Employment Standards TRIBUNAL

An appeal

- by -

Ashley Home Care Cleaning Centre Ltd.
(the "Employer" or "Ashley)

- 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.: 2001/564

DATE OF HEARING: October 15 and November 8, 2001

DATE OF DECISION: January 24, 2002

DECISION

APPEARANCES:

Ms. Jeanette Church	on behalf of the Employer
Mr. George Lehnert Mr. Al Berube Ms. Wendy Rondeau Ms. Susan Perrault	on behalf of the Complainants
Mr. Rod Bianchini	on behalf of the Director

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 issued on July 19, 2001. The Determination concluded that Ms. Wendy Rondeau ("Rondeau") and Ms. Susan Perrault ("Perrault") were owed $4,652.07 by the Employer on account wages (Sections 18(2), 40(1) and 58(3)).

The background facts may be gleaned from the Determination. Ashley is in the business of providing home cleaning services. Rondeau and Perrault, the Complainants or the Employees, worked as house cleaners: Perrault from March 25, 1999 to June 23, 2000 at the hourly rate of $9.00, and Rondeau from February 17, 2000 to June 22, 2000 at the rate of $8.00 per hour. The Complainants were paid for the time allotted to cleaning the houses plus an additional flat rate of .5 hour for any and all travel between houses. The Employer's view was that this was sufficient to cover travel between houses, the Complainants were of a different view. The delegate accepted that the Employer, in fact, paid the Complainants accordingly. In addition, there was an issue of whether Perrault cleaned and organized supplies, approximately 1 hour per day.

The Delegate defined the issues before him as follows: (1) what is considered "work"; and (2) were hours worked paid in accordance with the *Act*. The key issue between the parties was pay for travel time. The Delegate considered the definition of "work" (Section 1). The Delegate concluded that time spent travelling from one job site to another was "work" for which the Employees were entitled to be paid. Accordingly, the Delegate was of the view that Rondeau and Perrault were entitled to be paid from their first job of the day and the completion of their last. With respect to the issue of Perrault's "extra" work, the Delegate found that both parties were aware of the practice. According to the Determination, Ashley felt she was compensated for this by giving her an extra $1.00 per hour. The Delegate accepted Perrault's claim that she spent an extra hour cleaning and organizing supplies each day worked.

FACTS AND ANALYSIS

The Employer appeals the determination. The Employer, as the appellant, has the burden to persuade me that the Determination is wrong.

A hearing was held at the Tribunal's offices. Due to the large amount of documentation, which was not initially well organized, a second hearing date was required. The Delegate attended on that day. At the hearing, Ms. Church ("Church") testified on behalf of the Employer and answered questions from the Delegate and the Complainants. None of the Complainants testified. The Delegate participated on the last day of the hearing.

At the hearing the parties agreed that, aside from the issue of Perrault's "extra" work, the issue was pay for travel time or time between jobs. The parties agree that there is no dispute with respect to pay for the actual cleaning jobs, or the time allocated to those jobs. In other words, are the Employees entitled to be paid for the time from the beginning of the first job until the completion of the last job of the day? The parties, obviously, have different positions on this issue.

As mentioned, Church testified for the Employer. She is the principal operator of what is a small business. She explained that at no time did Rondeau or Perrault complain about overtime. On occasion, when there was a problem with pay, it was rectified. The majority of the customers served by Ashley are in central Richmond and, thus, located fairly close.

There was a considerable amount of documentation involved in this appeal. In my view, however, the arguments and the examples drawn to my attention by the parties, illustrated their positions with respect to the basis for the Delegate's calculations.

The Employer and the Employees drew my attention to a number of examples, including the following:

1. On September 2, 1999, Perrault worked 5.5 hours and was paid for 6, *i.e.*, 5.5 hours of cleaning and .5 travel time. The "weekly schedule" indicates that she started with one client, the first in the day, at 9:00 a.m for 1.5 hours. The next job, or client, a few minutes away, started at 11:00 for 1.5 hours. The third and last client of the day started at 3:00 p.m. for 2.5 hours. For that same day, the Delegate determined the beginning of the work day was 9:00 a.m. and the end was 5:30 p.m., 8.5 hours plus .5 travel time, for a total of 9 hours. The "weekly schedule", submitted into evidence, contains notations, consistent with Church's explanations that she always allowed .5 hours between jobs for rest, smoke breaks, lunch etc.

2. On July 14, 1999, Perrault worked 4.5 hours and was paid for 5, *i.e.*, 4.5 hours of cleaning and .5 travel time. The "weekly schedule" indicates that she started the first job of the day, at 11:00 a.m for 1.5 hours. The next client started at 1:30 p.m. for 1.5 hours. The third and last client of the day started at 3:30 p.m. for 1.5 hours. For that same day, the Delegate determined that the hours of work were 8.5 hours.

In cross examination by the Employees, Church conceded that weekly schedules, and other documents, contained errors or did not necessarily reflect changes that occurred after the schedule was prepared. The schedule, I understood, was usually given to employees at the beginning of the work week. Cancellations, etc. could occur. Employees could also be sent out in teams of three employees, as opposed to the usual two, in which case the time allocated to the particular client was shortened from, for example, 2 hours to 1.2 hours.

The Delegate also questioned Church. She agreed that she supplied the car driven by Perrault. She agreed that she did not tell the Employees what to do with the time between jobs. They could take breaks, including smoke breaks. She agreed that they usually followed the schedule set out by the Employer. The Employees had a pager so they could contact Church. The Employer did not agree that there were many jobs with more than one hour's travel time between them.

At the conclusion of the hearing, the Appellant Employer argued that the Delegate erred in his calculations--he gave the Employees too many hours. The Employer wants the Determination cancelled. The Respondent Employees argued that they were entitled to be paid for the entire day, *i.e.*, from start to finish (and for the restocking, as well). The whole day was company time. The Delegate argued that he based his decision on the records and that the errors pointed to by the Employer does not change the thrust of the Determination. The Employer controlled the time.

I start by setting out the relevant sections of the *Act*.

"Work" is defined in Section 1 of the Act:

> "Work" means the labour or service an employee performs for an employer whether in the employees's residence or elsewhere.

The Delegate also made reference to the following provision:

> 1(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.

The *Act* does not generally concern itself with the start and finish of the work day. Section 33 provides:

> 33. An employer must ensure that an employee working a split shift completes the shift within 12 hours of starting work.

This latter provision was not considered by the Delegate, nor, indeed, was it argued before me. In any event, I have difficulty with the suggestion that the Employees are entitled to be paid from the commencement of the first job of the day and the completion of the last job of that day.

First, clearly the actual time spent cleaning the homes of the Employer's clients count as "work" under the *Act*. That, in any event, is not in dispute.

Second, in my opinion, travel time between jobs is "work". I find that the "flat rate" of .5 for travel does not meet the requirements of the *Act*. While there are exceptions, for example, the daily minimum hours, an employee is generally entitled to be paid only for time actually worked. I can appreciate that it is simpler from an administrative point of view, and perhaps in many cases is sufficient, if actual travel time exceeds the .5, the employees must be paid for such time. The travel time must be established by the available evidence, including such records as the parties are in possession of.

Third, and this is perhaps where the real difference is between the parties, I accept that where the time between jobs is of short duration, the Employees should be given credit for that time as if were "worked". Such time is likely to include travel time from one job to the next, getting ready for the next job, delays and other factors that invariably "sneak" into any schedule, etc. Church's own evidence was that she always scheduled .5 hours between jobs. In other words, this is at the Employer's discretion. As noted above, "[a]n 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". The .5 hours between jobs is effectively time the Employees are "on call". Common sense indicates that there is little meaningful work they can do apart from waiting for the next job to start, and I accept that they are not on their "own time". (Amounts already paid on account of the .5 travel time must be considered in this context.) I emphasize that there is, in my opinion, generally nothing magic about the .5 hour. On the facts of this case, this is the time designated by the Employer. The Employer could organize its affairs to minimize this time and, hence, reduce its labour costs.

Fourth, in the circumstances of this case, where the time between jobs exceed the .5 hour, I am of the opinion that the Employees are not entitled to be paid for that time. In my view, the Employees are on their own, and not subject to the Employer's control, and can meaningfully do what they wish to do. There is nothing before me to indicate that the employees were required to be available, or on call at a location designated by the Employer. As well, if I accepted the Delegate's and the Respondents' argument based on pay from the start and finish, I would be ignoring Section 33.

Based on the evidence before me, I am of the view that the Delegate erred. As I indicated to the parties at the hearing, one of the likely options in the circumstances, given the large amount of documentation, was a referral back. I refer the calculation of amounts owed, if any, back to the Director in accordance with the principles set out in this decision.

With respect to the "extra" work for Perrault, there is nothing in the Determination to support that Perrault spent an extra hour each day cleaning and organizing supplies. I accept that she did some extra work. All the same, the amount of time spent on that work must be assessed with reference to the available evidence. Church's evidence, and this in not contradicted by sworn

testimony, was that Perrault had agreed to do this work. While Church states that she was paid for it, through the higher hourly rate, that in my view is irrelevant. Perrault must be paid for hours worked. Church explained that she had done this work herself and that it took no more than one hour per week. In a submission to the Tribunal, Church agreed that Perrault may have spent perhaps 5 minutes each day filling spray bottles. I refer the calculation of the amount Perrault is entitled to back to the Director on the basis that Perrault is entitled to two hour's pay per week for the "extra" work done. Based on my assessment of the evidence, two hours is probably reasonable given the work involved.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated July 19, 2001, be referred back to the Director for further investigation in accordance with this decision.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal