

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1996, C. 38

- by -

Gerard Galata
("Galata")

of a Determination issued by -

The Director Employment Standards
(the "Director")

ADJUDICATOR: Alfred C. Kempf

FILE NO: 96/051

DATE OF HEARING: June 3, 1996

DATE OF DECISION: July 23, 1996

DECISION

OVERVIEW

This is an appeal by Galata, operating as Penticton Taxi, pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination of the Director of Employment Standards (the "Director") under number 000338. Galata claims that no wages are owed to an ex employee, Roland Smith ("Smith"). He requests a cancellation of the Determination pursuant to Section 113 of the Act.

Galata appeared on behalf of Penticton Taxi and Smith appeared on his own behalf. Donna Miller represented the Director. A hearing was held in Penticton, British Columbia on June 3, 1996. At the hearing the parties were asked to exchange and provide me further documentation.

FACTS

Smith was a taxi driver employed by Galata. In addition, Smith and his wife under a separate contract performed dispatch services for Galata. The Determination does not include the hours worked in the dispatch service. Galata, however, submits that Smith is claiming wages and overtime for hours that he did not work as a cab driver but rather in performing the dispatch services.

The period covered by the Determination is December 1, 1994, to and including May 31, 1995. While there was some conflicting evidence on the point I am satisfied that Smith was hired as a senior driver with some supervisory responsibility over the several other drivers on his shift.

Smith's shift was from 5 p.m. to 5 a.m. and was normally Monday, Wednesday, Thursday, Friday and Saturday.

Business fell off after 3 a.m. - particularly on weekday nights. Despite this, minimum coverage was expected to be 2 cabs.

Near the end of shift it was not uncommon to have drivers wait for calls at restaurants and clean their vehicles. They also look for "flagged" fares. Their last task is to re-fuel their vehicles for the next shift.

Galata at the hearing referred to the fact that the log book for his cabs often indicated that Smith was not actively transporting fares right up to 5 a.m. Smith disputed this and indicated the fact that he was not receiving fares did not mean that he was no longer on call (and therefore on duty).

During the 12 hour shifts meal breaks were taken by Smith but usually during slack times. If a call came in during a time that he was having a meal he would be required to interrupt his meal break if no other driver was available. I conclude on the evidence that Smith had uninterrupted meal breaks of one half hour per shift.

Various records were produced which might indicate the number of hours worked but I am not satisfied that any of the records produced other than the log books and fuelling receipts were sufficiently contemporaneous to provide any accurate record of the number of hours worked by Smith.

It is the fuelling records that I specifically suggested that Smith make available. Smith made some of these records available to Galata, Ms. Miller and myself approximately 10 days after the hearing. The records were received by my office on June 19, 1996. In addition to the provision of these records, Smith prepared a schedule of hours worked relying upon the fuelling records.

In preparing the schedule he used gas receipts which usually indicated a time for re-fuelling. Where the fuel receipts do not indicate the time of the re-fuelling he estimated a shift of 12 hours. Where he had no re-fuelling records he is prepared to accept the hours submitted by the employer in his submissions.

Galata testified that Smith was not required to be on duty all 12 hours and could assign other drivers to cover the shift or simply go home if things were not busy.

ISSUE TO BE DECIDED

The issue to be decided is the entitlement of Smith to overtime. In order to determine this issue it will be necessary to determine the number of hours worked by Smith.

ANALYSIS

The records produced by the parties to date are inconclusive of the hours worked by Smith. I do not accept the argument by Galata that the log book is determinative of the hours worked by Smith since I find on the evidence that Smith had duties other than driving. I have considered section 1(2) of the Act. It provides in essence that an employee works while on call at a location designated by the employer unless the designated location is the employee's residence.

I agree that Smith was not working any longer upon return to his home at or near the end of his shift.

Galata urged me to find that certain handwriting in the log book was that of Smith. He further argued that since this handwriting occurred before the end of his shift that he must have been at home and therefore not working. I am unable on the evidence to conclude that Smith's handwriting appears on the log.

I find that the best indicator of the hours worked by Smith are the records of his refuelling each morning. I accept that these records indicate the time that he concluded his work for that shift.

Unfortunately these records were not available at the hearing of the appeal. When Smith provided the records after the hearing he attached a note explaining that he provided samples only as there were "too many to copy". Since I believe these records are crucial I have concluded that I must refer the matter back to the director to review the refuelling records and calculate the overtime eligibility as follows:

- a) work start time is 5 p.m.;
- b) work concludes upon the refuelling of Smith's taxi;
- c) on those days where the refuelling receipt does not indicate the time for refuelling (I understand there are some such receipts) hours of work are to be determined as the average daily hours worked by Smith;

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d) the average daily hours worked by Smith is to be calculated using those days where refuelling receipts indicate the time of refuelling;

e) in making the aforesaid calculations 1/2 hour is to be deducted from each day worked for meal and coffee breaks.

ORDER

In summary, I order under Section 115 of the Act, that Determination #000338 be varied as set out above and referred back to the Director for recalculation.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal
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