

BC EST #D148/98
Reconsideration of BC EST #D050/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116
of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Interior Retread & Sales, operating as Fountain Tire
(the “Employer”)

- of a Decision issued by -

The Employment Standards Tribunal
(the “Tribunal”)

ADJUDICATOR: Mark Thompson
FILE NO.: 98/087
DATE OF DECISION: **March 29, 1998**

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DECISION

OVERVIEW

This is an application for reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of Decision #D050/98 (the “*Decision*”), which was issued by the Employment Standards Tribunal (the “*Tribunal*”) on October 20, 1997. The *Decision* confirmed a Determination (the “*Determination*”) issued by the Director of Employment Standards (the “*Director*”) on June 6, 1997. The *Determination* found that Interior Retread & Sales Ltd., operating as Fountain Tire (the “*Employer*”), had violated Section 18(1) of the *Act* in respect of a former employee Terence Alcorn (“*Alcorn*”). In particular, the *Determination* found that the *Employer* had failed to pay *Alcorn* for time actually worked.

The *Decision* focussed on the *Director*’s reliance on *Alcorn*’s records of time worked and the definition of time worked under *Alcorn*’s contract of employment. The Adjudicator concluded that the *Director* had correctly relied on *Alcorn*’s records and that time spent waiting for ferries and travelling on ferries was included under *Alcorn*’s record of employment.

In its request for reconsideration, the *Employer* argued that the Adjudicator had erred in his interpretation of *Alcorn*’s contract of employment and the status of travel time under the *Act*.

ISSUE TO BE DECIDED

The issue in this case is whether *Alcorn*’s time spent travelling on a British Columbia Ferry and waiting for ferries should be classified as work time.

FACTS

Most of the facts of the case are not in dispute. The *Employer* operates a tire retread plant, retail and service outlet in Abbotsford. It picks up and delivers tires to be treated in its retread plant from various locations in the Province. Its drivers go to Vancouver Island and the Sunshine Coast for this purpose.

The *Employer* hired *Alcorn* effective January 2, 1997. It made a contract of employment with *Alcorn* by which he would be paid a flat rate of \$1,440.00 every two weeks. The contract was based on an hourly wage of \$18.00 for an expected 80 hours of work over a two week period. Drivers were paid on a flat rate because the *Employer* had no means of monitoring their work while they were away from the plant. The president of the

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Employer testified before the Adjudicator that Alcorn would have some very long days and some shorter ones. Travel to the Sunshine Coast and Vancouver necessarily involved longer days due to the need to travel on a ferry. On other days, Alcorn could leave work early, and he was entitled to every second Friday off. Alcorn testified that he did work the long days travelling to Vancouver Island and the Sunshine Coast, but not shorter days when he was working on the Lower Mainland. He provided records of his time worked to show that he worked at least until 4:15 p.m. on the days he did not leave the Lower Mainland. Records submitted to the Adjudicator showed that he had two Fridays off between his date of hire and his last day of work, March 25, 1997. In addition, on three Fridays he worked either two or three hours. On other days Alcorn worked until 6:00p.m. In addition, he worked on two Saturdays during his period of employment

Alcorn raised the issue of his hours of work with the Employer, asking to be paid for the extra time. The Employer refused on the grounds that he should be able to complete his tasks in the time called for in his contract of employment. A short time later, Alcorn quit and filed a complaint under the Act.

The Employer presented the Motor Vehicle Operator's Daily Log for Alcorn to the Adjudicator. A Daily Log is required by the Ministry of Highways and Transportation pursuant to provincial legislation. Both Alcorn and the Employer considered the logs to be correct. These records distinguished between Alcorn's "on-duty time," which was time driving and performing other ancillary functions. They also noted his "off-duty" time, which included time spent on ferries or waiting for a ferry. The time recorded as on-duty time was about half of the time Alcorn claimed as working time. The Employer did not have any hours of work records of its own, but argued that the Operator's Daily Log should be accepted as the record of Alcorn's time worked for purposes of this case.

The Employer argued that travel time was not "work" under the Act, citing *Lone Wolf Contracting*, BCEST #D267/96, as support for its position. It also urged the Adjudicator to accept the Operator's Daily Log as the true record of time worked.

The Adjudicator found that the Employer's contract of employment with Alcorn was sufficient to decide the case. Under that contract, Alcorn's time spent waiting for ferries and travelling on ferries was to be counted as time worked. It was not necessary to rely on an interpretation of the Act. Moreover, in the absence of any records of hours worked maintained by the Employer, the Director was entitled to rely on Alcorn's records of time worked.

ANALYSIS

In its request for reconsideration, the Employer repeated its argument that travel time was not working time under the Act. It also urged that the Daily Operator's Log be accepted as the correct record of Alcorn's time worked. Finally, it argued that the contract with

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Alcorn did not provide for extra pay for work in excess of 80 hours per two week period. Rather he agreed to work for a flat sum of \$1,440 per pay period.

Mr. Alcorn pointed out that under British Columbia Ferry Corporation regulations the driver of a vehicle is in charge of the vehicle while it is on a vessel.

The Employer's arguments in support of its request for reconsideration were presented to the Adjudicator in the hearing that led to the Decision. The appellant in a request for reconsideration before this Tribunal must demonstrate that there was a serious error in law in the original decision or that significant evidence was not available to the Adjudicator would have led to a different result.

The Employer did not fulfill either requirement in this case. The Adjudicator found that Alcorn should be paid for time worked, including time on a ferry or waiting for a ferry, under his contract of employment with the Employer. Alcorn's description of the contract of employment, i.e., that he would be paid \$1,440 for 80 hours of work over a bi-weekly pay period is more logical than the Employer's version. Payroll records credited Alcorn with 80 hours of work per pay period. The Act empowers the Director to recover wages owed to employees that exceed the conditions in the Act, so it was not necessary to determine whether the time Alcorn spent on the ferry or waiting for a ferry was "work" under the terms of the statute. I concur with the Adjudicator's view that Alcorn's contract of employment governed his hours of work, which included time spent waiting for ferries and travelling on them. At all times, Alcorn was responsible for the Employer's vehicle and its cargo.

ORDER

For these reasons, under Section 116 of the Act, I decline to cancel, vary or refer the Decision (BC EST #D050/98) back to the original panel.

Mark Thompson
Adjudicator
Employment Standards Tribunal