Employment Standards TRIBUNAL

An appeal

- by -

Antoinetta Perral Decina
("Ms. Decina")

- 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: Shafik Bhalloo

FILE No.: 2014A/8

DATE OF DECISION: April 1, 2014

DECISION

SUBMISSIONS

Alexander Imperial — on behalf of Antoinetta Perral Decina

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*") Antoinetta Perral Decina ("Ms. Decina") has filed an appeal of a determination issued by the Director of Employment Standards (the "Director") on December 9, 2013 (the "Determination").

2. On November 2, 2009, Ms. Decina filed a complaint with the Director alleging that Denise and Ondrej Sroka (the "Employer" or "Ms. Sroka" or "Mr. Sroka") had contravened the *Act* by failing to pay her overtime wages (the "Complaint").

3. Following an investigation into the Complaint, which started almost one year after the Complaint was filed by Ms. Decina, the Director concluded that the *Act* had not been contravened in respect of Ms. Decina's employment and that no wages were owed to her. Accordingly, the Director ordered in the Determination that no further action would be taken in respect of the Complaint.

4. Ms. Decina, through her representative, contends that the Director failed to observe the principles of natural justice and further erred in law in making the Determination.

5. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on my review of the Reasons for the Determination (the "Reasons"), the written submissions of Ms. Decina's representative, and the "record" that was before the delegate when the Determination was being made. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 of the *Act*, the Respondent will and the Director may be invited to file further submissions. Conversely, if I find the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUES

6. The issues in this appeal are twofold, namely:

   (i) Did the Director err in law in making the Determination?

   (ii) Did the Director fail to observe the principles of natural justice in making the Determination?

FACTS AND ARGUMENT

7. Pursuant to a written contract of employment, dated May 1, 2008, Ms. Decina was hired as a domestic by the Employer at a rate of pay of $8.00 per hour to provide care to the Employer's two-year-old child, Andrew, and also to perform housekeeping chores for the Employer.

8. Ms. Decina's employment commenced July 8, 2008, and continued until June 3, 2009.

9. On November 2, 2009, Ms. Decina filed the Complaint against the Employer alleging that the Employer contravened the *Act* by failing to pay her overtime wages.

10. Based on my review of the Reasons, the delegate appears to have first contacted Ms. Sroka on October 19, 2010, almost one year after Ms. Decina filed the Complaint. After that initial contact, the delegate sent Ms. Sroka an email on October 20, 2010, with a Demand for Records, pursuant to section 85(1)(f) of the *Act*. The Employer was asked in the Demand to deliver employer records to the Employment Standards Branch (the "Branch") by November 5, 2010, which Ms. Sroka did.

11. The delegate states that he then reviewed Ms. Sroka's records, and asked Ms. Decina to provide all the evidence she had in regard to her overtime claim. It is unclear from the "record" when that request was made by the delegate. It is also unclear when Ms. Decina provided a general summary of her job duties and a record of hours which she kept on an Excel sheet because the "record" appears to be deficient in that regard.

12. I note that the delegate in the Reasons also notes that on August 24, 2011, Ms. Decina provided the Branch with a copy of a calendar on which she kept a record of hours worked.

13. I further note the delegate states in the Reasons that he met with Ms. Decina on February 10, 2012, at the Branch, and gave her copies of the records provided by Ms. Sroka and, at the same time, Ms. Decina provided him with her original record of hours which she kept on a calendar.

14. The delegate then conducted a fact-finding meeting with Ms. Sroka on October 30, 2012. The delegate notes Ms. Decina declined to attend at that meeting, and wanted a separate meeting. The delegate accommodated Ms. Decina by scheduling a separate meeting on November 9, 2012. The delegate also notes that the evidence of both parties was exchanged during these meetings. Thereafter, slightly over one year later, the Determination was issued.

15. In the Reasons, the delegate notes that Ms. Sroka disputed Ms. Decina's claim for overtime wages and argued that the latter did not work the overtime hours she was claiming. Ms. Sroka explained that Ms. Decina was hired to take care of her son, Andrew, and provide basic housekeeping duties while Ms. Sroka would be away from home. Ms. Sroka and her husband work as flight attendant and air traffic controller respectively. Ms. Sroka stated that she set Ms. Decina's schedule according to their schedules because both she and her husband knew their schedules in advance, and this allowed them to spend more time with their son while scheduling Ms. Decina to work only eight (8) hours per day / 40 hours per week, pursuant to the Employment Agreement. Ms. Sroka submitted that it was important for one of the parents, if not both, to be at home when Andrew woke up and went to sleep. She also noted that Andrew's grandparents would often pick him up and drop him off at pre-school and would make regular visits.

16. The delegate also notes in the Reasons that after reviewing the records produced by Ms. Decina, Ms. Sroka noticed several days where Ms. Decina claimed to have been working overtime when Mr. Sroka or she, herself, were at home. As an example, Ms. Sroka notes that Ms. Decina's daily planner for January 1, 2009, indicates that she started work at 7:00 a.m. because Andrew woke her up and then she continued on with the day, but she did not indicate when she finished her day. However, in her calendar, Ms. Decina wrote down that she worked from 10:00 a.m. to 8:40 p.m. Ms. Sroka indicated Ms. Decina was not scheduled to work on that date and based on her own record, adduced to the delegate, Mr. Sroka was off work on January 1, 2009, and that she, herself, came home from a flight in the afternoon.

17. The delegate also notes in the Reasons that Ms. Sroka gave evidence that Andrew was three-years-old during Ms. Decina's period of employment, and he was used to taking a nap every day during the afternoon.

However, there were several days in Ms. Decina's daily planner that noted various things that Andrew did, or that she did with Andrew, but did not mention that Andrew was "tired, resting or taking a nap". Ms. Sroka contended that if Ms. Decina recorded everything that Andrew did throughout the day in her planner, as she claimed, how could she have forgotten to add when Andrew would rest or take a nap?

18. Ms. Sroka also disputed the records in Ms. Decina's daily planner for several days where Ms. Decina claimed that while she was cleaning the house or preparing meals, Andrew would be in the other room or downstairs watching TV, sometimes for 2 to 3 hours at a time. According to Ms. Sroka, she would never allow her three-year-old child to watch that much TV.

19. Ms. Sroka also submitted to the delegate that Andrew celebrated his birthday on [date of birth][1], and that she had a small birthday party at home for him. According to her records, Ms. Decina worked on that day from 1:00 p.m. to 9:00 p.m., but according to Ms. Decina's planner, the latter states she worked from 7:30 a.m. to 8:20 p.m., and her diary did not indicate that it was Andrew's birthday on that date.

20. The delegate also notes in the Reasons that Ms. Sroka provided the weather report for 2008/2009 winter season, and argued that the winter in 2008 was one of Vancouver's worst winters in 40 years, and that on December 14, 21, and 24, it snowed 11 cm, 22.4 cm, and 26.2 cm respectively, and December 20 was the coldest day of the month with temperatures of -15.2 degrees Celsius. Therefore, according to Ms. Sroka, it would not make any sense for Ms. Decina to take Andrew out in the park to play during the cold winter weather, although that is what Ms. Decina appears to have recorded in her daily planner.

21. The delegate also noted that Ms. Sroka provided a letter from Wind and Tide Preschools Ltd. as evidence that Andrew was registered as a student at the said preschool from September 2008 until June 2009, and scheduled to be in school on Tuesdays and Thursdays from 12:30 p.m. to 3:00 p.m., although nowhere in Ms. Decina's planner does she indicate that Andrew was in school during these times.

22. The delegate, in concluding in the Determination that Ms. Decina was not owed any overtime wages, preferred the evidence of Ms. Sroka to that of Ms. Decina. More particularly, with respect to the matter of Andrew being in school on Tuesdays and Thursdays from September 2008 to June 2009, the delegate reasoned as follows:

> Ms. Sroka also provided a letter from Wind and Tide Preschools. The letter was to certify that Andrew was enrolled in the Tuesday-Thursday three year old class, which ran from September 2008 to June 2009 from 12:30 p.m. until 3:00 p.m. Ms. Sroka stated that not once did Ms. Decina mention Andrew being at school in her day planner. According to Ms. Decina's record, on Thursday, January 8th they were at the park from 10:30 a.m. to 5:00 p.m. Ms. Sroka explained that Andrew was at preschool on January 8th from 12:30 p.m. to 3:00 p.m. at this time. Also according to Ms. Decina's log, on Thursday February 19th they went to the park at 2:00 p.m. and returned home at 5:00 p.m. Ms. Sroka stated that Andrew was also in school during that period.

23. With respect to Ms. Decina's response to Ms. Sroka's contention that Andrew was in school on Tuesdays and Thursdays, the delegate notes that:

> …Ms. Decina stated she did not find it important to record that information in her planner. All she recorded was the time she spent with Andrew. I asked Ms. Decina about the days in her planner where she stated they were at the park or at the library but according to Ms. Sroka Andrew was in school. In response, Ms. Decina stated 'Denise [the Employer] is stupid; she doesn't know what she is doing'.

[1] removed due to privacy reasons

24. The delegate reiterated that in preferring the evidence provided by Ms. Sroka over Ms. Decina's, he went over the daily logs of Ms. Decina and compared them with Ms. Sroka's records. He compared the hours from Ms. Decina with Ms. Sroka's record of hours for Ms. Decina, Ms. Sroka's work schedule and Andrew's school schedule and reasoned as follows:

> In comparison to Ms. Sroka, Ms. Decina provided few details and often stated that she did not recall certain information. Ms. Decina often stated that she forgot to mention certain things in her day planner. For example, I asked Ms. Decina about Andrew's third birthday party on December 6th 2008 and why she did not mention it in her log. Ms. Decina said that it was a mistake and she forgot to put down the details of his birthday party, but confirmed she was there. According to Ms. Decina's daily planner for December 6, 2008, Andrew woke up at 7:30 a.m. and Ms. Decina prepared breakfast and after played cars with Andrew. At 10:00 a.m. they left for the park and played at the park until 4:30 p.m. Once they got home Ms. Decina prepared dinner and Andrew went to sleep at 8:20 p.m. Ms. Decina did not mention anything about Andrew's birthday party.
>
> I find it more probable that Ms. Decina did not maintain her diary on a day to day basis as she indicated. I find that if she had, it was unlikely that Ms. Decina would forget to indicate in her planner that she was working on Andrew's birthday. A review of Ms. Decina's records indicate [*sic*] that when she did maintain a record she explained everything she did with Andrew from making his breakfast, to playing with him, to cleaning up after him and taking him to the park. Had Ms. Decina maintained her records daily as she suggested I find it more than probable that she would have indicated that on December 6, 2008 she assisted or prepared for Andrew's birthday party.

25. With respect to Ms. Decina's entry in her day planner for January 1, 2009, when Ms. Sroka indicates the latter did not work because Mr. Sroka was off of work and she herself returned home from work in the afternoon, the delegate notes:

> Ms. Decina wrote down that she started work at 7:00 a.m. because Andrew woke her up. Ms. Decina did not write down when she finished her day. However, according to Ms. Decina's calendar of hours Ms. Decina indicated she commenced work on January 1, 2009 at 10:00 a.m. rather than 7:00 a.m. start time [*sic*] as per her day planner. A review of Ms. Sroka's record indicates that Ms. Decina was scheduled for a day off on January 1, 2009. When questioned regarding this particular day, Ms. Decina stated that she made a mistake in her entry and does not remember when she worked.

26. With respect to certain entries in Ms. Decina's daily planner recording that she went to the park with Andrew, the delegate notes:

> Ms. Sroka stated that December 2008, January and February 2009 were the coldest months of the year and she would never allow Andrew to walk, play, and have a picnic at the park in these types of conditions. However, Ms. Decina's record indicated that she took Andrew to the park on December 14th, 20th and 21st. The weather reports provided by Ms. Sroka clearly indicate that the 2008 and 2009 winter was one of the coldest winters in the lower mainland. Accordingly, I find it unlikely that Ms. Decina took Andrew to play in the park in the winter months for the length of time she stated, in such weather conditions.

27. The delegate then went on to conclude:

> Based on the evidence provided, I find that Ms. Sroka's position is supported by several pieces of independent third party evidence. The work schedule provided by Ms. Sroka clearly shows that Ms. Decina's working hours were scheduled around Ms. Sroka's flight schedules, Mr. Sroka's work schedule, Andrew's school schedule and the time Andrew spent with his grandparents. Ms. Sroka stated this type of schedule was set so Mr. Sroka and Ms. Sroka could spend more time with Andrew and Ms. Decina would not have to work extra hours.

> Not only does this evidence support Ms. Sroka's position it also shows that the records Ms. Decina has provided are not an accurate reflection of the work she has performed. The evidence in this case is more consistent with the position of Ms. Sroka than that of Ms. Decina.

SUBMISSIONS OF MS. DECINA

28. Ms. Decina submits two (2) grounds of appeal. With respect to the first ground appeal, namely, the Director failed to observe the principles of natural justice in making the Determination, she contends there was an unreasonable administrative delay on the part of the Director's delegate in processing the Complaint which led to an abuse of process in this case. More particularly, Ms. Decina argues that the delegate took almost a year before he contacted Ms. Sroka in October 2010 and issued a Demand for Employer Records. When those records were received in November 2010 the delegate indicates that he contacted Ms. Decina to provide evidence, although he does not provide the date for such communication. The delegate merely notes that Ms. Decina provided a copy of her calendar in August 2011, although, Ms. Decina argues, she submitted a copy of her calendar with the Complaint in November 2009.

29. Ms. Decina also states that it is not clear from the "record" what the delegate was doing between November 2010 when he received Ms. Sroka's records and February 2012 when he met with her to disclose Ms. Sroka's records. This significant delay, Ms. Decina argues "caused her prejudice and harmed her by undermining her right to know and meet the case against her". More particularly, she states that as a result of the significant passage of time, she was placed in a prejudicial position "by having to explain in detail discrepancies between her records and the employer's records for events that occurred three to four years prior". Ms. Decina also argues that the delegate did not acknowledge the impact of the delay on her ability to recollect detailed information, but instead went on to make "an adverse finding based on her alleged lack of credibility and the alleged unreliability of her records".

30. Ms. Decina also submits that by the time the Director conducted a fact-finding meeting in November 2012 she was already re-employed and had difficulty seeking time away from work to attend the process.

31. Ms. Decina also submits that it took another full year before the delegate issued the Determination in the matter, which also put her in a prejudicial position because the delegate "appears to have based a large part of his decision on a finding that her evidence (particularly oral testimony) was not credible". Ms. Decina states that her credibility would be difficult to recall and assess after this significant passage of time.

32. Ms. Decina argues that the inefficient handling of this matter by the delegate of the Branch cannot be justified and that no reasonable person would expect that a claim for overtime hours and wages related to a single year of employment would take four years to conclude.

33. In addition to the delay argument under the natural justice ground of appeal, Ms. Decina also adds that there was a breach of natural justice on the part of the Director because of the failure of the delegate to provide her with disclosure of Employer documents and, therefore, she was not informed of the case against her and the right to reply was therefore frustrated. More particularly, Ms. Decina states the delegate only provided her with a portion of the Employer's records noted in the Determination. She was not provided with a copy of the weather report for 2008/2009 winter season, a copy of the letter from Wind and Tide Preschools or any other "independent third party evidence" referred to in the Reasons by the delegate. Ms. Decina argues that this failure in disclosure of the material denied her her right of reply and, therefore, her natural justice rights were compromised.

34. Ms. Decina also submits under the natural justice ground of appeal that the delegate failed to conduct a proper investigation of the Complaint because the Director did not "investigate into the actions of one of the employers of record, Mr. Sroka". Ms. Decina states that while the delegate spoke with Ms. Sroka, "he did not seek or test the evidence of a key party to the appeal, Mr. Sroka". Ms. Decina states that she was employed by both Mr. and Ms. Sroka, but Mr. Sroka was not asked to provide evidence and, therefore, she was denied an opportunity to test his evidence and provide an alternative argument as to why his work schedule was not material to the central issue of whether overtime hours were worked. Similarly, Ms. Decina contends that an argument can be made with respect to the grandparents, suggesting that the latter should have been spoken to by the delegate as well.

35. With respect to the second ground of appeal, namely, the error of law ground, Ms. Decina argues that the delegate erred in several aspects of the legal test for determining whether overtime pay was owed. First, Ms. Decina argues that the delegate failed to analyze whether Ms. Sroka's records met the standards set out in section 28 of the *Act*; that is, whether the calendar she provided was of hours actually worked or Ms. Decina's scheduled work hours. Ms. Decina claims that this failure "to apply the statutory language in section 28 to his analysis" resulted in the delegate committing an error of law.

36. Ms. Decina further argues that the delegate "narrowed the governing statutory test for overtime wages" by focusing on the work schedule, rather than "addressing whether the Employer 'directly or indirectly' allowed [Ms. Decina] to work more than 8 hours a day or 40 hours a week". Ms. Decina contends that her main argument in the Complaint was that she worked overtime hours because she took care of Andrew even when his parents were at home, and the delegate made an unfair and unreasonable inference that because Ms. Sroka had set up Ms. Decina's work schedule to assist them to spend more time with their son, overtime hours were not actually worked. Ms. Decina states that the delegate erred in law in reversing the onus of proof by requiring her to provide a record of actual hours worked, rather than properly focusing on "whether the statutory test was met, in that the employer must ensure that an employee does not work any hours not scheduled, as it is required to supervise and record their hours of work" (citing the decision of the Tribunal in *International Energy Systems Corp.*, BC EST # D189/97).

37. Lastly, Ms. Decina also contends that the delegate erred in law by relying on "independent third party evidence". More particularly, Ms. Decina states that the delegate "did not cite what this third party evidence was nor provide supporting reasons as to why it would be considered independent". Ms. Decina states that the work schedules for both Mr. and Ms. Sroka were provided by Ms. Sroka and, therefore, cannot be independent third party evidence. With respect to the weather information, Ms. Decina argues that although this information may be from an independent source, it cannot be relied upon to prove that she did not work overtime hours in the winter months as it is the Employer's obligation to ensure that she did not work overtime hours. Ms. Decina states that while she says that even though Ms. Sroka assumed that snow would mean she was not going to the park, it was, in fact, the opposite, because Andrew loved to play outside even in cold temperatures.

38. With respect to the letter from the preschool, it simply showed that Andrew was enrolled in preschool, but did not show his full attendance record. On the whole, Ms. Decina argues that the delegate placed an incorrect burden on her to provide credible records of her hours worked, and this was incorrect in light of the statutory language and also because she was at a serious disadvantage working inside the Employer's home, which made it more likely for the Employer to directly and/or indirectly allow the working of overtime hours without fulfilling their obligation to record her hours worked.

ANALYSIS

(i) *Natural Justice*

(a) Administrative Delay in the Delegate's Handling of the Complaint

39. While I agree with Ms. Decina's contention that there was some significant delay between the filing of the Complaint and its investigation by the delegate and a further significant delay by the delegate in issuing the Determination which has not been adequately explained in the Reasons nor in the "record", I am not convinced, based on the evidence before me, that the delay affected the outcome of the Complaint proceedings, nor caused Ms. Decina any prejudice.

40. I note that in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, the British Columbia Human Rights Tribunal heard several sexual harassment complaints against Blencoe, a member of the British Columbia Legislature for twelve (12) years, about 32 months after they were originally filed. Blencoe claimed that the Human Rights Tribunal had lost jurisdiction due to unreasonable delay in processing the complaints and that the unreasonable delay caused him serious prejudice, which amounted to an abuse of process and a denial of natural justice. The Supreme Court of Canada observed that in an administrative context, delay, standing alone, does not amount to an abuse of process. The delay must be "unacceptable" and coupled with proof of actual prejudice flowing from the delay.

41. In this case, while there is an unexplained delay of approximately twelve (12) months before the delegate commenced investigation into Ms. Decina's Complaint and there is also a delay during the investigation process after the delegate received the Employer records and a further delay of slightly more than one year after the fact-finding meeting with Ms. Decina before the Determination was issued, I do not find that Ms. Decina has provided sufficient proof that significant prejudice has resulted from the unacceptable delay. While a breach of natural justice and duty of fairness may occur when the delay impairs a party's ability to answer or challenge the evidence of the party adverse in interest, I do not find that in this case, Ms. Decina has shown that the undue delay caused her actual prejudice.

42. While I note that Ms. Decina indicates that the prejudice she suffered was "by having to explain in detail discrepancies between her records and the Employer's records for events that occurred three to four years prior", this does not explain the inconsistencies between her calendar and her day planner. For instance, for January 1, 2009, while Ms. Sroka indicated that Ms. Decina was off on that day, Ms. Decina's calendar indicates she commenced work at 10:00 a.m., but her day planner indicates she commenced work at 7:00 a.m.

43. I also do not understand why none of Ms. Decina's records, her calendar or her day planner, indicate that Andrew went to school on any Tuesday or Thursday, when she was relatively meticulous in recording everything she did. My review of Ms. Decina's calendar shows that she was occupied with Andrew on many Tuesdays and Thursdays during the time when he was supposed to be at the preschool between 12:30 p.m. and 3:00 p.m.

44. While I appreciate Ms. Decina's contention that she cannot recall what happened one or two years ago, the delegate relied upon Ms. Decina's records, which presumably were created contemporaneously or shortly after the events recorded happened. There were inconsistencies in those records that appear to have persuaded the delegate to prefer the evidence of Ms. Sroka over Ms. Decina's. I do not see the undue delay in the investigation and Determination of the Complaint causing Ms. Decina prejudice.

(b) Failure to Provide Ms. Decina with Documents

45. With respect to the allegation of Ms. Decina that the delegate did not provide disclosure of a copy of the weather report of the 2008/2009 winter season and a copy of the letter from Wind and Tide Preschools, I note that in the "record", the delegate unequivocally indicates in the letter dated January 31, 2014, that submissions from both parties were disclosed to the other prior to the issuance of the Determination. In the case of Ms. Decina, she would have received pages 1 to 14 submitted by the Employer, which included the weather report, as well as a copy of the letter from Wind and Tide Preschools, and given the delay (of slightly more than one year) by the delegate in making the Determination, Ms. Decina had ample opportunity to respond to those submissions and documents before the Determination was issued, but there is no record of that. In addition, I note in the Reasons, the delegate indicates at page 3 that he met with Ms. Sroka on October 30, 2012, for a fact-finding meeting and with Ms. Decina on November 9, 2012, and that evidence of both parties was exchanged during these meetings. In these circumstances, I am not persuaded that Ms. Decina did not have disclosure of the materials described by her or that she did not have the opportunity to reply to those materials.

(c) Failure to Conduct Proper Investigation Into the Complaint

46. Ms. Decina submits that the delegate failed to conduct a proper investigation and breached the principles of natural justice by not testing the evidence of Mr. Sroka, as well as Andrew's grandparents. Ms. Decina contends that she, as a result, was denied an opportunity to test the evidence of these potential witnesses and provide an alternative argument as to why Mr. Sroka's schedule or the grandparents' involvement in Andrew's life was not material to the central issue of whether overtime hours were worked. I am not persuaded by this argument and do not find that the delegate's decision to simply rely upon Ms. Sroka's evidence on behalf of the Employer resulted in a breach of the natural justice rights of Ms. Decina. While I appreciate that the delegate, in an investigation, has a more inquisitorial function with corresponding powers to gather relevant evidence, not only from the parties, but also from non-parties if necessary, I find Ms. Decina's argument rather speculative that the Determination would have been otherwise had the delegate pursued these other potential witnesses. I find that there was sufficient evidence before the delegate, including the inconsistencies in the evidence produced by Ms. Decina herself, to give the delegate a sufficient basis to prefer the evidence of the Employer against Ms. Decina's and to conclude as he did in the Determination.

(ii) *Error of Law*

47. As indicated previously, Ms. Decina contends that the delegate failed to analyze whether Ms. Sroka's records met the standard set out in section 28 of the *Act* and whether those records show hours Ms. Decina was scheduled to work or actually worked. Ms. Decina contends that the delegate failed to apply the statutory language in section 28 to his analysis and thereby erred in law.

48. Ms. Decina also contends that the delegate, instead of addressing whether the Employer "directly or indirectly" allowed her to work more than 8 hours a day or 40 hours a week, focused on the work schedule and made an unfair and unreasonable inference that because Ms. Sroka had set up her work schedule to assist her husband and herself to spend more time with their son, overtime hours were not actually worked by Ms. Decina.

49. Ms. Decina also argues that the delegate reversed the onus of proof by requiring her to provide a record of actual hours worked, and failed to analyse whether the statutory test for overtime wages was met, namely, that an employer must ensure that an employee does not work any hours not scheduled by the employer.

50. Ms. Decina also argues that the delegate erred in law in relying on the "so-called 'independent third party evidence"'. In particular, Ms. Decina states that the schedules for Mr. and Ms. Sroka were provided by Ms. Sroka, and could not be said to be independent. As for weather information provided by Ms. Sroka, Ms. Decina argues that the delegate mistakenly relied upon this information to prove that she did not work overtime hours in the winter months, and neglected to consider that it was the Employer's obligation to ensure that she did not work overtime hours.

51. With respect to the letter from Andrew's preschool, Ms. Decina argues that it only showed Andrew's enrollment but not his full attendance record.

52. According to Ms. Decina, the Director incorrectly placed the burden on her to provide credible records of her hours worked, and this is incorrect in light of the statutory language.

53. Having said this, with respect to Ms. Decina's submission questioning whether Ms. Sroka's records met the standard set out in section 28 of the *Act*, I have reviewed those records, and particularly the handwritten records on the calendar submitted by Ms. Sroka for the period December 2008 to May 2009 (the "Calendar"). I cannot determine whether what is recorded by the Employer or Ms. Sroka in the Calendar is the hours worked by Ms. Decina or the hours she was scheduled to work. Section 28 of the *Act* requires the Employer to maintain proper payroll records, which records must include, *inter alia*, "the hours worked by the employee on each day". While the delegate could have done more to probe whether these records complied with the statutory requirements under section 28 of the *Act*, I cannot say that the delegate reversed the onus of proof by requiring Ms. Decina to provide a record of actual hours worked. It is not Ms. Decina's obligation to maintain payroll records (see *Carline Holdings Ltd.*, BC EST # D441/98). However, this should not be confused with the burden of proof in an unpaid wage complaint, which rests with the complainant/employee (see *Consumer Direct Contact Ltd.*, BC EST # D082/00). Having said this, even if the records produced by the Employer did not comply with the requirements of section 28 of the *Act*, the delegate is entitled to consider all relevant evidence in determining whether Ms. Decina's burden of proof has been discharged (see *Consumer Direct Contact Ltd., supra)*.

54. I also note that in *Hofer*, BC EST # D538/79 (reconsideration dismissed, BC EST # D120/98), the Tribunal observed:

> 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 employee's records *or their oral evidence concerning hours of work. These records or oral evidence must then be evaluated against the employer's (incomplete) records to determine the employee's entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate may accept the employee's records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable.* [*My Italics*]

55. In the case at hand, although Ms. Decina has made much of the delegate's choice of language – "independent third party evidence" –in the Reasons when referring to some of the evidence presented by Ms. Sroka, particularly the weather report and the letter from Andrew's preschool, I find that it was open to the delegate to consider both these documents, including the Calendar (which appears more like a work schedule document) and Ms. Sroka's oral evidence at the fact-finding meeting, to test Ms. Decina's records and the latter's oral evidence. I find that the delegate weighed all of the evidence adduced by both parties and the reliability of their evidence, and came to a reasoned conclusion. The delegate did not find Ms. Decina's evidence entirely reliable and preferred the evidence of Ms. Sroka. I do not find any evidence that would persuade me that the delegate's decision in this regard was irrational or perverse, nor do I find the delegate's decision to fall within any of the instances amounting to an error of law described in the British Columbia Court of Appeal's decision in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*,

[1998] B.C.J. No. 2275. In the result, I find no basis to interfere with the delegate's conclusion and dismiss Ms. Decina's appeal.

ORDER

56. I order, pursuant to section 115 of the *Act*, that the Determination, dated December 9, 2013, be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal