Employment Standards TRIBUNAL

An appeal

- by -

Ziad Ardat aka Ziad Elardat aka Ziad El Ardat aka Ziad Abouelardat aka Ziada Bou El Ardat aka Ardat El Abou and Maha Ardat

(the "Employer")

- 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: Ib S. Petersen

FILE No.: 2001/641

DATE OF HEARING: November 29, 2001

DATE OF DECISION: January 14, 2002

DECISION

APPEARANCES:

Mr. Ziad Ardat	on behalf of the Employer, the Ardats
Mr. Eduardo Servin	on behalf of Janet Pineda
Ms. Janet Pinada	
Mr. Kamel Yamolky	interpreter, Arabic
Mr. German Rodriquez	interpreter, Spanish

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director's Delegate issued on August 17, 2001. In the Determination, the Director's Delegate rejected the Employer's assertion that Pineda was an independent contractor and found that she did not quit her employment with her Employer, the Ardats. Rather she was "forced" to quit. The Delegate concluded that the Employer terminated Pineda's employment because it failed to protect her after an alleged incident with the older Ardat child, a boy of 15. Pinedas allegations included threatening and inappropriate conduct. The Delegate determined that she was entitled to compensation for length of service, one week's pay, $234.16. As well, on balance, the Delegate accepted Pinedas records of hours worked and awarded her $1,485.26 on account of wages. The Delegate based her award on the minimum wage rate in effect.

The Employer takes issue with the Delegate's conclusions with respect to the termination, the hours worked and the pay received. Those are, in a nutshell, the issues before me.

FACTS AND ANALYSIS

The Employer, as the Appellant, has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am of the view that the Employer has met that burden in part with respect to the issue of the termination of Pineda's employment.

Pineda was employed by the Ardats between April 25, 2000 and August 25, 2000. She was employed as a "nanny," doing housekeeping and child care duties. She did not live with the Ardats. As mentioned above, the Ardats argued before the Delegate that Pineda was an independent contractor. At the hearing, this argument was not pursued in any detail. In any event, from the facts before me, I would agree with the Delegate's conclusions in that regard.

1. Hours and Wages

I turn first to the issue of hours of work. In my view, the Employer has failed to show that the Delegate's conclusions in that regard were wrong. The evidence before the Delegate was, in brief, that Pineda worked Tuesdays to Fridays, generally from 7:30 a.m. to 4:30 p.m., and on Saturdays, generally from 9:00 a.m. to 4:00 p.m.--those were the days Mrs. Ardat attended hair dressing school. Ardat's evidence at the hearing was that he left for work at 6:00 a.m. (in other words, he was not there when Pineda started) and returned around 3:00 p.m. (Mondays through Fridays) and that "she was free to leave when he got home." He testified that she worked 7-8 hours per day. Both the Employer and the Employee submitted work logs to the Delegate, who, although she noted that neither appeared to have been made contemporaneously, found Pineda's to be more credible in the circumstances. Ardat did not address these work logs at the hearing. Based on his testimony at the hearing alone, I conclude that he has not met the burden to show that the Delegate erred with respect to hours of work.

The issue of amounts paid was not seriously in dispute. Pineda was paid $1,000 per month, except the last month when she was paid $750. Another amount of $200 was acknowledged to have been paid. The total amount paid was $3,950.

Ardat's position before the Delegate, and, indeed, at the hearing, was that he had an agreement with Pineda that she was to be paid $1,000 net per month for less than full time hours. Pineda's position was that the amount was $1,200. The Delegate did not accept the wage rate alleged by either party and concluded that the minimum wage in effect rate applied. In light of my conclusion with respect to hours worked, I am not persuaded that the Delegate erred on this point, either.

2. Termination of Employment

I now turn to the issue of Pineda's termination. Despite the fact that this issue involves a relatively small amount of money, it is complicated by significant factual disagreements between the parties.

The Delegate's conclusions with respect to the termination are encapsulated in the following quote from the Determination:

> "Under Section 63 of the *Act*, the onus fall on the employer to prove that the employee chose to quit of their own free will, thereby relieving the employer of the liability of compensation for length of service. The employer has failed to produce any such evidence to contradict the complainant's position that she was forced to quit, rather the complainant states that she chose to quit. The complainant states that she could not return to work because of an incident that occurred with the Ardats' son and the complainant filed a police report relating to that incident. The employer states that Pineda was mad and she left the house.

> The employer also states that he does not recall speaking to the police regarding the incident report that Pineda had filed.
>
> Pineda would not have chosen with a clear head and frame of mind to quit her employment with Ardat. Ardat felt that Pineda was competent enough to care for their children throughout her employment; yet on the last day of employment, Ardat portrays Pineda as "mad".
>
> Under Section 66 of the *Act*, the Director ... may determine that the employment of an employee has been terminated if a condition of employment is substantially altered. Pineda clearly felt that she was in danger if she continued working for the Ardats, inasmuch as she reported this incident to the RCMP .... The employer has a responsibility to protect an employee from a circumstance that compels the employee to resign."

On the face of the Determination, and on the evidence before me, I find it difficult to accept this rationale. In my view, it is illogical that Pineda, on the one hand, would not have quit "with a clear head or frame of mind" and, on the other, that she left her employment--or was forced to leave her employment--because of the danger she felt she was in. If she was in danger, as suggested, it would make imminent sense for her to leave her employment. Now, having heard the parties testimony at the hearing, I can truly appreciate the Delegate's difficulties.

I agree with the Delegate to the extent that the onus is on the Employer to prove that the Employee "quit". The adjudicator's comments in *RTO (Rentown) Inc*., BCEST #D409/97, sets out the Tribunal's jurisprudence:

> "Both the common law courts and labour arbitrators have refused to rigidly hold an employee to their "resignation" when the resignation was given in the heat of argument. To be a valid and subsisting resignation, the employee must clearly have communicated, by word or deed, an intention to terminate their employment relationship and, further, that intention must have been confirmed by some subsequent conduct. In short, an "outside" observer must be satisfied that the resignation was freely and voluntarily and represented the employee's true intention at the time it was given."

In my view, however, the onus is on the employee to establish that he or she was dismissed from her employment. I agree with the comments of Errico J. of the British Columbia Supreme Court in *Walker v. International Tele-Film Enterprises Ltd.*, [1994] B.C.J. No. 362 (February 18, 1994), at page 17-18:

> "The onus of proof is on Mr. Walker to prove that he was wrongfully dismissed. This is not a case where the defendant employer is raising justification. The issue is whether Mr. Walker left the company on his own volition or whether he was dismissed. Counsel for Mr. Walker cited a decision of the Nova Scotia Court of

> Appeal in *McInnes v. Ferguson*, (1900), N.S.R. p. 517. This decision holds that the onus lay on the employer where the issue was whether or not the employee left voluntarily, but there is no judicial discussion about it. I have considerable difficulty with this proposition which shifts the onus of proof to the defendant. This is a concern I share with Prowse J., as she then was, who in *Osachoff v. Interpac Packaging Systems Inc*., unreported, Vancouver Registry, April 21st 1992 C910344, discussed this decision and declined to follow it, as I do. In that case, as in this, the onus is on the plaintiff to establish on the balance that he was dismissed."

In any event, this is not a typical resignation case. If, as Pineda explained, that she was in danger, I can accept that the failure of the Employer to provide adequate safeguards could constitute a change in terms and conditions of employment such that Section 66 is triggered.

The resolution of the issue of Pineda's termination turns largely on credibility. It is an understatement to say that allegations of wrongful conduct of the part on both parties were flying fast and furious.

The B.C. Court of Appeal noted in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at 357:

> ".... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions."

Those comments are apposite.

The parties agree that Pineda's last day of employment was August 25, 2000. Apparently, that was her pay-day. The parties do not agree on most material facts at to the events leading up to or after that date.

Ardat's version of the events was that he had a conversation with Pineda about changing her days of work to Monday though Friday as Mrs. Ardat's schedule at the hair dressing school had changed. From the evidence of both parties, the conversation turned into an argument. Ardat explained that Pineda got upset when he withheld $200 from her pay cheque until she returned a bicycle she had borrowed from the family. Pineda left--"mad and upset"--and did not return to work until the following Monday. Ardat's evidence was that she told him before she left that she "was going to take him to court".

Ardat says he found out that Pineda had not come to work when his wife telephoned him. He then telephoned Servin--then Pineda's boy friend, now her husband--who he thought might know her whereabouts. He testified that Pineda had moved without giving her new address to the Ardats. Servin told him "don't phone here" and "I don't know anything about her." The fact that she had moved without telling Ardat and the occurrence of the telephone call was not contradicted. It was Ardat's understanding that Pineda quit.

Pineda explained that the last day of her employment was August 25, 2000. She said that she asked Ardat for her cheque "because she was leaving." In direct testimony, she testified that she felt she had to "remain in [her] job until the end of the month to get paid". Ardat got upset, came over close physically and started yelling at her. She stated that she thought he was going to hurt her. She testified that the 15 year old boy had an attack--it is agreed that he has a disability--but that Ardat ignored the boy and continued yelling at her. According to her testimony in direct, she left the Ardats' home and "the same day went to the Employment Standards Branch and the police." In cross examination by Ardat, she reiterated that she went to the police on August 25, about 3:00 or 4:00 in the afternoon, "with her husband to make a complaint about Ardat not paying [her] and threatening [her]." Ardat denied threatening Pineda.

Pineda testified that Ardat had made threatening comments to her and that she had great difficulties with the behaviour of the children, in particular the oldest child, boy of some 15 years. She testified that the boy had seriously threatened her and had behaved in an inappropriate manner. She explained that she went to the RCMP with the allegations as the Ardats did not take any action with respect to their son's alleged behaviour. She testified that she felt that she was in danger in the Ardat household. She said that the RCMP had advised to quit but she felt she could not afford to do so.

According to Pineda's submission to the Tribunal, dated November 14, 2001, which was referred to in testimony, she went to the police some time before August 25, 2000. That would appear to be consistent with the tenor of the Determination, though not on her evidence under oath or affirmation at the hearing. According to her submission, the reason she went to the police was that she "was so scared to death." She alleged that on "one of the times [she] was chased by the boy with a knife, [she] had the chance to run out of the house. And they locked me out". This is just one of the examples. Other examples include sexually inappropriate conduct and allegations which may simply be characterized as "bad behaviour". It is clear from Pineda's point of view that she did not have a good relationship with the Ardat's children. From her standpoint, the Ardats did not do anything to stop the behaviour. She explained that she felt intimidated by Ardat, who she said told her he was once a guerilla fighter and would kill whomever was responsible for hurting his children. It is not an understatement to say that Ardat denies the substance of these allegations. Ardat, in turn, accused Pineda of cheating welfare etc.--allegations she denied.

Servin, who was Pineda's representative at the hearing, also testified. He said that the couple did not go to the police on August 25, they went there one or two weeks before. In cross examination, he stated that it was a "few days" before, "maybe one or two weeks" before, he "did not have the exact date." Servin also testified that he observed Ardat yelling and threatening Pineda though a window of the Ardat residence. He had come to pick her up. He agreed that he did not go to assist Pineda even though he felt that she was in some danger, "it looked like [Ardat] was going to hit her." His explanation was that he was "trusting God and [Ardat]" that Pineda would not get hurt.

As a matter of background, Ardat explained that he had had discussions with Pineda about her work, and a raise she had requested and he was unwilling to grant. These discussions occurred in July. At that time, Ardat explained, Pineda had asked for a $400 raise. He told her "I'm sorry, but if you want you can start looking for another job." She said "fine." He asked her to give "two weeks notice if she found another job" so the family could get a replacement though the nanny agency. Pineda denied that she had asked Ardat for a raise.

In the circumstances, upon my review of the evidence, I am satisfied that Pineda intended to leave her employment on August 25, 2000, the subjective element of the test, and that she did not return, the objective element. All the same, this is not the end of the matter because the real issue is whether Pineda, as she alleged, was "forced" to quit due to the conduct of the Ardats or their children.

In the circumstances, I find the testimony of Pineda and Servin to be not entirely unreliable on the issue of the circumstances resulting in the termination of her employment.

First, given the very serious allegations made against the older Ardat child--and I do no propose to set out the allegations in more detail than I already have for privacy reasons--I would have expected Pineda to have left the work place immediately if, in fact, the allegations were true. The allegations are very serious. I do not accept Pineda's and Servin's suggestion that she went back because they needed the money and to try "for a few more days."

Second, and in the context of the first point, Pineda's testimony was inconsistent with her submission to the Tribunal with respect to a fairly critical event, the involvement of the Richmond R.C.M.P. As well, Pineda's and Servin's testimony was inconsistent with each other. Pineda explained that they went to the police on August 25; Servin explained that it occurred "a few days," or "one or two weeks" before. I cannot reconcile these two versions of this fairly critical event. While Servin stated that his "wife was not good with numbers" [or words to that effect] and that I should look at the "big picture," I cannot agree. The "big picture" is made up of details. I note that I am not overly concerned about Pineda's failure to provide a specific date or time for the involvement of the police. In the circumstances of the evidence, I am concerned about whether the police became involved after she left the Ardat's employ as a "tool" in her battle with the Ardats.

Third, Servin had to be told several times to stop interfering in Pineda's testimony and attempting to "correct it" to conform to his view of what the evidence ought to be. While he acted as her representative, and I appreciate that he is not a lawyer and was eager to speak for his wife, I am concerned about the extent to which Pineda's evidence was, in fact, hers.

In brief, I do not accept the Pineda's testimony regarding the older Ardat son. I do not accept that she was in danger. I do not accept her allegations with respect to the Ardats. The facts are more consistent with her wanting to leave the Ardat's employ. The material facts are that there was an argument between Ardat and Pineda on August 25, 2000. The argument, I think, happened because Pineda wanted to quit without notice and because Ardat wanted to retain the

$200 until the return of the bicycle. Following that, Pineda left the workplace and did not return. In my view, that is consistent with a quit. In short, I am of the view that the delegate erred on this point.

Having considered all the circumstances, I am persuaded that the appeal must succeed in part.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated August 17, 2001 be confirmed, except that the award for compensation for length of service be cancelled and set aside.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal