

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Bob Buchanan operating as Pressed for Time Drycleaning
("Buchanan or employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 98/722

DATE OF HEARING: January 28, 1999

DATE OF DECISION: February 18, 1999

DECISION

APPEARANCES

Bob Buchanan
Dawn Cody

OVERVIEW

This is an appeal by the employer of a Determination dated October 30, 1998. This appeal was heard concurrently with an appeal by the employer concerning a breach of the family responsibility leave provisions of the *Act* which is the subject of a Decision issued concurrently with this decision as Decision BC EST #D035/99. The employee was routinely scheduled for a 3 hour shift on Wednesday.

ISSUES TO BE DECIDED

Did the Delegate err in determining that the employer breached the *Act* by failing to schedule shifts that were 4 hours in duration?

FACTS

The employer is engaged in the business of operating a dry cleaning business, at a number of locations in the Nanaimo area. The employer gave evidence that the proper name of the employer was P.F.T. Drycleaning Inc. Mr. Bob Buchanan is an officer but not a shareholder of that company. The company and its predecessor has been operating a dry cleaning business in the Nanaimo area for 33 years, and since Mr. Buchanan's involvement has never been involved in an employment standards complaint.

At all times material to this appeal, Ms. Cody was employed on a part time basis with the employer while she was attending Malaspina College in Nanaimo. The employer argued that it only has two employees at the Woodgrove location, the manager, Margaret Gill and Ms. Cody. The employer indicated that Ms. Gill as the permanent employee was entitled to her choice of the hours, and that it accommodated Ms. Cody in offering her a three hour shift as she was a valuable long term employee. The employer apparently was aware of the four hour minimum requirement set out in the *Act*. The employer indicated that Ms. Cody raised no objection with him. Had she raised an objection the scheduling problem would have been avoided by denying to Ms. Cody the opportunity to work a three hour shift. The employer indicated that it was a take it or leave it proposition, and the employee took it, and therefore should not be heard to complain about the breach of the *Act*. The employer further argued that Ms. Cody as a part time employee was not entitled to receive a preference in the number of hours that she worked over Ms. Gill, the full time employee.

The employer argued that it was not required to cut Ms. Gill's hours to give the part time person a four hour shift, when only three hours were available to be worked.

The employee's evidence, which I accept, is that she tried to fit her college education around her part time jobs. She indicated that she raised the objection with Margaret Gill, her manager. She indicated that she did not raise the objection with Mr. Buchanan as he was not her supervisor.

Ms. Cody filed copies of her college schedule as Exhibits at the hearing. These documents confirmed her oral testimony that she was at all times material to this matter, available to work a four hour shift on Wednesdays. Her schedule was such that she was free to work after 10:30 am. There was some suggestion in the material filed by the employer that she was not available to work a four hour shift.

ANALYSIS

The burden is on the employer to demonstrate an error in the Determination such that I should vary or cancel the Determination. Here the employer has admitted not only that it was aware of the minimum four hour shift requirement set out in 34 of the *Act*, but that if the employee did not accept the three hour shift she would have not been offered the shift. It was a benefit to her.

There are certain exceptions to the minimum four hour shift set out in section 34 of the *Act*, but none of those exceptions apply to the facts of this case. Those exceptions include a suspension of the work for a reason completely beyond the employer's control, reasons related to the fitness of the employee to perform the work or comply with safety regulations. A school student is entitled to 2 hour minimum pay, when that student reports to work. Ms. Cody as a college student did not fall into the category of school student as defined in the *Act*. The employer did not raise any of the exceptions to the *Act*, in its written material, oral testimony or argument.

Section 4 of the *Act* clearly interferes with the "freedom of contract" between employees and employers. Any "agreement" made in contravention of the *Act* or the *regulations*, is not enforceable. It is no defence to a breach of the *Act* for an employer to state that the employee willingly agreed to the breach. That section of the *Act* reads as follows:

The requirements of this *Act* or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 68.

Here the evidence is that Ms. Cody was pressing for more hours, and that the employer attempted to accommodate her and balance these needs off against the needs of a more senior full time employee. Ms. Cody indicated that she raised the four hour shift issue with Ms. Gill. No doubt it was more convenient for the employer to use Ms. Cody, an

experienced employee, to fill a three hour slot than to pay Ms. Gill more money or hire a new highschool student to work 2 or 3 hours.

An employer is free to fix the hours of operation of its business, and schedule the employees in a manner which does not infringe the *Act*. Here the employer chose a scheduling method which infringed the minimum hours of work provisions of the *Act*, and it is no answer to say that it sought to strike a balance between the hours worked by its full time employees and part time employees.

The only issue remaining is the amount of money to be paid by the employer to Ms. Cody. The parties are agreed that this problem for 50 shifts, not 52 shifts as out in the Determination. Ms. Cody is entitled to be paid for 50 hours of work, at her hourly rate prevailing at the time together with vacation pay, and interest. The amount set out in the Determination is incorrect, as the amount is based on the assumption that the employee earned \$9.00 per hour during the entire period, whereas the employee's wage rate changed. The proper amount is as follows:

23 shifts April 23/97 to Oct 1/97	23 hours at \$8.25/hr	\$189.75
2 shifts Oct 1 to 14, 1997	2 hours at \$8.50/hr	17.00
25 shifts Oct 15 to May 20/98	25 hours at \$9.00	\$225.00
Sub-total		431.75
Vacation pay at 4%		17.27
Sub-total		\$449.02

and interest calculated in accordance with the *Act*.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, is varied to provide that the amount to be paid to the Dawn Cody is \$449.02, with interest calculated in accordance with the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal

PEL/lb