receiving reimbursement for fuel charges (which he would not have otherwise received) in exchange for transporting the rolls back and forth. Witt concedes that if there were no rolls in his truck, he was not entitled to be paid for his driving time to and from the work site.

In light of the foregoing circumstances, can it be said that the transportation of tar paper rolls back and forth between Witt's home and the work site constituted compensable "work" as defined in the *Act*?

In my view, the travel time involved here cannot be considered to be compensable "work". In this case, the travel time, *per se*, was not "work" since Witt was not under the employer's direction and control during the drive to and from the work site each day (see *Spearhead Forestry Services Inc.*, B.C.E.S.T. Decision No. D488/97; *Norton*, B.C.E.S.T. Decision No. D406/98). "Where travel time is claimed as 'work' employees will be required to demonstrate some very compelling reason why that time should be treated as such for the purposes of the *Act*" (*Lone Wolf Contracting*, B.C.E.S.T. Decision No. D267/96). In my view, this case is not conceptually distinct from a situation where, for example, an employee transports his (or even the employer's) work tools (say, in the back of his or her truck) between home and the work site each day.

The benefit of this arrangement flowed not to Cambridge, nor to Witt, but rather to Witt's friend who, but for the arrangement, would not have been able to do the cutting work in question. The "labour or services" (see section 1 definition, *supra*.) undertaken by Witt, in reality, was

performed for the benefit of Witt's friend, rather than for Cambridge's benefit. The friend was carried on Cambridge's payroll and was paid for his services.

In my view, in the most strict literal sense, the only additional "work" performed by Witt was loading and unloading his truck--a task that admittedly was not physically demanding nor time consuming and, as previously noted, that effort was more for his friend's, than Cambridge's, benefit. I consider that latter "work" to constitute nothing more than a *de minimus* claim and, in any event, I am of the view that Witt was fully and fairly compensated by the fuel reimbursement arrangement. I have no doubt that the parties themselves never intended that their arrangement would create compensable "work" such that Witt would be entitled to claim "travel time". If Witt had demanded payment for travel time from the outset I do not doubt that the arrangement never would have materialized.

In the circumstances here presented, I think it a most unfair result [see section 2(b) of the *Act*] if Witt's "travel time" claim is accepted. I consider this claim to be not much more than a trumped-up claim filed in retaliation for what Witt (wrongly as it turned out) conceived to be a dismissal without cause.

In light of my above-stated conclusion, I need not address whether the travel time claim was inflated.

The appeal is allowed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled (both as to the unpaid wage award and as to the penalty).

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal