



An appeal

- by -

Heather and Travis Stewart

- 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:** Cindy J. Lombard

**FILE No.:** 2003A/186

**DATE OF HEARING:** October 2, 2003

**DATE OF DECISION:** January 7, 2004



## DECISION

### APPEARANCES

The appellant, Heather Stewart (“Stewart”), appeared on her own behalf together with her mother, Vicky Blundell who gave evidence.

The respondent, Imelda Cardinal appeared on her own behalf and gave evidence as did the following witnesses on her behalf:

Lawrence Kuemerle, Ms. Cardinal’s current employer  
Chris Emery

### SUBMISSIONS AND OVERVIEW

This is an appeal filed by Stewart who appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on May 30, 2003, and which found that Stewart owed to Imelda Cardinal (“Cardinal”) wages, statutory holiday pay, one week compensation for length of service, annual vacation pay and interest pursuant to section 88 of the *Employment Standards Act* (the “Act”) in the sum of \$2572.04 (the “Determination”).

Stewart submits that she hired Cardinal to work as a nanny to her children/domestic for one month from April 2, 2002 to May 3, 2002. On May 3<sup>rd</sup> she says that she told Cardinal that she no longer required her services but that she was welcome to stay on and live with them as a guest which Stewart says that Cardinal did and voluntarily pitched in and helped with the children and housework in return for room and board until the Labour Day weekend, 2002. On that basis she says that Cardinal was not an employee during the relevant period and therefore does not owe her any monies pursuant to the *Act*.

Cardinal submits that she was employed by Stewart from March 18, 2002, when she arrived in Canada having been sponsored by the Stewart family to work as a child care provider/domestic until she was fired without cause or notice on September 2, 2003 and therefore that the Determination should be upheld.

### ISSUE

During the period March 12, 2002 to September 2, 2002 was Cardinal an employee as defined by the *Act*?

### ARGUMENT

Cardinal was sponsored by Stewart and her husband, Travis, to come to Canada from Hong Kong (they had originally met in the Philippines where Cardinal is from) to work as a nanny/domestic. An employment contract was completed by the Stewarts in August, 2001 while Cardinal was still in Hong Kong and in which they agreed to pay her minimum wage for a 40 hour, 8 hour day and overtime if those hours were exceeded. The contract was signed by Cardinal in December, 2001. The Stewarts paid for Cardinal’s air fare which she agreed to repay in the amount of \$900.00 and this amount was deducted by the delegate in the Determination.



Cardinal arrived at the Stewart's home in Salmon Arm, B.C. on March 18, 2002. Cardinal says that she began working right away. Stewart, on the other hand, says that Cardinal did not start working until April 2, 2002 when Stewart returned to work after being on sick leave.

On May 3, 2002 Stewart was terminated from her employment. Thereafter Stewart says that she told Cardinal that she had no money to continue to employ her but that she was welcome to stay on and live with the Stewarts as a guest. Stewart says that Cardinal pitched in and helped with household chores and the children in return for room and board.

The onus is on Stewart as the appellant to show on a balance of probabilities that the Determination is wrong such that the Director made a reviewable error pursuant to section 112 of the *Act*, namely, an error of law, or failed to observe the principles of natural justice in the making of the determination or evidence has become available that was not available at the time the Determination was being made.

## THE FACTS AND ANALYSIS

Stewart says that Cardinal was not an employee during the period March 18, 2000, to September 2, 2002, excluding April 2 to May 3, 2002, when she was employed, but was simply staying on in her home as a guest and on a daily basis pitching in to help in return for room and board. Stewart was also at home and one of their two children was in school. Stewart says that Cardinal's "pitching in" did not come anywhere close to the 12-hour days Cardinal says that she worked during this period. Stewart did not keep records of the hours that Cardinal did work.

Stewart and her mother, Blundell, both assert that it was not possible that she could have worked twelve hours per day and therefore her evidence is not credible and should not be believed at all.

Stewart did pay Cardinal a child care subsidy that she received from the provincial government in the amount of \$288.50 which she says was for a ten day period when she was looking for work. On her application she named Cardinal as the fulltime caregiver for her children.

Cardinal says that she came to Canada to work for the Stewarts based on her faith in the contract that they signed. She says that she began working right away. She did not at any time receive a written calculation of what she was owed and applicable deductions and did not receive any pay for even the one month that Stewart admits that she was employed.

Cardinal did keep records of her hours and work done which as set out by the Director indicate that she worked 12 hours per day during 128 days of the period March 12, 2002 to September 2, 2002. The work performed included child care, preparing meals, cleaning, doing laundry, shovelling snow, bringing in fire wood, etc. Cardinal says that her day would start at 6:30 a.m. preparing breakfast for the school aged son who left on the school bus at 7:15 a.m. In the evening dinner was prepared late when Mr. Stewart returned from work.

Cardinal says that she was expected by Stewart to be present and continue with her duties and on that basis she continued to be an employee as defined by the *Act*. According to the *Act* an "employee" includes "a person an employer allow, directly or indirectly, to perform work normally performed by an employee" and an "employer" to include a person "who has control or direction of an employee." Stewart's actions on the Labour Day weekend in insisting that Cardinal be present to help with the move



is just one example of her continuing to exert control over Cardinal and expecting her to be present to continue to perform the duties for which she had been hired but never paid.

Chris Emery, who together with his wife, have become close friends of Cardinal's, supported Cardinal's evidence that she continued to work long days through the summer months. Emery was also present when the relationship came to an end. Cardinal had come to the Emery's home for the Labour Day weekend. Stewart called to demand that Cardinal return to her home to help her with a move and Cardinal refused.

Where the evidence of Stewart and Blundell conflict with that of Cardinal and Emery we find that the evidence of the latter was more forthright.

After reviewing all of the evidence before us we have concluded that the Appellant, Stewart has not discharged the onus on her to show on a balance of probabilities that the Director made a reviewable error. There is no error of law, there is no allegation that the Delegate did not observe the principles of natural justice in arriving at the conclusion in the Determination and no evidence was submitted which was not available to the Delegate which would change the findings in the Determination.

The Appeal is therefore dismissed.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued.

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**Cindy J. Lombard**  
**Adjudicator**  
**Employment Standards Tribunal**