Employment Standards TRIBUNAL

An appeal

- by -

Anna R. Hicks

- 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: John Savage

FILE No.: 2007A/6

DATE OF DECISION: April 11, 2007

DECISION

SUBMISSIONS

Anna R. Hicks, for herself, Appellant

Syd Blackwell, Owner/ Operator Wintergreen Haven Services Ltd., for the Employer

Ed Wall, for the Director of Employment Standards

OVERVIEW

1. This an appeal by Anna R. Hicks ("Hicks") from a Determination of the Director of Employment Standards dated January 10, 2007 (the "Determination").

2. The Delegate conducted a hearing December 7, 2006. Following the hearing the Delegate found that Hicks was employed by Wintergreen Haven Services Ltd. ("Wintergreen"), that the *Employment Standards Act* (the "Act") had been contravened, ordered that Wintergreen pay wages of $1327.84, and levied an administrative penalty in the amount of $500.

3. Hicks says she was employed by Wintergreen from June 18, 2006 to September 14, 2006, as an on-call resident at a supported living home operated by Wintergreen in Revelstoke, B.C. Hicks was required to be at the home from 6:30pm until the owner returned to the site in the morning. Hicks says that, being "on call" she worked 12 hours per day. Wintergreen took the position before the Delegate that Hicks was not an employee at all.

4. The Delegate found that Hicks was an employee although the time worked was only 2 hours per day.

5. Hicks appeals the Determination arguing that the Delegate erred in law (1) in miscalculating the amount of wages due and (2) in failing to find that wages equivalent to 12 hours work per day were due.

6. The Director and Wintergreen acknowledge that there has been a mathematical error in the calculation of wages. Wintergreen questions whether this amounts to an error of law.

7. The Director and Wintergreen take the position that, once the mathematical error has been corrected, the finding of the Delegate that wages should be limited to 2 hours per day is appropriate. Hicks says that being "on call" is work and that she is entitled to wages for the period of time she was on call.

ISSUES

8. The issues are as follows:

   (1) Does a mathematical error in the calculation of wages by a Delegate give rise to an error of law correctable on appeal?

(2) Did the Delegate err in law in finding that the Employer owed wages equivalent to two hours per day?

LEGISLATION

9. An appeal under the Act is limited to being based on errors of law, breaches of natural justice, or where evidence has become available that was not available at the time the determination was being made:

> 112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

10. In determining Hick's appeal the Delegate referred to the definition of "work" contained in section 1(1) of the Act:

> 1.(1) In this Act:
>
> …
>
> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> (2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

CALCULATION ERROR

11. In this case the calculation error is straightforward. The Delegate determined that Hicks was entitled to 2 hours pay at $8 per hour for 84 days. The amount owed should therefore be based on unpaid wages of $1344 (2 X $8 X 84) plus annual vacation pay plus interest. Instead the Delegate ordered that $1244 plus annual vacation pay and interest be paid.

12. In calculating the vacation pay the Delegate based the vacation pay owed on the correct amount ($1344). It is clear, therefore, that the mathematical error is simply a typographical error. Such an error is an error of law, as there is no evidence to support the finding.

13. Simply put, given the findings of the Delegate, there was no evidence before the Delegate that the correct amount of unpaid wages was $1244. All the evidence supports the finding that the unpaid wages should be based on $1344. Making a finding for which there is no evidence amounts to an error of law: *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.).

BEING ON CALL AS WORK

14. Hicks says that she was "unquestionably at work while on call at Wintergreen Haven". She says that this follows from it being undisputed that she was required to be on the premises from 6:30pm to 6:30am. As she was responsible for the "goings-on" she should be paid for the entire period of time for which she was required to be on the premises.

15. In interpreting the Act one must be cognizant that the legislation is remedial and an interpretation is favoured that extends the protections of the Act: *Machtinger v. HOJ Industries Ltd.*, [1992] SCR 986. Moreover, the *Interpretation Act* provides for the remedial construction of statutes. The words should not be strained, however, to provide an unreasonable result.

16. The Delegate in considering this issue referred to the definition of "work" referenced above. The Delegate noted that the deeming provision in section 1(2) of the Act provides than an employee is deemed to be at work while on call "…at a location designated by the employer unless the designated location is the employee's residence".

17. In this case Hicks resided at Wintergreen Haven during the period in question. Wintergreen Haven was found to be her residence during her period of employment. There is no suggestion, for example, that this was similar to a temporary remote camp as was the case in *Knutson First Aid Services* BCEST # RD095/01. No issue is taken in the appeal from the finding that Wintergreen Haven was her residence. In such a case the deeming provision does not apply.

18. The exclusion of the deeming provision is not, however, the end of the matter. The Delegate went on to consider whether, while in her residence, Hicks was free to engage in her own pursuits or whether she performed other tasks. The Delegate found that generally Hicks was free to engage in her own pursuits and was not actively providing a service to the employer. In my opinion the Delegate did not err in law in coming to this conclusion. Indeed, a consideration of section 1(2) supports this interpretation.

19. In my opinion section 1(2) contemplates several situations. First, being on call at a location designated by the employer is generally considered being at work. Section 1(2) deems that to be so unless the exception applies. Second, an exception is created where the designated location is at the employee's residence. If the designated location is at the employee's residence then the deeming provision does not apply. Third, the deeming provision merely does not apply in such circumstances, so the legislature left it open whether work was being performed where a person was on call in their residence.

20. Since the deeming provision does not apply at the employee's residence, clearly the legislature intended that in such circumstances the employee must either be doing something more than merely being on call to perform work, or, perhaps, that the duties related to being on call were of a particular kind or nature. If merely being on call were sufficient for a finding that there was work, then the exclusion from the deeming provision would be unnecessary. Consideration of the deeming provision and the exclusion from it indicates, in my view, the true legislative intent, namely, that where a person is on call at their residence something more is required before there is compensable work as defined in the Act.

21. In this case the Delegate considered what something more might be, concluding that where Hicks responded to alarms, secured the premises, and provided some domestic services, work was performed for which she should be compensated. While the evidence was imperfect, the Delegate concluded that Hicks performed such tasks for two hours of every day. As I understand the submission of Hicks, she does not

take issue with such estimation, her point being that all on call time is compensable. For the reasons given here I disagree.

22. In considering this appeal, this Tribunal is limited to determining whether the Delegate erred in law. In a number of decisions of the Employment Standards Tribunal, panels have adopted the definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.). That definition can be paraphrased as finding an error of law where there is:

1. a misinterpretation or misapplication of a section of a statute;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; or
5. adopting a methodology that is wrong in principle.

23. In my opinion the Delegate did not err in law in his interpretation or application of the Act or general law. The deeming provision of the Act indicates the Legislature's intent that being on call while in one's residence does not in and of itself constitute work. There must be something more. While I might differ from the Delegate in determining what that something more is, the determination of what constitutes something more is generally a question of fact for the Director to determine, not for this Tribunal to determine on appeal.

SUMMARY

24. The Appeal is allowed in part. The Determination of the Director should be corrected to provide that Wintergreen pay Hicks unpaid wages in the amount of $1344, plus vacation pay and interest as provided in the Act. The Determination of the Director as to the hours of work is confirmed.

ORDER

25. Pursuant to section 115 of the Act, I order that the Determination be varied to show that $1344 is owed as wages. The Determination of the Director as to the hours of work is confirmed.

John Savage
Member
Employment Standards Tribunal