

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 -

Greg Watson
("Watson")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE NO.: 98/635

DATE OF HEARING: December 21, 1998

DATE OF DECISION: February 11, 1999

DECISION

APPEARANCES

Greg Watson,	for himself
Steve Fonyo, Kerry Mohnssen, Joe Seguin,	for Watson
Major Awan, Adil Awan,	for Premier Auto Transmission, Ltd.

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Greg Watson ("Watson") against a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 15, 1998. In the Determination the delegate found that there was insufficient evidence to conclude that Watson had worked an 8.5 hour day for his former employer, Premier Auto Transmission Ltd. ("Premier"), which would have given rise to overtime pay.

Watson appealed on the grounds that he had regularly worked 8.5 hours per day. According to Watson, the delegate had not investigated his complaint properly.

ISSUE TO BE DECIDED

The issue to be decided in this case was the normal work schedule Watson worked for Premier.

FACTS

Watson was employed as a transmission "swingman" in Premier's shop in Richmond from November 1996 through March 26, 1998, when he completed a two-week resignation notice and quit. On approximately May 15, 1998, Watson filed a complaint, alleging that he had worked 8.5 hours per day and 42.5 hours per week for the period of his employment. Specifically, he stated that he began work at 8:30 a.m. and worked until 5:30 p.m. with a 30 minute unpaid lunch break.

Premier did not maintain any records of hours worked, or apparently any comprehensive payroll records. Watson did not keep a diary or other written evidence of his work schedule. Both Watson and Premier introduced verbal evidence of the work schedule in Premier's shop.

The Director's delegate investigated the complaint. He first contacted Premier. Mr. Adil Awan informed him that no work schedules or payroll records had been kept during Watson's employment, although a time clock was installed after his complaint. Mr. Awan stated that the standard work day at Premier began at 9:00 a.m. and concluded at 5:30 p.m., with a 30 minute unpaid lunch break.

When Watson applied for Employment Insurance benefits on March 30, 1998, he stated that he had worked 40 hours per week, although he had not been "paid for actual hours worked." On March 31, Watson informed Human Resources Development Canada (HRDC) that he had been working 8.5 hours per day, beginning at 8:30 a.m., with an unpaid lunch break and no paid coffee breaks. The HRDC Board of Referees found the evidence of working hours "contradictory." Watson explained that his March 30 statement was based on instructions from an HRDC employee who told him to should include the time for which he had been paid on his application for Employment Insurance.

An officer of the Employment Standards Branch attended the work site unannounced before 8:30 a.m. He observed Mr. Awan arrive before any other employees and open the gates at 8:40 a.m. Another employee arrived at 8:50 a.m., followed by other persons. Work commenced at approximately 9:00 a.m.

The delegate spoke with Mr. Major Awan, not related to Mr. Adil Awan, who had been an employee of Premier for approximately 10 years. Mr. Major Awan stated that during his employment, the shift began at 9:00 a.m. The only recent change in work arrangements was the installation of a time clock.

Based on the evidence of Mr. Major Awan, Mr. Adil Awan, the observation of the workplace and inconsistencies in Mr. Watson's evidence, the Director's delegate concluded that Watson had worked 8 hours per day and was not entitled to overtime pay.

Watson argued that the Director's delegate had not conducted a thorough investigation. He called three other employees (or former employees) as witnesses in support of his case.

Mr. Steve Fonyo had worked at Premier for three years "off and on" and became a full-time employee on March 23, 1998 and was on lay off at the time of the hearing. He could not testify about Watson's hours of work, but stated that work in the shop started at 8:30 and finished at 5:30, with only a half hour lunch break. In August or September 1998, a time clock was installed as a result of Watson's complaint.

Mr. Kerry Mohnssen started working for Premier in April 1997. He arrived for work at 8:20 or 8:25 a.m. and began work at 8:30. He worked with Watson for four months, and all employees except for Mr. Major Awan worked the same schedule. Mr. Joe Seguin ("Seguin"), the shop foreman, opened the shop, and employees put on their coveralls and started the coffee before 8:30. When Seguin was away, Mr. Adil Awan opened the shop. Coffee breaks were informal, but normally taken at the work area. Normally, someone brought coffee downstairs from the lunchroom. Lunch breaks were also informal. Mr.

Mohnssen usually went across the street to buy a sandwich. All employees took their lunch breaks about the same time.

Seguin, who testified under summons, was the shop foreman for Premier and was an employee for 8.5 years and worked with Watson 1.5 to 2 years. Seguin started work at 8:30 a.m., arriving earlier to open the doors, set the alarm, start the compressor and put the coffee on for his crew, which began work at 8:30. The shift ended at 5:30 p.m. When he started work, management told him that the work day was 9 hours, with a 30 minute lunch break. Coffee breaks were not taken sitting down. Seguin preferred to split the crew for lunch. Watson brought his own lunch or drove to a fast food outlet a few blocks away. Occasionally, Watson did not finish lunch within the allotted half an hour.

Since August 1998, the hours of work changed and a time clock was installed. At the time of the hearing, hours were 9:00 to 5:30 p.m. The crew waits to punch in at 9:00. Previously, the routine was the same, but work began at 8:30. Seguin had punched out after 5:30, but was paid for 8 hours. When the Director's delegate called Premier to talk to Seguin in connection with Watson's complaint, management told him not to speak to the delegate. During his employment, Seguin had been absent from work for personal reasons for several days. As he recalled, his pay was not reduced for the time he was away.

Mr. Major Awan is a part owner of Premier and is responsible for one of its operations. He testified that he works on the shop floor, starting at 9:00 or 9:30. He works through his breaks and on most days is on the shop floor until 5:30. He did not have much contact with Watson and did not recall talking to him about pay matters.

Mr. Satvinder Basi ("Basi") was an employee of Premier for 3 or 3.5 years. He is not a swingman, but rebuilds transmissions on the shop floor with other employees. Basi testified that all employees came to work between 8:30 and 9:00 and started working about 9:00. He has always worked 8 hours or less. He observed Watson taking more than half an hour for lunch when he left the building to buy a sandwich.

Mr. Adwil Awan is an owner of Premier, not related to Mr. Major Awan. He testified that the normal work day begins at 9:00. He supervises the employees directly, in addition to meeting with customers. He arrives between 8:15 and 8:30 to open the shop. Sometimes Seguin opens, as does Mr. Awan's father, also an owner of the business. When he opens the shop, he opens the door and gate, turns the compressor on and goes over the work orders for the day. No one else is in the shop at that time. Between 8:40 and 8:55, the other employees, numbering 4 or 5, arrive. Someone makes coffee, and the employees chat with each other. Customers are booked to arrive starting at 9:00 "to give the guys some time." Lunch and coffee break times are flexible, and employees do sit down during coffee breaks. Shop work ends at 5:00 to give the employees time to clean up and to schedule work over to the next day. Because his customers know that transmission repairs take time, Mr. Awan does not have overtime work. Watson used to come to work between 8:30 and 8:40. Most days he went out for lunch.

Prior to a discussion with Mr. Awan's father, Watson had not complained about the number of hours for which he had been paid. Shortly after this discussion, Watson gave notice of his resignation. About three months after the HRDC hearing, Premier installed a time clock. Mr. Awan denied that Premier had changed its work schedule in 1998, and the flexible arrangements for time off continued.

ANALYSIS

Watson's appeal was based on evidence that he and other employees regularly worked 8.5 hours per day. According to Watson, he had raised the matter of his hours of work with management and gave notice of his resignation when his request for overtime was denied. He requested a new investigation by a delegate of the Director. Premier denied that Watson and other employees had worked 8.5 hours per day and pointed to the lack of any previous complaints about its work schedules and the time off Watson had received for personal reasons.

Watson bore the onus of demonstrating that the Determination was incorrect. In addition to his own testimony, he presented evidence from two employees and one former employee concerning the normal work schedule. Premier presented evidence from two of its owners and one current employee. Neither party presented any collateral evidence to support the oral testimony.

After considering the evidence before me, I conclude that Watson normally did work 8.5 hours per day. Three considerations led me to that conclusion.

While all of the witnesses testified in a forthright manner, the individuals who came forward on Watson's behalf had little to gain from their testimony. It is not clear that either Mr. Fonyo or Mr. Mohnssen could even file complaints as a result of this decision. Mr. Seguin remains an employee of Premier who was summoned to testify. By contrast, Premier's evidence was dominated by two principals of the company, although Mr. Basi, a current employee, also testified. The Determination relied in part on the findings of an HRDC Board of Referees regarding Watson's evidence. The Board of Referees decided that Watson did not have cause to leave his job. One of the issues he raised in his appeal was an alleged disagreement with management about his hours of work. I found Watson's explanation for his appeal to be credible, without taking issue with the Board's decision.

Secondly, the internal logic of the evidence favoured Watson's position. Mr. Adil Awan testified that he did not book appointments with customers prior to 9:00 a.m., but he wanted to "give the guys time" before the customers arrived. It is more probable that employees were expected to arrive before the customers to prepare the work and be ready to road test vehicles and the like. The observations of a representative of the Director during the unannounced visit would be consistent with a change in practice by Premier to which Seguin referred. Furthermore, oral evidence presented to the Tribunal confirmed Watson's statements in his appeal.

Thirdly, Premier kept no records of hours worked and did not present any records of its payroll. Section 28 of the Act requires employers to maintain payroll records. It would be inconsistent with the purpose of the act in Section 2(b) to "promote fair treatment of employees and employers" to permit an employer to benefit from such a basic violation of the Act.

Premier's argument relied heavily on the lack of prior complaints from Watson or other employees, as well as its liberal treatment of employees when they needed time off. The Act gives former employees six months to file complaints against employers. It would be improper to penalize a former employee for taking advantage of a right granted by the statute. Lacking any records, it is not possible to verify Premier's claims about granting time off with pay. Even if Premier's evidence is accepted, and there is no reason to doubt it, the law does not permit an employer to neglect its obligations to meet basic requirements of the employment relationship in such a fashion.

ORDER

For these reasons, the Determination of September 15, 1998 is referred back to the Director, pursuant to Section 115 of the *Act*. No data on the number of days Watson worked was available to the Tribunal. It will be necessary to gather information on this point, but Watson is entitled to payment for overtime worked under the conclusions of this decision.

Mark Thompson
Adjudicator
Employment Standards Tribunal