

An appeal

- by -

Brent Davies
("Davies")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: James Wolfgang

FILE No.: 2001/69

DATE OF DECISION: May 25, 2001

DECISION

APPEARANCES:

Brent Davies	For himself
Jesse Nielsen	For Brent Davies
Brad Davies	For Brent Davies
Linda Davies	For Brent Davies
Greg Prinz	For Nanaimo Car Care Centre Ltd.
Terry Eggrit	For Nanaimo Car Care Centre Ltd.
Curtis Cairns	For Nanaimo Car Care Centre Ltd.

No one attended to represent the Branch.

OVERVIEW

This is an appeal by Brent Davies (“Davies”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* from a Determination dated January 03, 2001 by the Director. Davies alleged he was not paid all wages including overtime, statutory holiday pay and vacation pay at the time he terminated his employment. Jesse Nielsen (Nielsen”) was also a complainant but did not appeal the Determination.

The Determination found Nanaimo Car Care Centre Ltd. (“NCCC”) did not contravene the *Act* and did not owe Davies any money. The Determination found the records of NCCC to be more reliable than those of Davies.

Davies is appealing the fact the delegate for the Director believed his records were unreliable when the employer did not have any records of the hours worked by him.

NCCC kept no records of hours worked by Davies however they dispute the number of hours claimed by Davies.

I took evidence from all of the parties.

An offer to mediate the matter was rejected.

ISSUES

Was the delegate correct in relying on the incomplete records of NCCC and not giving any weight to the records of Davies? Is any money owed to Davies?

ARGUMENT

The Determination found Davies was employed as a cleaner and detailer by NCCC from May 03, 2000 until August 31, 2000. Davies argues he also worked September 1, 2000 and did not get paid for that day.

Davies was paid on a piecework basis. He received 40% of the charge for cleaning a car or truck. Davies initially claimed he had worked for NCCC a year before and “quit the job because I felt that I was not being properly compensated for the work done and the hours worked”. NCCC claim the company did not exist one year earlier. Davies later changed this to say he had worked for a different company however, that company was taken over by the present owner of NCCC. When he began work at NCCC his father insisted he keep a record of the hours he worked because of the problem with the previous company. His father gave him a calendar in which he claims he marked the hours worked each day when he arrived home.

Davies was paid twice a month, with a draw on the 15th and the remainder of his pay at the end of the month. He would indicate the amount he wanted for the draw and a cheque would be issued. Davies claims he was not shown any records on what hours he had worked or what commissions he was being paid, either at the time of his draw or when he received his month end pay. When he received his pay at the end of May the amount did not equal what Davies believed he had earned. When he approached NCCC to get payroll information he claims he was told, “it was none of my business and to get back to work”. When Davies requested the records to see which vehicles he had been paid for, he was refused. He claims the same thing happened in June when he asked for the information.

Davies’ father contacted the Employment Standards Branch (the “Branch”) when Davies was not provided any information on his hours of work and/or how his commission was being calculated. He claims he was told that Davies should start looking for another job and wait until he left to file a complaint. Davies found another job, terminated his employment with NCCC and filed a complaint with the Branch. He believes the Branch contacted NCCC in July regarding the payment of minimum wage as the owner questioned Nielsen, asking if he had contacted the Branch. In that month the manner of record keeping changed with commissions being identified for the first time on the pay stub.

NCCC did not keep records of the hours worked by each employee but claim they used a “Nanaimo Car Care Commission Tracking Sheet”. The sheet listed the date, make and type of each vehicle, the invoice number, the price of the work to be done, the amount of the commission and the name of the person working on the vehicle. The title of this tracking sheet was changed in August to “Payroll Tracking Sheets” however the information remained the same. NCCC agreed they did not show the actual invoice to the employees; however, they were free to view the tracking sheets to check on the work they had done.

NCCC claim the tracking sheets were provided to Davies at the time he received his pay and was available to any employee on request. In their response to the Tribunal dated February 8, 2001 NCCC stated:

Mr. Davies at any time he asked was able to review his payroll tracking sheet (see attached) if Mr. Davies was concerned he was brought into the office and this sheet was presented to him, if he was not concerned the sheet was still presented to him on the fifteenth of each & every month this being the Day he refers to as advance day.

The NCCC witnesses at the hearing supported this evidence.

Davies claims he was never shown the document headed “Nanaimo Car Care Commission Tracking Sheet”. In support of Davies, Nielsen, at the hearing, also claimed he did not see his tracking sheets.

NCCC claim they have between 15 to 40 vehicles on their lot at any time and the firm employs 8 to 10 employees on a regular basis. NCCC claims each job is recorded on a two-part invoice with the name of the employee at the top of each one. Most of their business is for automobile dealerships and the invoices are used for billing the customers. NCCC claims those records are available for any employee to review on request, however they contain customer information and they will not supply copies to employees. They claim the delegate inspected all of the invoices that Davies had worked on and checked the tracking sheets.

The owner of NCCC admits he kept no record of hours worked by his employees as he claimed he was unaware of the requirements of the *Act* in this regard however, he argued he was paying minimum wage. He claimed the only rule he had was that each employee must be at work by no later than 8:30 each morning. They were paid on a piece work basis therefore he did not care, within reason, how long they took for lunch or how many coffee and smoke breaks they took. He said the coffee truck usually came at 9:00 am, some time after 10:00 am and at about 3:00 pm. He claimed Davies always took a break when the coffee truck was there and, in addition, took several smoke breaks during the day. Davies and his friend, Nielsen, would leave for lunch and often did not come back for a considerable time. Davies and Nielsen often worked together on vehicles, splitting the commission.

Davies said the records he submitted to the delegate were reduced by 30 minutes each day for lunch. He further said he was prepared to take another 30 minutes off each day for breaks. He claims he was not aware breaks were not paid time when he submitted his claim for hours.

For the period from May 3, 2000 until May 13, 2000 Davies did not have a vehicle and was driven to work each morning and picked up at the end of his shift by his mother. She claims she drove him to work for 8:30 in the morning and when she picked him up at 5:00 pm she would often have to wait a few minutes for him to finish what he was doing after 5:00.

Nielsen supported Davies' evidence as he claimed he was picked up and driven home from work each day by Davies. He and Davies worked the same hours, however he did not work every day Davies worked. Nielsen also stated in a undated letter to the Tribunal that:

“Mr. Greg Prinz says he gave us an hr (sic) for lunch. I on the other hand only recall him giving us half an hour for lunch. Brent and I would sometimes forget our lunch, so we would go out to eat, but arrive back just in time to start work again”.

There was no record of Nielsen's calendar supplied to the Tribunal, as he did not appeal the Determination. Nielsen filed a complaint at the same time as Davies and the same delegate investigated both complaints. The Determination has very little information on the investigation of Nielsen's complaint. If the tracking records and payroll records of Nielsen were matched with Davies' evidence it may have helped determine the accuracy of Davies' records. They both travelled to work and returned in the same vehicle and, presumably, worked the same hours.

Davies claims he started work earlier than most employees, cleaned the shop on Saturdays and worked two statutory holidays. Davies claims he worked May 22 and July 1st. On the July 1st holiday he was given the Monday, July 3rd off. NCCC deny Davies worked on the statutory holidays as the shop was closed on both holidays. NCCC denies having Davies clean the shop. The owner claims he personally does the shop cleaning on Sunday. NCCC also doubts Davies could have started work at 6:30 am as the employee who opens the shop does not arrive until between 7:00 and 7:30 am. Davies claims he made arrangements with that person to open the shop early on the days he started before 7:30 am.

Davies, in a letter to the Tribunal dated March 8, 2001, stated he had identified a number of discrepancies between the alleged payroll records of NCCC and the tracking sheets. For example, there are days he worked but no vehicles are shown on his tracking sheet and there are days when he is shown as not working and vehicles are shown on his tracking sheet. NCCC claim the payroll and tracking records vary because the payroll records are based on the time the customer is invoiced and the tracking record is when the employee is assigned the vehicle. They also point out it could take longer than one day to complete a vehicle and therefore nothing would show on the tracking sheet.

In preparing their report for the delegate, NCCC claim they took all of the work orders Davies had worked on, assigned what they considered “normal” times to perform each job and translated that into daily hours for the purpose of minimum wage payments. The records of NCCC vary considerably from the records of Davies as they claim they only paid for what they estimated was time worked, not for coffee and lunch breaks and other none productive time. When NCCC were questioned at the hearing on the time they estimated it would take to clean a “typical” car, their evidence was it takes from 4-6 hours. NCCC's witnesses substantiated this amount of time to complete a normal job although some particularly dirty vehicles could take longer.

The Determination found the primary issue to be the reliability of the Complainants and the Employer's records. The delegate reviewed the records of NCCC and of Davies and determined that the records kept by Davies were not reliable as no times were indicated for breaks and the duration of those breaks. The Determination found the Employer's records were "incomplete" as they were the hours the Employer guesstimated the Complainants actually worked, based on the work orders.

The Determination stated:

In the absence of proper records, and when faced with conflicting evidence such as this, it has been the practise of this office to accept the employer's records, unless the employee can clearly establish that they are flawed. The Complainants were unable to do so and thus their complaints must be dismissed.

THE FACTS AND ANALYSIS

NCCC relied solely on the tracking sheets to determine the amount of pay an employee was to receive. There are no hours recorded on the tracking sheets. It simply identifies the vehicle and the amount of money being charged for that particular job. They apply the 40% commission and that becomes the employee's earnings for that job, regardless of the amount of time taken to complete the task.

Some time after the complaint by Davies, NCCC created a record of the hours worked by him, probably in response to a request from the delegate for the hours worked by Davies. As NCCC had no record of the actual hours worked by Davies, they took what they considered to be the average time it takes to complete a vehicle and Davies' tracking sheets and produced the "hours worked" for the purpose of minimum wage. That record attempted to translate the amount of commission paid into a statement of hours worked. Any formula that pays solely on performance cannot be used to determine minimum wage. Without the time component, which is the hours an employee is under the direction or control of the employer, it could not be used to determine if minimum wage had been paid or not. To establish if minimum wage has been paid one must determine the amount of earnings and divide that by the hours worked. Without a record of the exact hours worked it is impossible to confirm whether the requirements of Section 16 of the *Act* have been met. It is also impossible to determine if any overtime is payable under Section 40 of the *Act*. I do not believe the report of the hours of work for Davies prepared by NCCC to be reliable and should not be used to indicate compliance with Section 28 (d) of the *Act*.

It is my opinion, they could not have paid Davies minimum wage based on the tracking records, notwithstanding the delegate appears to have accepted the "created hours" by NCCC. In the May tracking report Davies has a witness from the 3rd to the 13th indicating the time he was taken to work and the time he was picked up at the end of his shift. Even if you took the worst case scenario of 1 hour for lunch and ½ hour for breaks off a minimum day of 8 ½ hours Davies was

at the shop 7 hours per day. There are only 3 days in which he claims he worked less than 8 ½ hours in the 4-month period.

Davies records show he worked 24 days in May, not counting the statutory holiday. Using the above-mentioned “worst case scenario”, if he worked 7 hours per day that would equal 168 hours for a minimum wage of \$1,201.20 for the month. His commission earnings for May were \$903.00. That would produce a shortfall of \$298.20 for May.

In June Davies’ records report he worked 26 days. Again, using the “worst case scenario”, working 7 hours per day that would equal 182 hours for a minimum wage of \$1,301.30. (Davies claimed he worked from 7.5 to 9.5 hours per day, except for 1 day, not including lunch breaks of 1 hour) his commission earnings for June were \$1,056.00 leaving a shortfall of \$245.30.

It appears in July the Branch contacted NCCC, pointing out they were in violation of the *Act*. If NCCC were unaware of the requirements of the *Act* regarding minimum wage, overtime and record keeping prior to July, which they may well have been, from that date on they should have changed the way they were monitoring the hours worked by their employees. The record shows Davies worked 23 days in July not including the statutory holiday. If, as above, we calculate him working 7 hours per day that would be equal to \$1,151.15 for minimum wage. (Davies’ records indicate he worked from 8 to 10.5 hours per day, except for 1 day, not including lunch breaks) His commission earnings were \$822.00 leaving a shortfall of \$329.15.

There was some attempt to correct those violations after the Branch contacted NCCC in July and the evidence of the owner at the hearing was that they were doing business in a different way now. While I accept some changes were made I do not believe they were substantive. The forms changed and commissions were now identified, however the practice of paying on the tracking sheets continued without regard to the requirement to pay minimum wage or overtime. The new pay slips did not have any provision for hours of work and there is no line item for overtime, if worked.

I accept that other employees may have been more productive thereby earning commissions in excess of minimum wage however that is not the issue. Davies may not have utilized his time effectively and his work habits may not have been the best however the employer did not take any action against him thereby accepting his conduct. From that time if Davies was not a good worker, as NCCC claim, they should have taken corrective action or terminated him. They did not and the same situation occurred in August.

Davies’ record shows he worked 21 days in August not including the statutory holiday. Using the same 7 hours per day that would equal minimum wage in the amount of \$1,051.05. (Davies claims he worked from 7.5 to 10.5 hours per day except for 1 day) His commission earnings were \$916.00 leaving a shortfall of \$135.05.

That produces a situation where, using the very minimum hours that reasonably could have been worked, Davies is owed \$1,007.70. I am not saying this is the proper amount owed Davies, I am

indicating by using the most liberal deduction of time for breaks and deducting that from the minimum daily hours of work claimed by Davies, 8.5 including the lunch break, (except for 3 days), that is the amount he would have received. Davies claims he worked considerably more hours on many days.

I have not considered the possible requirement for the payment of overtime in the above calculations.

The Determination states:

I have determined that the *Act* has not been contravened.

With all due respect, I feel the *Act* has been contravened. Prior to July and probably after NCCC was clearly in violation of Sections 16, 27, 28 and possibly 40 of the *Act*. It was not a case of incomplete records but a case of no records relating to the hours worked by Davies and the other employees. While they may be beneficial, there is no obligation for the employees to maintain records of the hours worked. The *Act* clearly and unequivocally places that responsibility on the employer. Section 28 (1) of the *Act* states:

- (1) For each employee, an employer must keep records of the following information:
 - (d) the hours worked by an employee on each day, regardless of whether the employee is paid on an hourly or other basis;

Section 28 of the Regulations states:

The penalty for contravening any of the following provisions is \$500 for each contravention:

- (a) section 25 (2), 27, 28, 29, 37 (5) or 48 (3) of the *Act*;
- (b)

This is not a discretionary provision, either in quantum or in application, when a violation of the above listed sections occurs, there must be a penalty. I recognize this provision is not always enforced, however it clearly places the responsibility for record keeping on the employer. The records kept by the employer in this case were not “improper” records but no records.

I am not familiar with the practice in the office of the delegate, however the Tribunal has taken the position that when faced with the absence of accurate records by the employer they will favour the evidence of the employee, even if flawed. For example, Hi-Rise Salvage Ltd. BC EST#D 293/97 states, in part:

In several previous decisions this Tribunal has found that where the employer has not kept accurate records of the hours worked the evidence of the employee

should be preferred and that any partial records should be accepted unless there is substantial credible evidence to establish the facts alleged by the employer. (emphasis added)

The employee should not be penalized nor should the employer benefit by the absence of records by the employer. There have been a number of Determinations issued where the hours recorded by the complainant did not contain times taken for breaks and the delegates arbitrarily set a reasonable amount to be deducted from the hours recorded and calculated the hours worked on that basis. This, I believe, could have been done in this case.

I am not convinced the records of Davies are completely accurate. I have used what I consider the minimum hours only to indicate he is owed wages. It must be remembered the onus is on the employer to prove the records of the employee are incorrect when the employer has no records. To do otherwise would allow an employer in violation of Section 28 of the *Act* to deny an employee their rights.

In respect as to whether Davies started as early as 6:30 am or left late could be verified. Davies did not have a key to the shop and someone had to open it for him if he were to start before the regular start time and lock up if he remained after the normal time to close. It should be possible to determine if that happened and whom the person was who opened and closed for Davies

I have not dealt with the question of whether Davies worked any overtime, statutory holidays or whether he worked on September 1, 2000, as claimed. Again, a reasonable investigation should be able to determine if Davies performed work on those days.

The matter of hours worked, overtime, if any, statutory holiday pay and the amount of minimum wage owed Davies are referred back to the Director for investigation.

ORDER

In accordance with Section 115 of the *Act* I cancel the Determination by the Director dated January 3, 2001. The matter is referred back to the Director for further investigation as indicated above. Interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal