

**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 -

Jean Pierre Rodrigue

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 97/345

**DATE OF HEARING:** July 15, 1997 & December 15, 1997

**DATE OF DECISION:** January 20, 1998

**DECISION**

**APPEARANCES**

Dianna Lowe                    on behalf of                    Jean Pierre Rodrigue

Scott M. Austin                on behalf of                    Santana Trucking Ltd. and  
Lunar Trucking Ltd.

**OVERVIEW**

This is an appeal by Jena Pierre Rodrigue, under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued on April 9, 1997 by a delegate of the Director of Employment Standards.

The Determination required Santana Trucking Ltd. and Lunar Trucking Ltd. (“Santana/Lunar”) to pay \$973.63 (including interest) to Mr. Rodrigue as a result of a finding that he was entitled to compensation for length of service, minimum daily pay, vacation pay, and reimbursement for an unauthorized deduction as well as an adjustment to reflect an overpayment of wages.

Mr. Rodrigue’s appeal is based on the ground that the Director’s delegate found that his claim for overtime wages was denied because “ ... there (were) no records on which to base an accurate calculation” of his entitlement to overtime wages.

A hearing was held at the Tribunal’s offices on July 15, 1997 at which time evidence was given by Mr. Rodrigue under oath. Various documents for the month of January, 1996 were entered into evidence through his testimony, including “weigh scale tickets”, “run sheets”, “driver’s vehicle check”, and “pre-air/pre-trip sheets”. The Director’s delegate did not attend the hearing. According to the evidence which I heard, similar documents were available for inspection for the period of Mr. Rodrigue’s employment with Santana/Lunar. On the basis of that evidence I found that it was unreasonable for the Director’s delegate to conclude that there were no records on which to base an accurate calculation. I adjourned the hearing at the conclusion of Mr. Rodrigue’s evidence, with the agreement of all parties which were present, to enable the Director’s delegate to conduct a more thorough investigation of Rodrigue’s claim for overtime wages.

I ordered (*Jean Pierre Rodrigue BC EST #D316/97*), that the matter be referred back to the Director’s delegate to “ ... review such documents as are available and are relevant to enable him to establish Rodrigue’s hours of work and the amount of wages, if any, which are owed”. I also ordered the Director’s delegate to conclude his review and to inform the parties of his findings on or before September 30, 1997

The Director's delegate wrote to the Tribunal on September 17, 1997 to advise that he had sent a "Demand for Production of Information" to : Wastech Services Ltd.; Canadian Waste Services Ltd.; Port Mann Landfill; and Mr. Rodrigue's legal counsel. According to the Director's delegate, "no information was received" and he concluded that "... Mr. Rodrigue has failed to establish that wages are owed to and his complaint ... is finalized." Subsequently, the Director's delegate sent a "Demand for Production of Payroll Records" to Santana/Lunar's legal counsel, Mr. Scott Austin, who advised the Director's delegate that "... his client did not keep a record of the hours worked each day by Mr. Rodrigue."

The hearing continued on December 15, 1997 at the Tribunal's offices in Vancouver at which time evidence was given under oath by John Dolan, Craig Parayko, Louise Parayko and Michael Mellenchuck.

### **ISSUE TO BE DECIDED**

Is Mr. Rodrigue's entitled to overtime wages under Part 4 of the *Act* (Hours of Work and Overtime).

I note that Mr. Rodrigue's claim for overtime wages is based on his submission that he worked up to 3 hours overtime on each Wednesday evening during his employment (except January, 1996 - March, 1996) and up to 4 hours overtime for each Saturday morning from June 3, 1995 to January 27, 1996, as well as March 31, 1996 and March 6, 1996. His counsel estimates that approximately \$5,500.00 in overtime wages is owed to Mr. Rodrigue.

### **FACTS & EVIDENCE**

#### ***Undisputed Facts***

The following facts are not in dispute:

- Mr. Rodrigue was employed by Santana Trucking Ltd. from October 1, 1993 until February 14, 1996 at which time he became an employee of Lunar Trucking Ltd. His last day of employment was April 13, 1996.
- Santana Trucking Ltd. and Lunar Trucking Ltd. are associated corporations pursuant to Section 95 of the *Act*.
- While working for Santana, Rodrigue was employed as a swamper. He was injured at work and filed a claim with the Workers Compensation Board. As he was unable to work as a swamper he was employed as a truck driver by Lunar. Santana is owned by Craig Parayko. Lunar is owned by Craig Parayko and Glen Harrison. Rodrigue's employment was terminated by Mr. Parayko while he was employed by Lunar.

- Mr. Rodrigue was employed initially as a “casual” employee. From August, 1994 until June, 1995 he worked 4 days/week (Monday-Thursday) from 7:30 a.m. to 1:30 p.m. Effective June, 1995 he worked five days/week (Monday-Friday). His salary is set out below:

October, 1993	August, 1994	“Swamper”	paid a daily rate
August, 1994	October 31, 1994	Truck driver	paid a daily rate
November 1, 1994	July 15, 1995	\$850.00(net)	bi-weekly (4 days/week)
July 16, 1995	July 31, 1995	\$900.00(net)	bi-weekly (5 days/week)
August 1, 1995	August 31, 1995	\$950.00(net)	“
September 1, 1995	January 31, 1996	\$850.00(net)	“
February 15, 1996	April 13, 1996	\$1,000.00(net)	“

- Mr. Rodrigue’s sister, Louise is married to Craig Parayko.
- Mr. Rodrigue’s employment was terminated without notice on April 13, 1996.
- Mr. Rodrigue has no written record of the number of hours which he worked each day.
- Santana/Lunar did not submit to Director’s delegate nor to the Tribunal a written record of the hours worked each day by Mr. Rodrigue.
- The Director’s delegate determined that “Rodrigue’s claim for overtime is denied as there are no records on which to base an accurate calculation.”

It is that aspect of the Determination which gives rise to this appeal. Mr. Rodrigue submits that various records exist to support his claim for overtime wages (e.g. weigh scale tickets from the Port Mann Landfill; Laidlaw Waste Systems Driver’s sheets; Laidlaw Driver’s Vehicle Check Sheets; Wastech Services Ltd. weigh scale tickets; and written statements by several people who are familiar with Mr. Rodrigue’s work schedule).

***Mr. Rodrigue’s Evidence***

At the hearing on July 15, 1997, Mr. Rodrigue testified that effective June, 1995 his work schedule was as follows on Monday through Friday, each week.

06:30 a.m.	Arrive at truck yard; warm up truck; complete pre-trip checks
07:00 a.m.	Meet C. Parayko at coffee shop (or gas station)
07:30 a.m.	Start garbage collection
12:00 - 12:30 p.m. or 1:00 - 1:30 p.m.	Complete garbage collection. Time varied depending on the day of the week and the time of the year. During the winter months, garbage collection was completed approximately 1 hour earlier than during the summer months.
+ 1 hour.	Drive to the coffee shop (or gas station) to drop off C. Parayko, drive to landfill site to dump contents of truck; return truck to truck yard

On each Wednesday, he testified, that after dumping at the landfill site he drove the truck to his home rather than returning directly to the truck yard. At approximately 6:00 p.m., he drove to the Laidlaw yard in Coquitlam to wash, fuel and check the truck and hand in his reports. He also testified that he returned the truck to the truck yard at approximately 9:00 p.m. His stated reason for not dumping the truck and refueling it, immediately upon completion of the collection route, was to avoid rush hour traffic on the Port Mann bridge.

He stated, further, that Richard Woo (Laidlaw) told him that Wastech would not allow him to dump on Friday at its facility in Coquitlam.

Mr. Rodrigue also testified that upon completion of the garbage collection he chose not to go to the landfill site on Friday. Rather, he waited until Saturday morning at which time he drove from his home to the truck yard, arriving at approximately 09:00 a.m., where upon he drove to the Wastech disposal facility in Coquitlam and then he went to the Laidlaw yard where he washed, fueled and checked the vehicle prior to returning to the truck yard at approximately 12:00 (noon).

According to Mr. Rodrigue's testimony on July 15th, it would take him between 4 and 5 hours to carry out these tasks upon completion of the garbage collection route.

The map which is attached to this Decision as Appendix "A" shows the following locations:

A	Mr. Rodrigue's home(s)	
B	Truck Park	128 Street / 82 Avenue
C	Landfill Site	148 Street / 114 Avenue
D	End of Wednesday garbage pick-up route	
E	Laidlaw / Wastech	Coquitlam

Mr. Rodrigue's counsel submitted an unsworn written statement by Caroline Pichner that he dumped at the Portmann Landfill "...around 2:00 p.m. - 2:30 p.m. from September, 1994 to the end of January, 1996". It is not clear who wrote the statement, but it is clear that it was not written by Caroline Pichner. Counsel also submitted into evidence through Mr.

Rodrigue's testimony various documents which were completed or acquired each day by Mr. Rodrigue (Port Mann Landfill weigh Scale ticket; Laidlaw "Run Sheet"; and contains Laidlaw "Drivers Vehicle Check" report). Each of these documents contain time and date information.

Mr. Rodrigue also testified that he described to the Director's delegate the kind of documents and records which Santana/Lunar, Laidlaw or Wastech retained and which would assist in establishing his entitlement to overtime wages.

Mr. John Dolan Jr. gave evidence which confirmed the approximate times which Mr. Rodrigue left home and returned home each work day. He also testified that he drove Mr. Rodrigue to the truck yard on many occasions.

***Employer's Evidence***

Craig Parayko testified that he drove Mr. Rodrigue to and from work on several occasions during his first months of employment in 1994. He also testified that Mr. Rodrigue preferred to and chose to go home at the end of the collection route rather than dumping, cleaning and refueling. According to Mr. Parayko, Mr. Rodrigue had two reasons for this preference: it allowed him time to prepare supper for his family; and, since his wife drove the family car to work, it was more convenient to wait for her to be at home so that she could drive him from the truck park back to the family home.

Mr. Parayko also testified that he told Mr. Rodrigue clearly that he should dump, clean and refuel the truck immediately after completing the collection route. However, Mr. Rodrigue continued to dump, clean and refuel on Wednesday evening and Saturday morning as these times suited his personal life better. In giving his evidence, Mr. Parayko described the various reasons (which were explained "many times" to Mr. Rodrigue) why he did not want Mr. Rodrigue to take the truck to his home:

- municipal parking by-laws prohibit parking commercial trucks on residential streets;
- the truck may be towed away;
- potential theft and/or vandalism; and
- additional fuel costs associated with "going out of his way" to get to his home.

According to Mr. Parayko, the "pre-trip" inspection of the truck was supposed to be completed before the truck's engine was started. Once the engine was started, it took approximately 10 minutes to "warm-up" the truck. Drivers and swampers had a choice: they could meet for coffee at 06:45 a.m. to 07:00 a.m. or they could meet at the starting point of the collection route at 07:30 a.m. He also testified that the "average end-of-runtime" was approximately 1:30 p.m. on a Wednesday. He gave the following time estimates in his evidence:

- End of route to Port Mann Landfill                      10 minutes

- Dumping at Landfill 5 - 10 minutes
- Port Mann Landfill to Laidlaw 15 - 20 minutes
- Refueling / cleaning at Laidlaw 30 minutes
- Laidlaw to truck park 25 - 30 minutes

In summary, Mr. Parayko testified that the dumping, cleaning and refueling of the truck would require no more than 1 1/2 to 1 3/4 hours on Wednesday or Friday. His evidence on this point did not change during lengthy cross-examination. His evidence that the collection route was completed at 1:00 p.m. each Friday was uncontroverted. He was also certain, under cross-examination, that the volume of traffic was “no problem” prior to 2:30 p.m. on a Wednesday or Friday afternoon. That is, rush hour traffic does not start on the bridge at 2:00 p.m.

Michael Mellenchuck testified that he is currently employed as a supervisor by Canadian Waste Services (previously Laidlaw) and has worked for approximately 5 years as a garbage truck driver or a recycling truck driver. He was employed for approximately 5 weeks by Lunar Trucking Ltd. to replace Mr. Rodrigue after his employment was terminated. He also testified that he began the collection route each morning at 07:30 a.m. and was “back at the truck park by 2:45 p.m.” except on Thursday, when he would be there by 2:00 p.m. Mr. Mellenchuck gave the following time estimates:

- pre-trip check 15 minutes
- end of route to Portmann Landfill 15 minutes
- dumping at landfill 10 - 15 minutes
- landfill to truck park 15 minutes
- refueling/cleaning at Laidlaw 10 - 15 minutes
- Laidlaw to truck park 20-25 minutes

He also testified that there was “...no problem with traffic on the bridge at that time.”

**ANALYSIS**

The only issue which this decision addresses is Mr. Rodrigue’s entitlement, if any, to overtime wages under the *Act*.

An employee’s entitlement to overtime wages is set out in Part 4 of the *Act* and, in particular, in Section 35 which states:

35. An employer must pay overtime wages in accordance with section 40 or 41 if the employer requires or, directly or indirectly, allows an employee to work

- (a) over 8 hours a day or 40 hours a week, or
- (b) if the employee is on a flexible work schedule adopted under section 37 or 38, an average over the employee's shift cycle of over 8 hours a day or 40 hours a week.

Section 40 of the *Act* describes the overtime wages which an employer must pay to an employee.

In his Reasons for Appeal, Mr. Rodrigue submits that:

I am appealing because there are records on which to base an accurate calculation of my overtime claim.

I worked overtime on each Wednesday evening and Saturday morning throughout the time that I was employed by Santana Trucking Ltd. and Lunar Trucking Ltd. On Wednesday evenings I fueled up between 6:00 & 9:30 p.m. I stopped and got a coffee at a local store each evening, and the proprietors of that store will be able to confirm this. On Saturday mornings I dumped the Friday load at the Transfer Station. I usually fired the truck up at 9:00 - 10:00 in the morning and finished after 3.5-4 hours. There is a record at the Transfer station to show that I dumped the load. I am attaching a copy of a Ticket which I still have in my possession showing that I dumped a load on Saturday, January 27, 1996. The remaining records are no longer in my possession but could have been obtained by the Director and are still available.

Mr. Rodrigue's hours of work on Wednesday and Saturday each week are at the centre of this appeal. According to Santana/Lunar's initial submission, those hours of work should not entitle Mr. Rodrigue to overtime wages for the following reasons:

### **Wednesday**

Mr. Rodrigue's preferred to go home immediately upon completion of the run, rather than dumping the load right away. He preferred to come back and dump it in the evening. **This was his own choice!** Had he emptied the truck on completion of the run he would have been finished 12:30 - 1:30 p.m. as any other day.

### **Friday**



Rather than first dumping the truck and going home, Mr. Rodrigue preferred to go home immediately and then dump the truck Saturday morning. **Again, this was his choice!** No overtime was required or necessary. Furthermore, it only required 3/4 hour to 1 hour to take the truck to the dump and empty it - not 3 1/2 to 4 hours as alleged.

(emphasis in original)

However, I note that the evidence given by Mr. Parayko and Mr. Mellenchuk supports a finding that the time required to dump, clean and refuel the truck would be no more than 1 1/2 hours to 1 3/4 hours. While Mr. Mellenchuk's time estimate is somewhat less than Mr. Parakyo's, they are both very similar and were not shaken in cross-examination.

I pause to note that this appeal would have been simplified greatly and, indeed, may not have been necessary if the Director's delegate had included in his investigation a review of the various documents which contain date and time information (weigh scale tickets, run sheets, drivers vehicle check sheets, pre-air/pre-trip sheets). The Director is given broad powers to enter a premises and to inspect records under Section 85 of the *Act*. When the Director's delegate wrote to the Tribunal on October 17, 1997 to confirm that he had received no written response to the "Demand for Production of Payroll Records" he did not exercise his full powers under Section 85(1) of the *Act*. It also would appear that the Director's delegate misconstrued the requirements placed on employers under Section 28 of the *Act*.

In a recent decision of the Tribunal (*Gordon Hofer*, BC EST #D538/97), the following guidance was given, at page 5, concerning an employer's responsibilities under the *Act* to maintain records:

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.

There is nothing in the evidence nor the parties' submissions to indicate that the Director's delegate imposed a penalty on Santana/Lunar.

In his written submission of October 17, 1997, the Director's delegate misconstrues two earlier decisions of the Tribunal: *Tri West Tractor Ltd.* (BC EST #D268/96) and *Kaiser Stables* (BC EST #D058/97). Both of those decisions deal with an appeal by an employer which sought to rely on documents which had not been disclosed and could have been disclosed to the Director's delegate during the investigation of a complaint. This appeal is quite different: it deals with an employee whose appeal is founded in part, on records which he says are in his former employer's possession and which should have been inspected by the Director's delegate during his investigation and prior to issuing the Determination dated April 9, 1997.

Due to the absence of written hours-of-work records this appeal must be decided largely on oral evidence which I heard at the hearings. Not surprisingly, there were significant differences in the oral testimony which was given by the various witnesses. Where there is a conflict in evidence, the views of the late Mr. Justice O'Halloran of the Court of Appeal of British Columbia in *Faryna V. Chorny*, (1952) 2 DLR 354 (BCCA) have been widely accepted. He made the following comments at page 357, on how the issue of credibility ought to be assessed by a decision - maker:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ...(pp.356-57)

When I review and consider all the oral evidence, written submissions and documents which have been submitted in this appeal, I am unable to conclude that Mr. Rodrigue is entitled to overtime wages under Part 4 of the *Act*. I make that finding for several reasons. First, I do not accept Mr. Rodrigue's evidence concerning how long it took him to dump, clean and refuel the truck. His evidence on that point was not "... in harmony with the preponderance of the probabilities." Second, I do not accept Mr. Rodrigue's submission that it was move time - effective to dump, clean and refuel on Wednesday evening and Saturday morning. I find that it was more likely than Mr. Rodrigue's real concerns were his family responsibilities and his lack of transportation from the truck yard to his home in

the afternoon. Third, I do not accept the submission that the volume of the traffic on the Port Mann Bridge at 2:00 p.m. or 2:30 p.m. was a factor which supports Mr. Rodrigue's appeal. Fourth, I find that I am not persuaded by Mr. Rodrigue's testimony concerning the prohibition against dumping at the Wastech Facility in Coquitlam on Friday afternoon. There was no evidence from Mr. Richard Woo nor from any employees of Wastech to corroborate this evidence. Fifth, I find that Mr. Parayko's estimate of the time required to dump, clean and refuel the truck is to be preferred over Mr. Rodrigue's estimate for reasons given at page 9 above.

What then, were Mr. Rodrigue's hours of work? There is no dispute that the collection of garbage or recyclables began at 07:30 a.m. and that the route(s) were completed not later than 1:30 p.m. (and often as early as 12:00 noon) depending on the day of the week and the time of year. This evidence supports a finding that the collection of garbage and recyclables took no more than 6 hours/days. To that I must add 1 3/4 hours to dump, clean and refuel the truck. I must also add 1/4 hour to account for the pre-trip check each morning. While I accept that Mr. Rodrigue arrived at the truck yard at 06:30 a.m., he did not work for a complete hour before starting to collect garbage and recyclables. He, like most other co-workers, went for coffee en route. I also note that Mr. Mellenchuk's estimate of 15 minutes to carry out the pre-trip checks is uncontroverted. Thus, I find that Mr. Rodrigue's hours of work amounted to a maximum of 8 hours per day and, therefore, he is not entitled to overtime wages under Section 35 of the *Act* because his employer did not "... require or, directly or indirectly, allow" him to work more than 8 hours/day or 40 hour/week.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination be confirmed.

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

**Appendix A**