

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: Beverley Davidson

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO.: 2000/473

DATE OF HEARING: August 25, 2000

DATE OF DECISION: November 9, 2000

DECISION

APPEARANCES:

Sheerin Kalia	Counsel for Neil's Carpet Services Ltd.
Beverley Davidson	on her 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 26th 2000 (#ER 089937) by the Director of Employment Standards ("the Director").

In the determination the Director found that Beverley Davidson was employed by Neil's from July 16th 1998 to December 5th 1998 and then again from January's 16th 1999 to March 15th 1999 as a telemarketer. In the first period of time she worked on salary and in the second on commission. The Director's delegate found that Davidson was entitled to wages for statutory holidays, minimum wage during the commission sales period of time, and overtime wages in the amount of \$2,360.04 plus interest.

Neil's disputes any liability for overtime, minimum wage or statutory holiday wages.

FACTS AND ANALYSIS

During the investigation by the Director's delegate he found that there were payroll records of the hours worked by Ms Davidson. However, Ms Davidson alleged that the records were not accurate and that she worked 12 to 13 hours per day, six days per week. The payroll records for the most part show that she worked an eight our day.

There are conflicting records as Ms Davidson produced certain daily timesheets that seemed to support her position that she had worked extensive hours over and above the basic 4 to 8 hours that she was hired to work. Neil's says that Ms Davidson was hired as a telemarketer and that all telemarketers worked a four-hour shift. Some telemarketers might work two four-hour shifts in a day but certainly not more.

Neil's agreed that Ms Davidson also did some office work when she was not on the telephone directly dealing with clients. They recognized the extra work by paying her a \$200 bonus on her pay cheque. Neil's points out that this was not for extra hours worked as the office work was done during her normal hourly work schedule. The payment was intended to recognize her contribution over and above that telemarketing work.

At the hearing I heard evidence that satisfied me that the claims by Ms Davidson to have worked between 12 to 13 hours almost everyday were unreliable. Her claims varied wildly through out her testimony and at times became so exaggerated that they lost all credibility.

Throughout her employment Ms Davidson regularly submitted timesheets for payroll purposes that were signed by herself and signed-off by her manager. The employer relied upon the accuracy of these timesheets and paid her accordingly. It seems incomprehensible that both she and the manager would have submitted false timesheets consistently claiming fewer hours than Ms Davidson actually worked.

Ms Davidson claimed that the former manager could verify the extent of her overtime hours but the manager was not called as a witness at the hearing. While the employer's evidence could not completely foreclose the possibility that Ms Davidson worked some extra hours it certainly demonstrated that she simply could not have worked the extraordinary number of hours that she claims six days a week.

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 on the preponderance of probabilities it is highly unlikely that Ms Davidson worked the hours she claims.

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. On the whole of the evidence at this hearing I find that Ms Davidson's evidence is not 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 Ms Davidson's exaggerated claims is that the claim that the commission sales did not meet minimum wage also fails because of a lack of credible evidence upon which to make such assessment.

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 remain owing. These amounts total \$218.01 plus interest to date of payment.

ORDER:

Pursuant to section 115 of the *Act* I order that the determination is varied to find that Beverley Davidson entitled to the sum of \$218.01 plus interest to date of payment.

John M. Orr

John M. Orr
Adjudicator
Employment Standards Tribunal