

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-

Lucien Frechette
("Frechette")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 98/626

DATE OF HEARING: January 15, 1999

DATE OF DECISION: January 26, 1999

Decision

APPEARANCES

For the Director: R. Stea
For Lucien Frechette: Bruce B. Jordan, Marni Sherer, Anthony Humphreys
For 535429 B.C. Ltd.: D. Katz

OVERVIEW

This is an appeal by Lucien Frechette ("Frechette"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against Determination #054824, issued by the Director of Employment Standards ("the Director") September 3, 1998. The Director's delegate determined that Frechette was an employee, not a manager as contended by 53542 B.C.Ltd. dba Maaco Auto Body ("Maaco"). The Director accepted that Frechette worked some overtime hours. However, the Director's delegate was unable to quantify the amount of that overtime on the evidence provided to him. He was not prepared to make a determination in the absence of reliable records and dismissed the claim.

The determination that Frechette was not a manager was not appealed.

ISSUE TO BE DECIDED

The issue on appeal is whether the Director's delegate unreasonably and improperly rejected the whole of the record of hours work maintained by Frechette.

FACTS

Frechette was employed by Maaco as a detailer commencing the first week of February 1997 and was paid an hourly wage. During the latter part of May 1997, Frechette was promoted to the position of estimator, working in the front office. His duties changed significantly, and he was placed on salary. During the months of May and June, he was trained to do estimates and manage the day to day operations of the business. Once trained, the evidence is that he did approximately 70% of the estimates until August, when another estimator was hired. His employment ended September 24, 1997.

The business was open 8:00 am to 6:00 pm Monday to Friday and 10:00 am to 2:00 pm Saturday, and closed Sundays and statutory holidays.

Maaco kept no records of Frechette's hours after he was placed on salary.

After filing his claim, Frechette was asked by the Director's delegate whether he had any records of hours worked. Frechette provided him with a "Frogs" calendar, which he advised the Director's delegate contained a record of the hours he worked each day.

When asked some time later whether he had any other documentation to support his claim, Frechette gave the Director a computerized spread sheet which recorded, among other things dates, hours worked, and overtime hours worked. The evidence is that this spread sheet was provided to the Director's delegate two to three weeks after Frechette gave him the calendar.

After receiving the documentation and interviewing Frechette, the Director's delegate wrote up a document which he described as a "Statement", which stated, in part, as follows:

"...I did keep a living record of the hours I worked on my computer at home. Attached is an accurate record of the living record. When I was on salary I worked a regular schedule of Monday to Friday from 8:00 am to 6:00 pm. There were days that I worked past 6:00 pm but I never left before that time...."

The statement was sworn by Frechette.

The Director's delegate relied upon Tribunal decisions which held that in the absence of employer records, quantum may be determined using living records kept and prepared by the employee during the course of their employment. After reviewing Frechette's records, the Director's delegate determined that he could not rely on the accuracy of the records produced. While he accepted that Frechette worked some overtime hours, he stated that in the absence of reliable records, he would not speculate on the hours and days worked.

Frechette's father, A. Humphreys, and girlfriend, M. Sherer, gave evidence at the hearing. Frechette stated that he had provided the Director's delegate with the names of both of these persons, but that the Director's delegate had not contacted them during his investigation.

Sherer lives with Frechette at the Humphreys residence. She testified that she saw Frechette make notes of his hours of work on the calendar after work, although she conceded in cross examination that she was often at work herself when Frechette returned from work. She also testified that Frechette's hours of work would be noted on the calendar when she glanced at it from time to time, indicating that he recorded them on a regular basis.

Humphreys testified that he created the computer spread sheet program for Frechette, and that together, they would enter his hours into the computer on either a daily, or every second day basis. They used the calendar to input the information into the computer.

Humphreys also testified that during the months of May and June, he drove Frechette to work before he himself went to work, and picked him up after he finished his work. Humphreys stated that his practise was to be at his work place at 7:45 a.m., and therefore, would drop Frechette off at work at approximately 7:30 a.m. Humphreys acknowledged in cross examination however, that he was aware Frechette was not required to be at work until 8:00 a.m, and that he dropped him off at 7:30 because it was convenient for him to do so.

During the period May 25 to June 30, Humphreys would also often pick Frechette up from work. Humphreys' evidence is that he left work at 6:15, and arrived at Maaco's workplace at 6:30 p.m. or later. He testified that he would often have to wait for a period of time after arriving because Frechette had not yet completed his duties. On occasion, Humphreys testified that he met Katz on

the premises and inquired whether Frechette was ready to leave. Katz replied that Frechette was still completing his work.

Humphreys stated he did not drop off or pick Frechette up during the month of July because of his later working hours, and that Frechette would take the car and drop him off at work first.

Frechette testified that he maintained his calendar on a daily, or every second day basis, and that the spread sheet, which was used to transfer the calendar notations into was also maintained on a daily or every second day basis. He argued that the documents were "accurate living records" as described by the Director's delegate.

Frechette testified that he arrived at work before 8:00 on a regular basis because he had to have the shop ready. He stated that he would open the doors, turn on the lights, and generally get it ready for customers who would drop their vehicles off at 8:00 a.m. He testified that he would often work after 6:00 p.m.

Frechette acknowledged that there were discrepancies between the spread sheet and the calendar that he could not explain. For example, as noted by the Director's delegate, the calendar indicates that he worked on July 1 (a statutory holiday) from 7:30 to 6:00 pm. Frechette explained that he recorded those hours because he was entitled to be paid for that time. During the week of August 25 to August 30, the calendar contains the notes 7:30 to 6:00, which were scribbled out. The word "Vacation" is written through the days of that week. Frechette explained these scribbled out times by saying that he intended to take his holiday from August 18 to 23, and in fact took it from August 25 to 30th.

Frechette had no explanation for why no hours were noted on the calendar for July 7, 28, 29 , 30, 31 and August 1, but 10.5 hours were noted on the spread sheet for each of those days.

Frechette acknowledged that he understood the statement he gave to the Director's delegate. He explained that the words " worked a regular schedule" meant that while those were the regular hours of the business, he in fact worked longer hours.

Frechette also testified that he worked during his lunch break almost daily. He stated that there was no set lunch hour, nor was there any defined area where employees could go to eat. He stated that he ate lunch in the front office, and if a customer came through the door looking for an estimate, he would have to interrupt his lunch break to do the work. Frechette testified that when another estimator was hired in August "things were less frantic".

Sherer testified that she brought Frechette lunch approximately 3 to 4 times per week, and that when she did so, Frechette was often too busy to leave work to eat. She stated that when she was there during his lunch hour, she often saw him greeting customers.

ARGUMENT

Frechette contends that, in the absence of company records, his documentation ought to be considered the best evidence. He states that it was maintained contemporaneously, and thus constitutes a " living record," which ought to have been relied upon. Frechette acknowledged that there were some discrepancies between the calendar and the computer generated spread sheet. He further acknowledges some discrepancies in the calendar itself, but suggests that these discrepancies are minor, and to be expected, as he was under no obligation to maintain them. He further argues that they ought not to be construed as false, or penalized for maintaining them.

He also argued that if the sworn statement was determined to be contradictory or ambiguous, it ought to be construed against the drafter of the document, in this instance, the Director's delegate.

Frechette also argued that the Director's delegate erred in determining that because he failed to demonstrate that his lunch hours were interrupted by work, he was nevertheless required to be available for work during a meal break. Therefore, he argued, he was entitled to be paid for those hours.

Frechette contends that the Director's delegate did not question him about any apparent inaccuracies in his documentation, request that he explain any of the notes, nor seek out any witnesses to corroborate his evidence.

Frechette further argues that the manner in which the complaint was investigated was prejudicial to his interests. He claimed that the delay in the investigation (which he filed in September 1997, and completed in September 1998) "obscured the required evidence" and "allowed the employer to cloud the issues involved." He also suggested that the Director's delegate treated him as hostile. Frechette also suggested that the witnesses interviewed still worked for Maaco, and may have been under some duress from Maaco. Consequently, he contends that their evidence must be regarded with that in mind.

The Director argued that the discrepancies were fundamental, and sufficiently serious as to render the documents wholly unreliable. The Director also contended that he could not just disregard those aspects of the documentation which contained discrepancies and rely on the balance to determine quantum.

The Director contended that the sworn statement, which he suggested was not ambiguous, repudiated the information noted on the calendar and the spread sheet. The Director contended that Frechette was given an opportunity to explain the discrepancies, and following the discussions, the delegate was left with doubts about the reliability of the record.

ANALYSIS

The Tribunal has determined that the test to be applied in circumstances such as this is "the best evidence rule." In *Hofer v. Director of Employment Standards* (B.C.E.S.T.D. #542), the Tribunal said as follows:

In the absence of proper records which comply with the requirements of Section 28 of the *Act*, it is reasonable for the Tribunal (or the Director's delegate) to consider employees' records or their oral evidence concerning their hours of work. These records or oral evidence must then be evaluated against the employer's incomplete records to determine the employees' entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate may accept the employees' records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable. Under those circumstances, if an employer appeals a determination, it would bear the onus to establish that it was unreasonable for the Director's delegate to rely on the employees' records (or evidence) and to establish that they were unreliable.

Further, the Tribunal stated

Thus, in my opinion, the appropriate test to apply in such circumstances is the "the best evidence rule". That is, the Director's delegate must make a reasoned decision, based on a evaluation of all the records and evidence which is available, to determine what is the best evidence of the number of hours actually worked by the employee.

Frechette contends that it was unreasonable for the Director's delegate to reject all of his records because of the minor inconsistencies, and that the best evidence is his record.

I agree with Frechette's argument that it is unfair to an employee to establish that he worked overtime, and the hours he did so, when the obligation of maintaining employee records rests with an employer. In this case, the employer was in breach of the Act in failing both to maintain records, and to pay Frechette overtime. To dismiss Frechette's claim for overtime wages appears to compound that unfairness, particularly when the Director's delegate was of the opinion that some overtime was owing.

I agree with the Director's delegate that the records are not entirely reliable. If Frechette had in fact recorded his hours of work contemporaneously, as he testified he did, there would be no need to scribble out the hours of work noted during the week of August 25 - 30th. Frechette went on vacation that week, somewhat unexpectedly. It appears that he recorded those hours when he assumed he would be going to work, or before he actually worked them, and scribbled them out later, when he went on vacation instead. I am unable to find that those hours were recorded contemporaneously.

There were a number of other days in which hours were recorded when Frechette was actually not at work. He was unable to explain those. There are inconsistencies between the hours recorded and the sworn statement. I find Frechette's explanation of why he would swear that he worked from 8:00 a.m to 6:00 p.m. daily, yet provide documentation that his hours were otherwise, to lack credibility.

I accept that Frechette's calendar was maintained somewhat regularly, although I do not accept that it was maintained daily, or even every second day. Nevertheless, I do not accept that it is entirely accurate, whether or not it was maintained daily.

I am unable to find that Frechette worked, or was required to begin work at 7:30 a.m. Humphreys' evidence is that he dropped him off for work for a 5-week period at that time because it was convenient for him to do so, even though he "knew he didn't start work until 8:00 a.m." Frechette himself stated to the Director's delegate that he sometimes came to work at 7:45, or 8:00 a.m. I find that he was not required to report for work until 8:00 a.m., but that on those occasions when he did arrive before that time, it was because it was convenient for him to do so, not because he was asked to.

I am unable to find however, that there is any real dispute that Frechette was required to be available for work over the lunch hour on a number of occasions. There is evidence that there was no specified lunch hour, and that he was often available for work, and did work, during that time.

Like the Director's delegate, I accept that Frechette worked some overtime hours. Because of the unfairness that necessarily results when a claim for overtime is dismissed in the absence of reliable evidence, there is a duty to investigate all possible information, and the evidence of all

parties involved. In this instance, the Director's delegate failed to interview two witnesses who had relevant and material evidence to provide him.

Determinations may only be made on the evidence provided. The Director can neither create evidence, nor be arbitrary in his interpretation of it. However, where there is some unclear evidence that may be explained, the Director's delegate has a duty to inquire into the inconsistencies with a view to determining the best evidence of the number of hours of overtime actually worked.

I refer the Determination back to the Director for further investigation of whether Frechette was required to be available for work during the lunch hour, and for a re-examination of the number of overtime hours actually worked.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated September, 1998 be varied as follows:

Frechette is entitled to payment for overtime. I refer the determination of the amount owed back to the Director on the basis that Frechette did not begin work before 8:00 a.m. I direct that the Director determine the amount owing on an expeditious basis.

The amount owing must be paid together with such interest as may have accrued, pursuant to Section 88 of the Act, since the date of issuance.

Carol Roberts
Adjudicator
Employment Standards Tribunal