

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 -

Neil's Carpet Services Ltd.
re: Barrie James Aldridge

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO.: 20000/087

DATE OF HEARING: August 25, 2000

DATE OF DECISION: November 9, 2000

DECISION

APPEARANCES:

Sheerin Kalia	Counsel for Neil's Carpet Services Ltd.
Barrie James Aldrich	on his own behalf
Gerry Omstead	on behalf of the Director

OVERVIEW

This is an appeal by Neil's Carpet Services Ltd ("Neil's") pursuant to section 112 of the *Employment Standards Act* ("the Act") from a determination dated January 25th 2000 (#ER 089937) by the Director of Employment Standards ("the Director").

In the determination the Director found that Barrie James Aldrich ("Aldrich"), an employee of Neil's, was entitled to wages for statutory holidays and overtime wages in the amount of \$3,444.64 plus \$600.00 as an unauthorized deduction totaling \$4,044.64 plus interest.

Neil's allows that the \$600 is owing but disputes any liability for overtime or statutory holiday wages.

FACTS AND ANALYSIS

Aldrich worked from August 17th 1998 to June 18th 1999. The Director found that Neil's did not keep any daily record of the hours worked by Aldrich but he did receive a copy of some records provided by Aldrich. The Director found that those records appeared to be reasonable and accepted them for the purpose of calculating overtime wages. He found that records provided by the employer were somewhat suspect.

In the appeal Neil's points out that although they did not comply with the provisions of the Act that require a daily record of the hours worked they had documents which showed the daily list of jobs completed including the times scheduled for the jobs. Neil's submits that the hours claimed by Aldrich are grossly exaggerated.

At the hearing I heard evidence that satisfied me that the claims by Mr. Aldrich to have worked between 10 and 11 hours almost everyday were indeed exaggerated. While Mr. Aldrich called two witnesses to testify that he could have worked those hours neither witness could actually say that he did. Mr. Aldrich did not testify on his own behalf and he did not call as a witness his previous manager even though he claimed that this manager could have verified the hours worked.

On the other hand the employer was unable to establish with any certainty the hours actually worked by Mr. Aldrich. This does create a dilemma because the onus is on the employer to keep proper records of the hours actually worked by their employees. In this case the employer did not do that. In the absence of employer records the Tribunal has usually preferred the records of the employee. But this is not true if those records are found to be inaccurate or unreliable.

It did appear from the evidence that there could have been occasions when Mr. Aldrich would not have completed his assignments within the normal eight our day. However it also appeared that Aldrich had a good working relationship with his manager. It seems very unlikely that Aldrich would not have claimed all of the hours he now says that he worked over and above his basic day.

In a situation such as this I am conscious of the decision in *Faryna v. Chorney* [1952] 2 D.L.R. 354 (B.C.C.A.) in which the court noted that the real test of the truth of the story “must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions”. I am satisfied that the preponderance of probabilities would have been that Aldrich would have claimed the extra hours through his manager at the time that he was working.

While it is true that the appellant (employer) has the onus, that onus is to satisfy the Tribunal that the determination is in some way wrong. While I cannot fault the Director’s delegate for accepting the records provided by Aldrich in the absence of daily timesheets from the employer, on the whole of the evidence at this hearing I find it to be highly unlikely that those records are accurate or reliable. I find that Neil’s has met the onus of satisfying me that the amount of overtime claimed in the determination is unfounded.

An unfortunate result of rejecting Aldrich’s exaggerated claims is that there may have been genuine times that he did in fact work some overtime. However, Aldrich did not testify and therefore there is no basis upon which I could discover which of his claims were genuine and which were not. I have no basis, therefore, upon which to vary the amount of overtime owing to Aldrich.

I am not satisfied that Neil's persuaded me that statutory holidays were properly paid. I therefore find that the amounts set out in the delegate’s calculations for statutory holidays remains owing. These amounts total \$1,140.05 plus interest to date of payment. As noted earlier Neil’s also concedes that \$600 was improperly deducted from Mr. Aldrich. I find that the total amount owing to Aldrich is \$1,740.05 plus interest to date of payment.

ORDER

Pursuant to section 115 of the *Act* I order that the determination is varied to find that Barrie James Aldrich is entitled to the sum of \$1,740.05 plus interest to date of payment.

John M. Orr

John M. Orr
Adjudicator
Employment Standards Tribunal