Employment Standards TRIBUNAL

An appeal

- by -

Rupert Clarke
(the "Employee")

- 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: Ib S. Petersen

FILE No.: 2001/653

DATE OF HEARING: December 13, 2001

DATE OF DECISION: December 17, 2001

DECISION

APPEARANCES:

Mr. Rupert Clarke	on behalf of himself
Mr. Jim Storie	on behalf of the Employer, Vancouver Trolley Company

OVERVIEW

This matter arises out of an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on September 7, 2001. The Determination concluded that Clarke was owed $162.63 by the Employer on account of statutory holiday pay. This aspect of the Determination is not under appeal.

Clarke worked as a driver for the Employer between May 6, 1999 and August 14, 1999. He was paid at the rate of $13.50 per hour. The determination rejected his claim for regular wages for time worked mostly in the beginning and the end of the work day. Clarke claims that he is entitled to some $226.13 on that basis. The Delegate considered time sheets, submitted by Clarke, showing that he worked and was paid for (generally) 6 3/4 or 7 hours per day. On a few days he was paid for more hours, on others, less. On the basis of the evidence, including interviews with witnesses, she rejected his claim that he worked additional time.

FACTS AND ANALYSIS

The Employee appeals the determination and, as the Appellant, has the burden to persuade me on the balance of probabilities that the Determination is wrong. I am not persuaded.

At the hearing, Clarke testified. At the conclusion of his case, the Employer elected not to call any evidence. The employer was content to rely on the evidence given by Clarke and the Determination.

Clarke explained that he worked additional time that he was not paid for. The documentary basis for his claim was time sheets, attached to the determination. These time sheets, filled out by Clarke, indicated in two columns "time in" and "time out." Another column, marked "hours," indicated the hours he was paid for. Invariably, the hours he claimed to have spent at work were less than what he was paid for. For example, on June 17, 1999, an "A" shift, the records indicate that he signed "in" at 8:15 a.m. and "out" at 5:30 p.m., more than nine hours, and claimed 6 and 3/4 hours of work (for which he was paid). Clarke explained that he was told to put down 6 3/4, or 7 hours, by another driver and agreed that he was not told by management to do this.

The shift schedule, attached to the Determination, indicates that shift "A" had a "report time" of 8:30 a.m. at the "base" and ended at 4:00 p.m. in Gastown. On that shift, he was paid for 6 hours (3 tours @ 2 hours), plus 15 minutes "pre-trip" of the vehicle, 15 minutes for the drive, and 15 for the cash-out at the end of the day, for a total of 6 and 3/4 hours. Shift "E" started in Gastown at (10:50 or) 11:00 a.m. and ended at the "base." Those were the shifts that Clarke--for the most part--worked. In between the tours Clarke had one hour of unpaid break time. Clarke claimed that he should be paid for time he spent, including travelling from the end-point in Gastown and for spending more time on the "pre-trip" than the Employer allotted for, and for work done at the end of the work day, such as helping other drivers with the clean-up of their vehicles if they gave him a ride back to "base" (on Terminal Avenue in Vancouver). He expected that the assistance to other drivers was "expected" by them. There was no evidence that management knew or condoned this practice if, in fact, this happened.

While Clarke was quite clear and unequivocal in his direct testimony with respect to the work he claimed to have done; in cross examination, I found his evidence to be less so. He was reluctant to admit that he had received a manual detailing, among others, the shift schedule and a "commentary" for the tours. In part, that may be due to the elapse of time--after all, this matter arose back in 1999. All the same, I am troubled by this because this case rests more or less on Clarke's testimony that he worked the additional time. As noted by the Delegate, he did not present, for example, alternative documentation of time worked. There were no witnesses at the hearing to corroborate his version.

In any event, faced with the time sheets, filled out by Clarke, provided to the Employer--and which, on the evidence, do not appear to have been controverted while he was employed there--I am reluctant to accept his claim that he worked additional time. These records are contemporaneous, credible and reliable. They must be accorded significant weight. If he actually worked the time claimed--i.e. the difference between the "in" and "out" times--why did he not claim this. I note that the Employer, at times, paid for additional time and questioned Clarke about this. Clarke reluctantly admitted this, then explained that there may have been times when he was delayed and this reduced his break times.

The Delegate noted in her analysis:

> "...I accept that it is possible that on occasion, Clarke worked longer than the 6 3/4 or 7 hours that are indicated on his time sheets. This is borne out by the statement of Jensen, who agrees that drivers may lose part of their break when a tour is delayed due to heavy traffic. Without evidence in the form of alternate time sheets, however, it is impossible to establish on which, if any, occasion, Clarke worked hours in excess of those indicated on his time sheets. I reject Clarke's notion that each day that he worked should be toped up to 8 hours, since

> there is no evidence, other than his own description of his working day, to support his claim."

As noted initially in this decision, the Delegate interviewed other drivers. Generally their explanation was not consistent with Clarke's, one example being the time necessary to do the "pre-trip" inspection of the vehicle.

In my view, the Delegate thoroughly investigated the claim and made a detailed and thoughtful decision, set out in her Determination. In short, I accept the delegate's conclusions. I am of the view that the Employee has not discharged the burden on the appeal and I dismiss the appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated September 7, 2001, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal