

An appeal

- by -

Marie Gertrude Jean Valmont
(“Ms. Valmont”)

- 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 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2013A/90

DATE OF DECISION: February 13, 2014

DECISION

SUBMISSIONS

Marie Gertrude Jean Valmont on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Marie Gertrude Jean Valmont (“Ms. Valmont”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on November 14, 2013.
2. On January 9, 2013, Ms. Valmont filed a complaint with the Director of Employment Standards alleging that Marie Cook contravened the *Act* in failing to pay her both regular and overtime wages. Ms. Valmont claimed that she worked for Ms. Cook as a domestic in the month of November 2012.
3. Following a hearing, the Director concluded that Ms. Valmont was hired as a sitter and that the *Act* did not apply to her situation. The Director determined that no further action would be taken.
4. Ms. Valmont contends that the Director failed to observe the principles of natural justice in making the Determination. She also claims that evidence has become available that was not available at the time the Determination was being made.
5. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
6. These reasons are based on Ms. Valmont’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Respondent and the delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

ISSUES

7. Whether or not the Director failed to observe the principles of natural justice in making the Determination and whether there is new and relevant evidence that would have led the Director to a different conclusion.

FACTS AND ARGUMENT

8. The Director’s delegate held a hearing into Ms. Valmont’s complaint on August 21, 2013. Each party was self-represented and called one witness.
9. Briefly, the evidence before the delegate was that Ms. Valmont worked at Ms. Cook’s home for a period of time between November 1, 2012, and November 24, 2012. Although the parties agreed that Ms. Valmont worked seven days a week, they agreed on little else including the number of days and hours Ms. Valmont worked, as well as the nature of the work performed.

10. Ms. Valmont's evidence was that Ms. Cook offered her a babysitting job, while Ms. Cook's evidence was that Ms. Valmont asked her for a job after she overheard her discussing the fact that her babysitter was taking a vacation.
11. There was no dispute that Ms. Cook picked Ms. Valmont up at her home every morning and dropped her off at night for several days in November 2012. Ms. Valmont contended that she was picked up at 5:00 a.m. and worked until almost midnight each night, seven days a week. Ms. Valmont claimed that she worked 168 regular hours and 158 overtime hours over 21 days between November 1, 2012, and November 24, 2012. Ms. Cook claimed that Ms. Valmont worked from 7 a.m. until 3 p.m. between November 4 and November 19, 2012. Ms. Cook denied that Ms. Valmont worked the hours she claimed. Ms. Cook testified that she agreed to pay Ms. Valmont \$800 for her services rather than an hourly wage, and that she did not intend to hire her as an employee.
12. Ms. Valmont asserted that she cooked, did the laundry and cleaned the house. She contended that her tasks were those of a maid rather than those of a babysitter and that her work was covered by the *Act*.
13. Ms. Cook testified that she asked Ms. Valmont to look after her children. She denied that she asked Ms. Valmont to cook, clean, do laundry or perform any other tasks that were not associated with the care of her children. She also said that Ms. Valmont was rarely required to make meals for her children, as her eldest daughter did not like cooked food and her infant daughter would not eat fish or pork or other food Ms. Valmont claimed to cook for them.
14. Ms. Valmont was either unable, or refused, to answer Ms. Cook's questions about what kind of vacuum cleaner and washing machine she used, where the vacuum cleaner was stored, what kinds of dials the washing machine had and why Ms. Valmont would have ironed Ms. Cook's daughter's school uniform after it had been laundered at the school.
15. Even though Ms. Valmont testified that although she kept a record of her hours of work in a notebook, she did not produce that notebook at the hearing.
16. Ms. Valmont's witness was a neighbour of hers, who testified that she observed Ms. Valmont being picked up at approximately 6:30 a.m. and dropped off between 11:45 p.m. and 12:30 a.m. The witness also testified that she was present when Ms. Valmont received \$800 from Ms. Cook as payment for her services.
17. The delegate determined that Ms. Valmont's evidence lacked credibility. She noted that Ms. Valmont was unable to describe the appliances she used to launder and vacuum, and found her to be uncooperative and evasive when asked questions about the work she performed. The delegate found Ms. Cook's reasons for not asking Ms. Valmont to perform those duties to be reasonable.
18. The delegate concluded there was insufficient evidence to establish that Ms. Valmont was required to perform any duties in addition to those involved attending to Ms. Cook's children. After considering the definition of "sitter" in the *Act*, the delegate decided that no further action would be taken.

Submissions

19. Ms. Valmont claims that there were a number of inconsistencies between Ms. Cook's evidence at hearing and documents she submitted to the Branch. Ms. Valmont alleges, among other things, that Ms. Cook submitted a forged document, specifically a letter from Ms. Cook's now former live-in nanny, to the delegate. However,

Ms. Valmont said that she could not provide evidence that the document was forged since she is now unable to communicate with the former nanny.

20. Ms. Valmont also says that the delegate failed to make any reference to texts Ms. Cook sent to Ms. Valmont's daughter in the Determination which she claims support her claim for overtime. Attached to the appeal submission are three pages of text messages which Ms. Valmont says is evidence of the time Ms. Cook picked her up and dropped her off.
21. Ms. Valmont also argues that the delegate's analysis about the number of hours she worked is flawed. Finally, in her appeal submission Ms. Valmont says that on her first day of work, the live-in nanny (who was on her holidays) trained Ms. Valmont to do the same chores she normally performed.
22. Attached to the appeal is a December 22, 2013, letter from a Kenneth Moore who stated that he had been dating Ms. Cook's live-in nanny for "over a year." Mr. Moore wrote that he was writing the letter because he was "upset" at the way Ms. Cook treated both Ms. Valmont and the live-in nanny. Among other things, Mr. Moore states that he visited the live-in nanny on numerous occasions and witnessed Ms. Valmont preparing meals for the children. He also said that Ms. Valmont was "in charge of taking out the garbage." He says that the live-in nanny trained Ms. Valmont to clean the house to Ms. Cook's liking.

ANALYSIS

23. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
24. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
25. Although Ms. Valmont alleges a failure to comply with principles of natural justice as one of her grounds of appeal, her written submissions are, in essence, an assertion that the delegate's conclusion is wrong.
26. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness".
27. I am satisfied that Ms. Valmont had a fair hearing and had a full opportunity to present her case. I find that she was provided with information on the hearing process and that she had full opportunity to present her case and ask questions on the evidence presented by Ms. Cook. In short, I find no merit to this ground of appeal.
28. Although Ms. Valmont appears to take issue with the delegate's analysis, I infer that her difficulty with the Determination is with the delegate's analysis of the credibility of the parties. In fact, much of her appeal submission, as well as the "new evidence" consists of a personal attack on Ms. Cook and the documents Ms. Cook submitted at the hearing.

29. The primary issue before the delegate was whether or not Ms. Valmont was a domestic or a sitter. The issue of the number of hours Ms. Valmont worked and whether or not Ms. Cook contravened the *Act* would have become an issue only if the delegate was satisfied that Ms. Cook was a domestic.
30. The *Employment Standards Regulation* (the “*Regulation*”) defines sitter as
- a person employed in a private residence solely to provide the service of attending to a child, or to a disabled, infirm or other person, but does not include a nurse, domestic, therapist, live-in home support worker or an employee of
- (a) a business that is engaged in providing that service, or
- (b) a day care facility
31. The *Regulation* excludes a sitter from the protection of the *Act*. (see section 32(1)(c) of the *Regulation*)
32. The delegate found Ms. Valmont to be evasive and noted that she was either unable to respond to questions put to her about various appliances or she refused to answer. She found Ms. Cook’s explanations of why Ms. Valmont would not be asked to perform the tasks she alleged she performed to be reasonable. The delegate found Ms. Valmont’s evidence to lack credibility.
33. Issues of credibility are questions of fact, not law, and I am unable to consider errors of fact unless they also raise errors of law (*Britco Structures Ltd.*, BC EST # D260/03). The Tribunal’s appeal authority extends only to questions of mixed fact and law where an identifiable question of law can be extricated and shown to have resulted in the error.
34. The delegate, having had the benefit of observing the parties at first instance, is entitled to deference on the assessment of the credibility of the parties. Her assessment was based on articulated reasons and, in my view, not unreasonable. I find no basis to disturb the delegate’s findings on Ms. Valmont’s credibility.
35. Having found Ms. Valmont’s assertions that she performed tasks of a domestic nature to lack credibility, the delegate concluded that Ms. Valmont’s duties were nothing more than what was required to attend to Ms. Cook’s children. The delegate determined that Ms. Valmont was a sitter, and as such, excluded from the protection of the *Act*.
36. Once she arrived at that conclusion, it was not necessary for the delegate to analyse any of the evidence on how many hours Ms. Valmont may have worked. There is nothing in the appeal submission that persuades me Ms. Valmont was anything other than a sitter.
37. Ms. Valmont submitted a letter from Mr. Moore on appeal, presumably as new evidence. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and

- the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

38. Mr. Moore's letter does not constitute new evidence, as it was clearly available at the time the Determination was being made. Ms. Valmont ought to have called him as a witness during the hearing.
39. However, even if I were to consider Mr. Moore's "new" evidence, there is nothing in his letter that would persuade me that the delegate's conclusions were incorrect. Mr. Moore's observation was that Ms. Valmont cared for the children, including cooking for them and "taking out the garbage". There is nothing in Mr. Moore's letter to persuade me that the delegate's conclusion was in error.
40. Finally, I note that Ms. Valmont asserts that the live-in nanny showed her how to clean and look after the house. There is no evidence Ms. Cook hired her for that purpose or directed her to perform those tasks, if indeed she performed them, further supporting the delegate's conclusion.
41. I find that Ms. Valmont has not met the burden of showing that the conclusion reached by the Director was unreasonable or unjustified on an objective assessment of the evidence before her.
42. The appeal is dismissed.

ORDER

43. Pursuant to section 115 of the *Act*, I order the Determination dated November 14, 2013, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal