

**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-

Ali Nezami  
(the "Appellant")

-of a Determination issued by-

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** E. Casey McCabe

**FILE NO.:** 99/87

**DATE OF DECISION:** June 22, 1999

**DECISION**

**APPEARANCES**

Tony Murazzo	for the employer
Ali Nezami	for himself
Diane MacLean	for the Director of Employment Standards

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by the complainant, Ali Nezami, of a Determination dated January 26, 1999 which denied the complainant’s claim for unpaid overtime wages. The Director’s Delegate determined that the employer had not contravened Section 40 of the *Act*.

**ISSUE(S) TO BE DECIDED**

1. Did the complainant work the claimed overtime hours?

**FACTS**

The employer operates a motor vehicle repair shop located at 7092 Curragh Avenue, Burnaby, British Columbia. The complainant worked for the employer as a bodyman from June 2, 1995 until January 2, 1997 when he quit his employment. Approximately twelve employees work for this employer. Of those twelve employees three are bodymen who are on the flat rate system. The other nine employees punch a time clock and are paid by the hour. The employees are paid bi-weekly and are issued pay stubs showing hours worked, rate of pay, deductions and net pay. This is in accordance with the requirements under Section 27 of the *Act*.

The interesting aspect of this case is the flat rate method of payment to the bodymen. The complainant is a bodyman. The crux of the complainant’s claim is that he worked overtime hours but was not paid for those hours. The problem with the complaint is that the complainant did not punch the time clock although time clocks were available in the work place and the employees who were not body men would utilize them. It is significant that none of the bodymen punched a time clock because they all work on the flat rate system.

The flat rate system is a standard by which the bodymen are paid on a per task basis. The amount of time required to perform each task has been arrived at through what appears to be an industry wide consensus based on input from tradesmen, employers, retailers' associations and I.C.B.C. The standard is not an exact science but seems to be an estimate of the amount of time required for a competent tradesman to complete a task in a workmanlike manner.

## ANALYSIS

As stated previously the flat rate system is utilized in this work place. By this system the bodymen are allowed to view a work order in order to assure themselves that the work can be completed in the time allotted. The file material indicates that for the most part the other two bodymen in this shop are able to complete work orders totaling in excess of 40 hours within a standard 40 hour work week.

The complainant alleges that he was not able to complete the tasks in less than the allotted time on the work orders and therefore worked overtime hours in order to complete the jobs. I understand from the complaint that the complainant is not claiming overtime for the notional hours which would be the difference between the amount of time allotted for the task and the actual hours worked but rather is claiming that he actually worked hours in excess of 8 per day or 40 per week in order to complete the tasks.

The Director's Delegate undertook a full investigation of the matter including interviews with the complainant, the employer, co-workers and persons who are involved in the industry including representatives from I.C.B.C. That investigation gave the Director's Delegate an understanding of the flat rate system. The Director's Delegate also investigated the employer's payroll records including the time keeping methods. Although not stated in the determination it is evident from the file material that the employer was assessed a penalty for failing to keep proper time records.

Against this background the best evidence that was available to the Director's Delegate in this matter consisted of the pay stubs. The pay stubs indicated that the hours paid in any particular time period were not hours in excess of 8 per day or 40 per week. Furthermore the complainant, although he alleges that he worked evenings and weekends, was not able to produce any evidence such as a private calendar, a day timer or time slips to show that he worked overtime hours. I note that the evidence shows that a punch clock was available at the workplace.

The Director's Delegate therefore based her findings of fact and conclusion in the determination on the best evidence that was available to her. The anecdotal evidence supplied by the complainant could not be corroborated because the co-workers that the complainant relied upon were not able to state the number of days or the amount of time on those days that the complainant worked past 5:00 p.m. In other words the uncorroborated oral evidence did not refute the written evidence on the pay stubs. It should be borne in mind that the complainant was not alleging that he wasn't paid as per the flat rate hours but rather was alleging that he actually worked overtime hours in excess of 8 per day or 40 per week.

In conclusion I am not satisfied that Mr. Nezami worked the overtime hours that he alleges he worked in his claim. I find that the Director's Delegate made findings of fact and drew conclusions based on a through investigation and the best evidence that was available to her. For these reasons the appeal is dismissed.

**ORDER**

The Determination dated January 26, 1999 is confirmed.

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**E. Casey McCabe**  
**Adjudicator**  
**Employment Standards Tribunal**