Employment Standards TRIBUNAL

An appeal

- by -

Wendy Michnick
("Michnick")

- 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: David B. Stevenson

FILE No.: 2001/756

DATE OF DECISION: January 7, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Wendy Michnick ("Michnick") of a Determination that was issued on October 5, 2001 by a delegate of the Director of Employment Standards (the "Director").

Michnick had filed a complaint with the Director under the *Act* alleging she was owed overtime pay and statutory holiday pay by her former employer, Prentice Hall Canada Inc. ("Prentice Hall"). The Determination concluded the *Act* had not been contravened, ceased the investigation of the complaint and closed the file.

Michnick says the Director committed an error by not accepting any of her evidence of hours worked. Michnick says the Tribunal should vary the Determination and either order an amount to be paid based on the records provided by her or order the Director to determine the hours of work from the records provided by Michnick.

The Director and Prentice Hall have filed responses to the appeal. The Tribunal has decided this appeal can be decided without an oral hearing.

ISSUE

The issue in this appeal is whether Michnick has demonstrated the Determination was sufficiently wrong in its conclusions of fact, in its interpretation of the facts or in its conclusions and decisions in respect of hours worked to justify the Tribunal exercising its authority under Section 115 of the *Act* to vary or cancel the Determination or refer it back to the Director.

FACTS

Michnick was employed by Prentice Hall from February 22, 1999 to September 9, 1999 as a Key Account Representative for the Professional, Trade and Reference Division of Prentice Hall at a rate of pay of $40,000 a year. She worked from her home.

The Determination notes that Michnick provided the following information:

- a letter dated February 12, 1999 setting out the conditions of her employment;
- a letter dated September 9, 1999 terminating her employment;
- a letter dated October 22, 1999 declining the severance package offered by Prentice Hall;
- a letter dated November 15, 1999 outlining a severance package for Michnick;

- a letter dated November 24, 1999 acknowledging receipt by Michnick of her Record of Employment and a cheque for the monies described in the November 15, 1999 letter;
- wage statements from pay period ending March 5, 1999 to the pay period ending September 17, 1999;
- Record of Employment issued September 17, 1999, for vacation pay and pay in lieu of notice;
- an amended Record of Employment issued November 16, 1999, for vacation pay, pay in lieu of notice and severance pay;
- a cheque from Prentice Hall to Michnick dated November 16, 1999 in the amount of $6,962.14 (net);
- a 1999 planning diary, labelled Book 1; and
- a 1999 planning diary, labelled Book 2.

Prentice Hall had kept no record of daily hours worked by Michnick. Prentice Hall acknowledged that Michnick worked overtime on May 26, 1999, had told them on May 31, 1999 she had worked overtime on 3 or 4 times and stated that Michnick was in Toronto for periods in March, May and June, 1999. Prentice Hall acknowledged Michnick's attendance in Toronto at the company's National Sales Meeting from June 11 to June 16, 1999.

The Determination concluded, in all the circumstances, that there was insufficient evidence to establish the exact number of hours worked by Michnick on a daily basis. The Determination includes a three and one-half page analysis of the information provided by Michnick. Central to the conclusion made in the Determination is a finding that the planning diaries kept by Michnick and provided to the Director by her could not be accepted as an accurate reflection of hours of work performed in a day. A number of examples are given in the Determination to support that finding.

The material provided by Michnick indicated a substantial number of overtime hours worked. In most cases, but not always, the hours were shown in the planning diaries in a manner she described as "daily equivalent hours", but no detail describing either the work being done in that time frame or how much time was taken up in work related tasks was provided. The material showed hours worked while she was on holiday in August, 1999. It also showed time travelling to or from Toronto on March 16 and 21, May 31, June 6, 10 and 20, 1999. March 21, June 6 and June 20 were Sundays. There also appears to be one day, April 13, 1999, where Michnick travelled to Calgary, leaving Vancouver at 7:00 am and returning to Vancouver at 10:50 pm. The material showed attendance at the conference on Saturday and Sunday, June 12 and 13, 1999. In one case, it showed Michnick travelling to Whistler, for what appears to work related to the "Market Place at Whistler Village", on August 6, 1999 and working in Whistler during the weekend of August 7 and 8, 1999.

During the investigation, Michnick took the position that the daily hours worked recorded in her planning diaries were "daily equivalent hours of work", which was described in a lengthy and detailed submission to the Director, dated June 11, 2001 as follows:

> I would note at the end of the day 9:00 am to 6:00 pm for nine hours of work. Some of that work might have been done from 7:00 am to 8:00 am, some may have been done from 8:00 pm to 10:00 pm or 12:00 midnight to 1:30 am. This was my short hand method of monitoring and recording my time. . . .
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> . . . . At times my day might be choppy with interruptions here or there. At times my day would go straight through . . . .

ARGUMENT AND ANALYSIS

Michnick argues that the Director, in effect, set a standard of reliability for the records provided by her that was too high. Michnick also submits the Director did not understand the explanation of the basis for daily hours worked that were recorded in her planning diaries.

In reply, the Director relies on the Determination, referring to the analysis of the information provided by Michnick. Counsel for Prentice Hall raises a number of arguments in reply:

- the appeal is out of time or, alternatively, some aspects of the appeal are out of time;
- some of the documents submitted with the appeal are settlement documents and as such should be considered confidential and declared inadmissible;
- it is an inappropriate use of the appeal process to have the appellant seek to assess - *de novo* - the appellant's claim; and
- Michnick has not shown there is an error in the Determination.

On this last point, counsel says the Director was not wrong to have concluded the records provided by Michnick could not be accepted as an accurate reflection of hours worked. There is some merit in the last two arguments.

I do not, however, accept that either of the first two arguments impact on the appeal. The appeal was filed within the time limits required by the *Act*. The documents provided by Michnick and received by the Tribunal November 8, 2001, appear to be no more than the complete record of the complaint. No party has indicated there is anything new in that material. If Michnick had not provided it, the Tribunal would likely have requested, and been provided, it from the Director. All of the material, in any event, relates directly to reasons found in the appeal filed with the Tribunal on October 29, 2001. This is not a case where a later submission raises new grounds of appeal not contemplated or related to the initial, and timely, appeal. Second, I have not found the confidential documents to be of any significance in deciding this appeal.

I completely agree with the third argument. An appeal before the Tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination - as a matter of fact, as a matter of law or as a matter of mixed fact and law - sufficient to justify intervention by the Tribunal under Section 115 of the *Act* (see *Docherty*, BC EST #D098/00). It is not the function of the Tribunal to substitute its opinion for that of the Director without some basis for doing so.

The burden is on Michnick, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. This burden has been described by the Tribunal in *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96) as the "risk of non-persuasion":

> Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L.Rev. 34 puts it, "the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy". In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of "burden of proof" is only of significance where the tribunal has not been persuaded.

Placing the risk of non-persuasion on an appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director.

For the most part Michnick has failed to meet the burden on her. In reviewing the substantial amount of material provided with this appeal, I cannot say the conclusion reached by the Director as it related to the sufficiency of the planning diaries as a record of daily hours worked was, in the main, wrong, unfair, unreasonable or not rationally grounded in the material available.

Where an appellant is challenging a conclusion of fact, the appellant must show that the conclusion of fact was either based on wrong information; that it was unreasonable, manifestly unfair or there was no rational basis upon which the findings of fact could be made (see *Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98). The only specific argument provided against the Determination comes in Michnick's December 4, 2001 reply submission. In that submission, Michnick says the Director did not understand her method of recording daily hours of work. I disagree. It is apparent the Director understood the explanation, but did not accept the planning diaries sufficiently supported the overtime claim. There is an inference in the argument made by Michnick that, absent any other information, the Director is bound to accept the records provided by her. That is not correct. The records of Michnick must withstand scrutiny on their own terms. There is no presumption of the correctness of her records only because Prentice Hall failed to keep records. As the Tribunal noted in *Mykonos Taverna, operating as the Achillion Restaurant*, *supra*, the Director has been accorded considerable latitude in deciding what evidence will be received and relied on when making decisions subject to fair hearing considerations and within the limitations set out in the first sentence of this paragraph.

The Determination sets out in some detail, the reasons for not accepting the planning diaries as a daily record of hours worked. Those reasons include:

(i) some dates showed start and end times, but the period covered included both personal and business appointments;

(ii) some dates showed notations of work, sometimes with a name beside it, but those names did not necessarily represent appointments;

(iii) other dates showed no times at all;

(iv) personal entries appear at the same time as entries of work performed;

(v) the planning diaries do not identify how long any particular task, whether work related or personal, took to complete;

(vi) despite an indication from Michnick that she separated business and personal records, there continued to be both personal and business notations in each record;

(vii) there was no indication that personal appointments for her children which were noted in the diaries were handled by her husband, and Michnick acknowledged that some of those personal appointments might well have been taken by her; and

(viii) no meal breaks were ever recorded in the planning diaries.

Taking all of the analysis into account, I cannot conclude the decision of the Director concerning the records provided by Michnick justifies the intervention of the Tribunal. I find that the decision of the Director that the planning diaries cannot be accepted, on their own, as sufficient

evidence of daily hours of work was not incorrect, unreasonable, manifestly unfair or without reasonable foundation.

That having been said, the material nevertheless raises several concerns with the Determination. These concerns arise in areas where the validity of the claim could reasonably have been referenced against other available information and do not depend solely on accepting the information in the planning diaries.

First, Michnick's claim included a claim for statutory holiday pay. In the Determination, the Director's only reference to this claim appears in the following comment:

> Nor am I convinced that there is sufficient evidence to support the allegation of overtime pay and statutory holiday pay owing to Michnick.

No reasons are given for the conclusion as it relates to statutory holiday pay. Further, a review of the material on file would suggest otherwise. While the record indicates the Victoria Day and Canada Day statutory were likely paid for, the same may not be said for the Good Friday statutory holiday. The records provided by Michnick indicate she worked that day, going to a client's store. If Prentice Hall alleges she did not work that day, that kind of allegation is readily determinable from evidence independent of the planning diaries. It does not appear that any real consideration was given to her claim for statutory holiday pay.

Second, Prentice Hall acknowledged that Michnick worked overtime on May 26, 1999. Nowhere in the Determination is there any indication that Michnick was paid any overtime pay for this day and no indication there was any consideration given to this matter. It should have been considered and decided, as it clearly was an obvious aspect of Michnick's complaint. It is simply not reasonable that this aspect of her complaint could have been dismissed because the Director did not accept the planning diaries as a record of daily hours worked. This matter has nothing to do with whether overtime was worked, but with how much overtime was worked. If there is an issue about that, the Director must make a decision from the best evidence available, but the inability of the Director to determine 'exactly' how much overtime is payable is not sufficient reason to deny an employee the minimum statutory entitlements of the *Act* when the entitlement is acknowledged (see *Director of Employment Standards*, BC EST #D344/96 (Reconsideration of BC EST #D224/96 and *Mykonos Taverna, operating as the Achillion Restaurant*, *supra*). In my view, the burden would be on Prentice Hall, having acknowledged overtime worked, to show Michnick's record of the overtime hours worked is unacceptable.

Third, as indicated in the review of facts, the material confirms that Michnick travelled to and from Toronto on several occasions, and to and from Calgary on one other occasion. Three of the travel days were Sundays, which, if considered work, would require the payment of overtime. One of the travel days had Michnick leaving at 7:00 am and not returning until 10:50 pm that same day. Travel time is not excluded from the definition of work. The question of whether "travel" is "work" is primarily a question of fact, but it does not appear this question was ever considered. On the face of the material, and based on the purpose for which the travel was

required, the time taken to travel would appear to fall within the definition of work. The hours for which overtime may be payable can be easily determined from other sources and do not rely entirely on Michnick's records. It does not appear that this aspect of the claim was given any consideration and, once again, the reasoning that caused the Director to not accept Michnick's record of typical days worked does not apply. There is undoubtedly objective evidence reasonably available to assist in an analysis of this part of her claim.

Fourth, the material suggests Michnick was attending a conference in Toronto, and working, on the weekend of June 12 and 13, 1999 and working in Whistler on the weekend of August 7 and 8, 1999. An analysis of these aspects of the complaint do not depend entirely on the records provided by Michnick. It is both unfair and unreasonable to reject these aspects of the claim, when their validity can be determined independently of the records provided by Michnick. There is nothing in the Determination indicating any effort was made to determine, independently of the records, the validity of these aspects of Michnick's claim.

Michnick has satisfied the burden of showing the decision of the Director to deny all aspects of her claim on the general refusal to accept the planning diaries as sufficient evidence of daily hours worked was wrong, unreasonable, manifestly unfair and not rationally grounded in the facts.

The Determination is confirmed in respect of its conclusion that Michnick's planning diaries are not, of themselves, sufficient evidence of daily hours worked to support her claim for overtime. The Determination is, however, deficient in its analysis and reasoning relating to those aspects of Michnick' claim that do not depend entirely on the planning diaries to establish entitlement. In respect of those areas, the decision of the Director to cease investigating the complaint cannot be confirmed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 5, 2001 be referred back to the Director to address the identified deficiencies.

David B. Stevenson
Adjudicator
Employment Standards Tribunal