

**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 -

Gordon Hofer

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 97/622

**DATE OF HEARING:** October 22, 1997

**DATE OF DECISION:** November 19, 1997

**DECISION**

**APPEARANCES**

Gordon H. Hofer	on his own behalf
Kenneth G. Ransford	on behalf of Vancouver Core Supply Ltd.

**OVERVIEW**

This is an appeal by Gordon Hofer, under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued on July 24, 1997 by a delegate of the Director of Employment Standards. The Director’s delegate determined that the hours which Mr. Hofer claimed to have worked with his former employer, Vancouver Core Supply Ltd. (“VCS”), were unreliable and could not “...be used to accurately determine what, if any overtime pay...” was owed to him.

Mr. Hofer submits that the Director’s delegate should have relied on the hours of work records from which VCS prepared its payroll while Mr. Hofer was one of its employees. VCS submits that those records are unreliable because they were created entirely on the basis of Mr. Hofer telling VCS’s office staff what hours he had worked in any given bi-weekly payroll period. VCS says that it has given the Director’s delegate reasonable grounds to question the reliability and validity of those hours of work records.

A hearing was held in the Tribunal’s offices on October 22, 1997 at which time Mr. Hofer, Moira Lutar and Mr. Ransford gave evidence under oath.

**ISSUE TO BE DECIDED**

The primary issue to be decided in this appeal is whether it was reasonable for the Director’s delegate to conclude that the hours of work records provided to him by Mr. Hofer and Vancouver Core Supply Ltd. were sufficiently unreliable that they could not be used to determine Mr. Hofer’s entitlement, if any, to overtime wages under the provisions of the *Act*.

If I conclude that the Director’s delegate was reasonable then I should confirm the Determination. If I conclude that the Determination was not reasonable, I must decide whether to vary or cancel the Determination.

**FACTS**

The following facts are not disputed. Mr. Hofer was employed by VCS as a truck driver/labourer from February, 1987 to June 26, 1996. During his employment with VCS he was required to deliver and pick-up engine parts to and from various locations around

the province as well as Alberta and Washington State. As a result, he drove “overnight” runs quite regularly. VCS did not have a formal recording mechanism to record Mr. Hofer’s hours of work but, instead, relied on him to inform the office staff (usually the secretary or the office manager) how many hours he had worked in each bi-weekly payroll period. He was paid for all of these hours of work at his regular (straight-time) wage rate (\$15.00/hour in 1994; \$17.00/hour effective June, 1995). His hours of work, according to VCS’s payroll records (which, as noted above relied entirely on Mr. Hofer’s input) typically varied between 80 hours and 100 hours in each bi-weekly period. Mr. Hofer was a trusted employee who was required to collect large sums of money (often in cash) from VCS’s customers. He was the only truck driver employed by VCS and had considerable freedom to schedule his hours of work.

Part 3 of the *Motor Vehicle Act Regulations* (B.C. Reg. 26/58) requires truck drivers to maintain a daily log for “...each day during which a commercial motor vehicle is driven.” [Section 37.16(2)]. These *Regulations* require a driver to record hours in four categories:

- off-duty hours
- driving hours
- sleeping hours
- on-duty/not driving hours (i.e. loading/unloading, pre-trip inspection, etc.)

Mr. Hofer testified he maintained a daily log as required by these *Regulations* during his employment with VCS. The Ministry of Transportation and Highways monitors compliance with the *Regulations* by comparing the mileage logged with the driving time logged by each truck driver. Each driver is required to sign each log sheet when it is completed.

As noted by the Director’s delegate in the Determination, the hours recorded in the driver’s log book were different from the hours submitted by Mr. Hofer to VCS for payroll purposes:

According to your evidence you recorded fewer hours of work in the log book in order to pass Department of Transport inspection. You claim that the hours submitted to VCS for wage payment correctly reflected your hours of work and that the log book hours of work as recorded by you were incorrect.

The Director’s delegate went on the note that:

VCS claims that it paid you for all hours submitted by you. VCS did not check the hours submitted for accuracy until they compared the log book hours to those submitted by you for pay.

It is the position of VCS that, as you maintained two separate records of hours worked, one or both of those records of hours worked must be incorrect. Therefore, the reliability of the hours claimed to have been

worked by you and submitted for payment of wages is suspect and cannot be relied upon for this claim for overtime wages.

Mr. Hofer testified at the hearing that the daily log which he completed each day is not an accurate record of his hours of work because the log does not record all of the hours he worked and because he "...learned how to do the log books from Ken Ransford."

There is a dispute in the testimony which I had concerning when Mr. Hofer's hours of work were recorded. Mr. Hofer testified that he "called them into the office" regularly. Mr. Ransford testified that either the secretary (Nadine) or the office manager (Moirira) would have to call Mr. Hofer at the end of each bi-weekly payroll period in order to obtain his hours of work information from him. This was corroborated by Moira Lutar's sworn testimony in which she stated that prior to being told by Mr. Hofer how many hours he had worked during the previous two weeks, "we had no idea what hours he had worked." She also testified that the payroll was prepared from Mr. Hofer's bi-weekly hours of work, not his daily hours of work.

VCS submitted a worksheet (July, 1994 - June, 1996) to the Tribunal (a copy of which was disclosed to Mr. Hofer prior to the hearing). This document compares the hours recorded by Mr. Hofer in the daily log with the hours he submitted for payroll purposes. There are many inconsistencies between the two sets of records.

Mr. Ransford testified that since Mr. Hofer resigned from VCS he has filed a report with the police to complain of threatening telephone calls which he believes have been made by Mr. Hofer. Also, VCS's solicitor wrote to Mr. Hofer on July 28, 1997 to request that he "cease any communication of any sort" with VCS or its employees and to draw his attention to Section 348(1) of the *Criminal Code*.

Mr. Hofer denies any wrong-doing by him of the type alleged by VCS.

## **ANALYSIS**

The Director's Delegate gave the following reasons for issuing the Determination:

It is my determination that the hours claimed to have been worked by you as submitted for payment by VCS are not reliable. You acknowledged that the hours of work recorded in the log book were not true and accurate. This false recording of hours taints the reliability of the other record of hours recorded by you and submitted for payment. Even if the record of hours maintained by you and submitted for payment of wages is suspect in part, it cannot be used to accurately determine what, if any, overtime pay is owed to you.

Therefore, no further action will be taken with this complaint. Your complaint will now be closed on our file.

Before proceeding further in my analysis, I find it necessary to comment on and express my disagreement with the following statement:

Even if the record of hours maintained by you and submitted for payment of wages is suspect in part, it cannot be used to accurately determine what, if any, overtime pay is owed to you.

I find this to be an unreasonable test against which to measure the reliability and validity of hours-of-work records. It would be more appropriate, in my opinion, to scrutinize the entire record and to evaluate it for reliability and validity. If some of the records are found to be unreliable then that part should be rejected for purposes of determining entitlement to wages under the *Act*. However, it would be wrong and unfair to reject all records submitted by an employer or an employee simply because one part of the records was found to be unreliable.

Section 28 of the *Act* sets out, in detail, the records which an employer must keep for each employee. This requirement places an onus on an employer to keep records which comply with the *Act* and Section 28 of the *Employment Standards Regulation* (B.C. Reg. 396/95) establishes a penalty of \$500.00 for each contravention of Section 28 of the *Act*. Thus, in my view, an employer who does not comply with Section 28 of the *Act* and fails to keep the required payroll records for each employee should expect the Tribunal to treat that failure as a significant omission on the employer's part. I do not know whether the Director's delegate imposed a penalty on VCS. If a penalty was imposed, VCS did not exercise its right of appeal.

In the absence of proper records which comply with the requirements of Section 28 of the *Act*, it is reasonable for the Tribunal (or the Director's Delegate) to consider employees' records or their oral evidence concerning their hours of work. These records or oral evidence must then be evaluated against the employer's (incomplete) records to determine the employees' entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate may accept the employees' records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable. Under those circumstances, if an employer appeals a determination, it would bear the onus to establish that it was unreasonable for the Director's delegate to rely on the employees' records (or evidence) and to establish that they were unreliable.

When I review all of the oral evidence and written submissions in this appeal I am unable to conclude that the Determination was unreasonable.

Thus, in my opinion, the appropriate test to apply in such circumstances is "the best evidence rule". That is, the Director's delegate must make a reasoned decision, based on an evaluation of all the records and evidence which is available, to determine what is the best evidence of the number of hours actually worked by the employee.

When I review and consider all of the oral evidence, written submissions and documents which have been presented to me in this appeal, I am unable to find that the Determination was unreasonable. I make that finding for the following reason. First, I note that Mr. Hofer did not submit a complaint to the Employment Standards Branch while he was employed by VCS and while he was allegedly not being paid wages correctly. Second, the driver's daily log, which Mr. Hofer completed and signed, differs significantly from the hours of work which he submitted to VCS for payroll purposes. Mr. Hofer did not offer any plausible explanation why he did not complete the driver's daily log to record "on-duty/not driving" hours or "off-duty hours". Third, I accept the evidence given by Mr. Ransford and Ms. Lutar that Mr. Hofer's payroll records are based on his bi-weekly hours of work as stated by him at the end of each payroll period. For that reason, they are not a reliable record of the hours worked by him each day (see: Section 28(1)(d) of the *Act*).

I also find that it was reasonable for the Director's delegate not to rely on the driver's daily logs because of Mr. Hofer's candid admission that those records are not accurate.

Mr. Hofer is the appellant in this appeal. It is trite law that the appellant bears the onus of establishing that his appeal should be successful. In this appeal, I find that Mr. Hofer has not established that the Determination made by the Director's delegate was unreasonable.

**ORDER**

I order that the Determination be confirmed.

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**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**

GC:bls