

**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 -

Alternate Building Supplies Incorporated  
("Alternate")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 97/680

**DATE OF HEARING:** November 18, 1997

**DATE OF DECISION:** November 25, 1997

**DECISION**

**APPEARANCES**

Dale Leinweber                      on behalf of Alternate Building Supplies Incorporated  
Ian Stewart                              on behalf of Alternate Building Supplies Incorporated  
Lawrence Bevilacqua              on his own behalf

**OVERVIEW**

This is an appeal by Alternate Building Supplies Incorporated (“Alternate”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated August 14, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Alternate alleges that the delegate of the Director erred in the Determination by concluding that Lawrence Bevilacqua (“Bevilacqua”) was owed for overtime wages and compensation for length of service in the amount of \$2,738.85 plus interest for a total of \$2,827.24.

**ISSUES TO BE DECIDED**

The issues to be decided in this appeal are:

1. Does Alternate owe overtime wages to Bevilacqua ?
2. Does Alternate owe compensation for length of service to Bevilacqua ?

**FACTS**

The following facts are not in dispute:

- Bevilacqua was employed by Alternate from December 1993 to December 13, 1996;
- until June 30, 1996, Bevilacqua worked six days each week;
- Bevilacqua was paid on a salary basis for work performed Monday to Friday and was paid at a daily straight time rate for work performed on Saturdays;
- Bevilacqua and Dale Leinweber (“Leinweber”) got into a heated discussion on Friday December 13, 1996;
- Bevilacqua left the workplace after the heated discussion with Leinweber;

- Bevilacqua attended the workplace on December 15, 1996 for the purpose of a meeting with Leinweber and Ian Stewart (“Stewart”), the principals of Alternate to discuss the circumstances which occurred the previous Friday;
- Alternate issued a Record of Employment (“ROE”) dated December 20, 1996 to Bevilacqua which indicated that Bevilacqua had been dismissed;
- Bevilacqua filed a complaint alleging that he was owed for annual vacation pay, overtime wages and compensation for length of service;
- the delegate of the Director determined that Alternate owed overtime wages and compensation for length of service to Bevilacqua.

Stewart and Leinweber testified on behalf of Alternate and stated that:

- they do not dispute that Bevilacqua worked overtime and is owed overtime wages;
- they do not dispute the calculation of overtime owing performed by the delegate of the Director for the period October 1995 to June 1996, inclusive;
- they do not agree with the calculations performed for the period December 1994 to September 1995 inclusive as both December 24 & 31, 1994 were only 4 hour days and for the balance of this period, the Saturdays worked were only 7 1/2 hour days;
- the number of incidents of misconduct by Bevilacqua clearly establish just cause for dismissal or alternatively, the actions by Bevilacqua constituted a repudiation of the employment contract and he should be considered to have quit.

**ANALYSIS**

The burden of establishing that the delegate of the Director erred in the Determination rests with Alternate.

There is no dispute that Alternate owes overtime wages to Bevilacqua. Bevilacqua did not challenge the evidence of Alternate with respect to the corrections to the calculations of the delegate of the Director in regard to the period December 1994 to September 1995 inclusive. The overtime wages owing to Bevilacqua are therefore recalculated as follows:

<b>period</b>	<b>hours adjusted</b>	<b>OT rate</b>	<b>total</b>
December 1994	8.5	\$15.34	\$130.39
January 1995	.5	\$15.34	\$ 7.67
February 1995	.5	\$18.75	\$ 9.38
March 1995	1	\$16.30	\$ 16.30
April 1995	2	\$18.75	\$ 37.50
May 1995	.5	\$16.30	\$ 8.15
June 1995	1	\$17.04	\$ 17.04

July 1995	1.5	\$17.86	\$ 26.79
August 1995	1	\$16.30	\$ 16.30
September 1995	1.5	\$17.87	\$ 26.80
<b>total adjustments</b>			<b>\$296.32</b>

Bevilacqua is therefore owed overtime wages in the amount of \$1,248.89 - \$296.32  
**=\$952.57**

The liability on an employer to pay compensation for length of service is found in Section 63 of the *Act*, which states:

*Section 63, Liability resulting from length of service*

63. (1) *After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*

(2) *The employer's liability for compensation for length of service increases as follows:*

(a) *after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;*

(b) *after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.*

(3) *The liability is deemed to be discharged if the employee*

(a) *is given written notice of termination as follows:*

(i) *one week's notice after 3 consecutive months of employment;*

(ii) *2 weeks' notice after 12 consecutive months of employment;*

(iii) *3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;*

(b) *is given a combination of notice and money equivalent to the amount the employer is liable to pay, or*

(c) *terminates the employment, retires from employment, or is dismissed for just cause.*

(4) *The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by*

*(a) totaling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,*  
*(b) dividing the total by 8, and*  
*(c) multiplying the result by the number of weeks' wages the employer is liable to pay.*

*(5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.*

The liability on Alternate to pay compensation for length of service to Bevilacqua may be discharged if just cause exists for termination or if Bevilacqua resigned his employment.

The evidence surrounding the circumstances of the heated discussion between Leinweber and Bevilacqua on Friday December 13, 1996 is certainly influenced by the perspectives of the participants. I am satisfied that both parties are recounting their recollection of the circumstances as they believe them to have transpired, however, those recollections differ on some significant points, was Bevilacqua fired or did he quit. I must therefore consider the subsequent actions of the parties in order to determine what most likely took place on Friday December 13, 1996.

There is no dispute that after the altercation with Leinweber, Bevilacqua left the premises of Alternate. There is also no dispute that over the subsequent weekend, Bevilacqua made a number of telephone calls to Stewart's residence to discuss the events of Friday. There is further no dispute that a meeting was arranged at Stewart's suggestion for 9:00 a.m. on Monday December 16, 1996.

Bevilacqua showed up at the workplace for the meeting and found that Stewart was not there but Leinweber was. After another discussion with Leinweber, Bevilacqua left the premises of Alternate. Bevilacqua then filed a complaint with the Employment Standards Branch alleging, among other things, that he was entitled to compensation for length of service.

The Records of Employment ("ROE") subsequently issued by Alternate on December 20, 1996 clearly indicates that Bevilacqua was dismissed from his employment.

Based on the evidence provided and on the balance of probabilities, I conclude that Alternate terminated the employment of Bevilacqua on December 13, 1996.

The evidence provided with respect to the alleged incidents of misconduct by Bevilacqua does not persuade me that Alternate had just cause to terminate the employment of Bevilacqua on December 13, 1996.

In the absence of just cause for termination of Bevilacqua's employment, Alternate is liable to pay compensation for length of service pursuant to the provisions of Section 63 of the *Act* in the amount as calculated by the delegate of the Director and set forth in the Determination.

The appeal by Alternate is allowed to the extent of the adjustments to the overtime wages owing as set forth above.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated August 14, 1997 be varied to be in the amount of **\$2,430.67** together with interest as calculated pursuant to Section 88 of the *Act*.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**