Employment Standards TRIBUNAL

An appeal

- by -

Vanessa Campbell
(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.: 2001/440

DATE OF HEARING: August 30 and 31, 2001

DATE OF DECISION: January 24, 2002

DECISION

APPEARANCES:

Mr. Ray Campbell	on behalf of Campbell
Ms. Vanessa Campbell	
Ms. Tammy Friesen	Counsel, on behalf of Ms. Jana Dvorakova ("Dvorakova" or the "Employee")

OVERVIEW

This is an appeal by the Employer, Campbell, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director issued on May 9, 2001. The Determination concluded that Dvorakova was owed $5,543.22 by the Employer on account of overtime wages.

The findings and conclusions in the Determination may briefly be set out as follows. Dvorakova worked for the Campbells from January 11, 1999 until November 15, 1999. She claimed that she worked on most days from 7:30 a.m. until 5:30 p.m. The Campbells disputed this and told the Delegate that--from February when Campbell returned from maternity leave--Dvorakova's authorized hours were 7:45 a.m. to 8:15 a.m. (when the older child left for school) and 10:30 a.m. to 4:30 p.m., for a total of 6.5 hours per day. Ray Campbell was at home in the morning and took care of the younger child. In January, her hours were somewhat less. The Campbells contended that Dvorakova spent hours every day on the internet. The Campbells' main point, as I understand it, was that Dvorakova had some two hours off work in the morning.

The Delegate noted that "[t]here has been no evidence presented by the employer of any method of recording the complainant's hours of work on a day to day basis." The Employer presented a detailed summary, which did not meet the requirements of Section 28 of the *Act*, and which was disputed by Dvorakova. The Delegate did not accept the Employer's records. According to the Determination, Dvorakova presented a diary in which she recorded her hours of work on a "contemporaneous" basis. The Delegate accepted this diary as the basis for his calculations. He deducted one half hour from each day as an unpaid eating break.

The Delegate reviewed the statutory definitions of "domestic" and "work." He concluded that because Dvorakova resided at the "employer's private residence" she was deemed to be at work "while on call unless she was at her own residence." While there was no dispute that Dvorakova occupied premises at the Campbells' home--she was a full-time live-in nanny--these premises were the "employer's private residence" and not, in the Delegate's view, the "employee's residence." He accepted that, although there was an adult family member at home, and Dvorakova spent time on the internet, she was nevertheless at work.

ISSUES

The Employer appeals the Determination. The Employer says that the Delegate erred in a number of respects:

1. He relied on Dvorakova's calendar which contained errors. In the appeal, the Employer says that she fabricated the work logs to show that she worked an additional two hours per day.

2. He erred in law when he determined that Dvorakova was "deemed to have been at work" while she was at the Employer's residence.

There is, as well, a further issue before me, namely whether the Campbells should be allowed to rely on a "nanny calendar," setting out hours worked, which was not provided to the Delegate in the course of his investigation. Not surprisingly, the Campbells argue that I ought to allow them to rely on this evidence and the Employee takes the position that I should not.

BACKGROUND FACTS

The "bare-bones" background facts are for the most part not in dispute. Dvorakova was employed as a full-time, "live-in nanny" for the Campbells from early January 1999 until November 15, 1999, when her employment came to an end. The Campbells have two young children, an 11 year old, Dustin, and a six month old, Raymond Jr. Dvorakova was paid $700 net per month. She was not paid for overtime, except for a two week period in June 1999.

EVIDENCE

Both of the Campbells testified. Dvorakova testified as well. While, as mentioned, the background facts are largely not in dispute, the parties' versions of most of the material facts, including the hours of work, contain inconsistencies, both internally and externally, and cannot easily be reconciled. For that reason alone, this case has been difficult to decide. All the same, I appreciate the parties patience for the relatively long delay in this decision being issued.

There is considerable dispute with respect to how and when the employment commenced. Campbell explained that she spoke with Dvorakova on the telephone on December 2 or 3, 1998. They discussed employment and Dvorakova accepted. Dvorakova denied this happened at all. She said that she came to Canada expecting to work for another family. For some reason this had fallen through by the time she arrived in Canada, on January 7, 1999, and she was picked up by the nanny agency at the airport. The agency indicated that it had another family for her, the Campbells. On January 8, she made the application to change the terms of her work authorization in Canada. Subsequently, Human Resource and development Canada approved the Campbells' job offer as *bona fides* and in early March, Dvorakova received the work

authorization. In the result, it would appear that in January and February, 1999 Dvorakova worked without the proper immigration documents.

From the information made available to her from the nanny agency, Dvorakova understood the nature of her basic duties and that her hours of work would be from 7:30 a.m. to 5:30 p.m. These hours were set out on the Campbells' application to the nanny agency. Dvorakova stated that the hours were "written on a piece of paper from Campbell to the agency". On the application form, which formed part of the record, the hours of work were stated to be "7:30 to 5:30 during the summer--may be adjusted. School days 8:00 to 5:00 (when Vanessa goes back to work f/t...)" Dvorakova stated that she had no other written information about her hours of work. She explained that within the first week Campbell provided her with "written information" about their expectations, details about each room, the baby's schedule, meals, and working hours. Included as part of the Campbells' case was a document, dated January 8, 1999, which generally conforms to the description given by Dvorakova. This document indicates that Dvorakova was to wake Dustin (the older child) up at 7:45 and drive him to school at 8:15. In her evidence, Dvorakova explained that the January 8 document may have been one of three pages she received from Campbell at the commencement of her employment.

Campbell testified that she had a document prepared for Dvorakova when she picked her up from the nanny agency setting out her hours of work and that she gave her this document. A typed document, with the date "January 11, 1999" written in hand, headed "Hours of Work", states that Dvorakova's hours of work was from 7:45 to 8:15 and again from 10:30-11:00 a.m. The document indicates that Dvorakova was free to do as she wished between 8:15 and 10:30-11:00. Dvorakova denied seeing this document in early January 1999. She explained that the first time she saw this document was in July 2001 as part of the appeal to the Tribunal.

Campbell explained that Dvorakova's hours of work was from 7:45 to 8:15 a.m. and from 10:30 a.m. to 4:00 p.m. (She agreed with 4:30 in cross examination). Dvorakova's duties for the first half hour in the morning was to get the older son ready for school. Ray Campbell, who operated a car dealership, set his own hours and was at home in the morning, until 10:30-11:00 a.m. Campbell explained that she was on maternity leave in January and that Dvorakova worked less hours.

The Campbells claim that Dvorakova did not work any overtime, except in June and October. In June 1999, Campbell went to Toronto on business. She agreed that Dvorakova worked some overtime in June and stated that she was paid for that time (in July).

Campbell explained, among other things, that Ray Campbell looked after the younger child until he left for work at around 11:00 a.m. She explained that she did not expect Dvorakova to do anything between 8:15 and 10:30 a.m. Campbell agreed that she usually left for work at 9:00 a.m., and worked 9:00-4:00. Raymond Campbell explained, in his direct testimony, that he looked after his son for two hours in the morning. He characterized himself as "Mister Mom" and as highly devoted to Raymond Jr., their first child. He explained that he had full

responsibility for Raymond Jr. during those morning hours--and, as I understood it, stated that he had a certain "routine". This responsibility included changing diapers and feeding. He would be the first to go to Raymond Jr. in the morning, not Dvorakova. In cross examination, he agreed that he woke up between 8:00 and 8:30, "watched the news" and showered. He agreed with the suggestion that he might relax for 1/2 hour. He might make calls to the office around 9:00 a.m. if he had any to make. He agreed that he did not record Dvorakova's work time, that was Campbell's job.

At the hearing, Dvorakova described her typical day. Getting up at 7:15 a.m., she would wake up Dustin at 7:30. She would then go to the kitchen and clean up from the night before and start to prepare breakfast and lunch, sometimes for both the Campbells. She then went back to Dustin's room and made sure he was up. She then went back to the kitchen to finish up there and ensure than Dustin was ready to leave for school at 8:15. A few times she drove him to school. Dvorakova explained that Campbell left for work around 8:00 a.m. After Dustin had left for school, Dvorakova went back upstairs to make up beds etc. She testified that the baby, Raymond Jr., woke up between 9:00 and 9:30 a.m. and that she would go to his room, change diapers and dress him. She denied that Raymond Campbell changed his diapers or fed him. Two or three times a week she gave him a bath in the morning. After that she took him to the kitchen to feed him. She would then play with him, read to him or play records for him. She agreed that Raymond Campbell left for work around 11:00 a.m. but she did not pay much attention to this most of the time. After Raymond Campbell left, she continued with house chores, vacuum cleaning, doing laundry, putting away toys, and dusting. Dustin came home from school at 3:00 p.m. Dvorakova started preparing for dinner which she was asked to have ready for 4:30 when Dustin was supposed to have dinner. Between 5:00 and 5:30 her work day was over. In short, Dvorakova described her typical work hours as 7:30 a.m. to 5:30 p.m.

With respect to the morning hours, between approximately 8:15 and 10:30 a.m., Raymond Campbell testified that Dvorakova was free to leave the home during those hours—"it was entirely up to her" and that it was "her free time". Dvorakova denied that he had the responsibility for baby Raymond when he was at home in the morning: in her words: "I had full responsibility for the baby".

Raymond Campbell also testified that Dvorakova spent considerable time on the internet during the day and that they--the Campbells warned her about it--and were concerned about the children. Dvorakova agreed that she sometimes spent some time in the morning on the internet but for the most part she did this in the afternoon when the baby was asleep or in the evening. It did not, in her view, interfere with her looking after the children. Both in direct and cross, she testified that she spent only a few minutes on the internet in the morning. Raymond Campbell stated, in cross examination, that he was concerned that she was "always on the internet" and, on one occasion, was on a "porn site". The Campbells pointed to a document, a few pages from a Telus statement for October 1999, to support their point, which indicated that Dvorakova on October 11, 1999, spent some 45 minutes on the internet between 8:19 a.m. and 10:38 and on

October 12, 1999, 39 minutes in the same approximate time slot, which they say was her break time. Raymond Campbell testified that he did not use the internet in the morning.

Campbell denied that Dvorakova drove the older child to school. She had him in a car pool. She said that she could not see herself allowing Dvorakova to drive him because she was "new." She was not sure, however, if Dvorakova had driven Raymond Jr. to school for a few days in the beginning of the working relationship.

According to an October 22 letter, from the Campbells to the Delegate, from June 17 and until the end of August, the Campbells changed Dvorakova's hours to 9:00 a.m. to 4:30 p.m. I understand Campbell's testimony to be that in October Dvorakova worked some overtime on "flexible" hours. The reason for the overtime in October was that two employees left the business in which Campbell worked, and that the Campbell family moved from Abbotsford to Surrey (around October 4). Campbell agreed that Dvorakova's duties remained basically unchanged throughout her employment.

Dvorakova explained that she was not aware that she was working overtime hours until June when she--she explained--found out from a friend. In September or October, she obtained a brochure and received other information from the Employment Standards Branch regarding her hours of work.

Campbell testified that she had a discussion in November with Dvorakova and suggested that they keep a calendar they could both agree on. She said she would give written notice if the hours of work changed. In November, Campbell testified, Dvorakova approached her with a claim for overtime and was asked for a "breakdown." A note from Campbell to Dvorakova stated:

> "From now on I want you to document your time on a calendar and leave it upstairs so that we both agree on it. Since we have moved I have added an additional hour to your workday. As discussed previously, I will be having my sister watch the baby so that you do not work over 40 hours per week...."

Campbell testified that in November, the relationship had started to deteriorate and the Campbells had started looking for a replacement for Dvorakova. In cross examination, however, she explained that they had started looking for a replacement in June. Campbell explained that they were "very dissatisfied with [Dvorakova] in June and sought another [nanny] but couldn't get one." In part, at least, the reason stated was that the "house was never so filthy". Dvorakova stated that she never got any complaints about her work. The Campbell testified that they contacted four agencies and did some interviews with prospective nannies in September to November. However, around this time, they bought a car for Dvorakova's use. She had to pay for gas and insurance. Campbell explained that, in her view, Dvorakova felt that the Campbells should pay for the insurance and that was the reason for the deterioration of the relationship.

Campbell suggested that Dvorakova, at the hearing, incorrectly claimed that she quit her employment with them. On the complaint to the Branch, she claimed to have been fired. The complaint form, which was before me at the hearing, contains a "check mark" in the "fired" box. From the documents on record, and the evidence at the hearing, it is clear to me that the relationship deteriorated in early November 1999, largely, from the evidence, over the disagreements between the parties over the pay issue. From Dvorakova's evidence it was clear that she started "pushing" the issue in early November. Raymond Campbell explained in his evidence--and in his correspondence--that Campbell was "uncomfortable with Jana" and "wouldn't be alone with her because she was overly aggressive". He wrote a letter to Dvorakova on November 8, 1999, asking her, among others, to put her concerns about her pay in writing. On the other hand, Dvorakova testified that she was getting "really uncomfortable" with the Campbells, especially Campbell. On November 18, 1999, the Campbells wrote a letter to Dvorakova which stated "...it is with regret that we wish to terminate your employment with us effective Nov 19th ..." Dvorakova testified that she was asked for her keys and to leave on November 15. Thus, it is clear to me that Dvorakova was, in fact terminated by the Campbells.

A substantial aspect of Campbell's appeal is the assertion that Dvorakova prepared different work logs during the course of her employment and the Delegate's investigation. Campbell testified that there were discrepancies between the different work logs prepared by Dvorakova (and, thus, the Delegate's calculations, based on those logs).

The *first* of the work logs, with which the Campbells had difficulty was, in fact, the Delegate's. That obviously cannot be directly attributed to Dvorakova as it was prepared by the Delegate (although, of course, clearly based on information supplied by her). This work log is the Delegate's calculations of Dvorakova's hours, and he deducted time for lunch breaks.

A *second* work log, before me, covered the period March to November ("Log#2"). It was prepared by Dvorakova based on her diary, according to her evidence, kept on a *relatively* contemporaneous basis, as explained below. Generally, this record indicates that Dvorakova worked 9-10 hours per day--sometimes more, sometimes less--from 7:30 in the morning til 5:30 in the afternoon. Dvorakova explained that she had had the habit of writing a diary for some 10 years. She generated the information for the Delegate from this diary. She explained that she would write in her work hours, not always daily, but sometimes a week or two in advance, and she would then "go back and change these hours if they were different" from the "real hours". She would subsequently "correct" the hours accordingly.

In cross examination, Dvorakova acknowledged that the diary contained errors. For example, on April 5, 1999, the diary indicated that she worked from 7:30 a.m. until 5:30 p.m., or 9.5 hours. The Delegate accepted this and determined that she was entitled to 8 hours at straight time and 1.5 hours at time and one half. Dvorakova acknowledged that she did not, as otherwise indicated by the diary, work the entire day on April 5. She had thought that the day--Easter Monday--was a day off and went to work after Campbell woke her up.

In their cross examination, the Campbells directed Dvorakova to inconsistencies in the various work logs and the diary. For June 14, 1999, for example, the diary indicates that Dvorakova worked from 7:30 a.m. to 6:15 p.m., log#2 is the same, and Log#3 states that she worked until 6:30, *i.e.*, 10 hours. For that date the Delegate credited her with 9.5 hours. This is equivalent to to 10 hours less .5 hours for a break. For June 18, 1999, the diary indicates that Dvorakova worked from 7:30 a.m. to 12:00 p.m., log#2 is the same, and Log#3 states that she worked until 12:30, *i.e.*, 5 hours. For that date the Delegate credited her with 5 hours. Dvorakova was asked why she claimed for 5 hours in Log#3. Her explanation was that it was an "accident". Generally, having reviewed the start and finish times for the period June 14 to 28, with the exceptions noted, Log#2 and Log#3 and the diary are consistent.

Campbell testified that she received a *third* work log from Dvorakova in June, for the period June 14 to 29 ("Log#3"). This log was in Dvorakova's handwriting and is based on two hours per day breaks. The work log sets out start and finish times, and claimed overtime entitlement. For example, according to this document, on June 14, Dvorakova worked between 7:30 a.m. and 6:30 p.m., or 11 hours. She claimed entitlement to only one hour of overtime on that date. The Campbells argued that is consistent with an 8 hour day, *i.e.*, with the two hour break in the morning. Similarly, for the following day, the document shows that Dvorakova believed she was entitled to 2 hours of overtime based on a work day from 7:30 a.m. to 7:30 p.m. On this document--Log#3--is a notation "2 hours break". Dvorakova denied that that notation was hers. Regardless, the information on document itself may be consistent with the Campbell's assertion that Dvorakova believed that she was not entitled to be paid for the two hours in the morning. The implication, from their standpoint, is that Dvorakova did not work those hours.

A *fourth* log was a summary of the *amounts* Dvorakova believed she was entitled to. It has the date October 22 written on it. The document was provided to Campbell by Dvorakova, who testified that this was an approximate calculation of what she felt she was owed.

The evidence of the parties--perhaps a bit summarily--boil down to the following propositions: the Campbells say that Dvorakova had the morning hours off and she was to do as she wished; Dvorakova, on the other hand, say that she generally worked from 7:30 a.m. to 5:30 p.m., i.e., without the two hour break.

PRELIMINARY ISSUE: THE "NANNY CALENDAR"

The Campbells sought to rely on a "nanny-calendar" produced in the course of these proceedings. As mentioned, one of the issues before me is whether to allow them to rely on this document.

It is not in dispute that this document was not produced to the Delegate in the course of his investigations. Campbell said that the "nanny-calendar" was accurate. Campbell's explanation was that she misunderstood what the Delegate requested of her and that was the reason she did not produce the "nanny-calendar" at the time of the investigation. She explained that she

believed that the Delegate simply had asked her for a written explanation or response to the complaint from Dvorakova. The response consisted of a detailed summary of Dvorakova's hours of work from January 11 to November 15, 1999 (dated October 22, 2000).

The letter from the delegate set out the basis for the overtime claim and stated among others:

> "I am writing to ask you, or preferably your husband (sic.), provide a written account of the hours that Ms. Dvorakova was required to work on each day. *If you have any record of her daily hours of work, these should also be provided*." (Emphasis added)

As I have already stated, the "nanny-calendar" was not provided to the Delegate. In the circumstances, I do not accept the Campbells explanation. I agree with counsel for Dvorakova that the calendar should not be admitted. In fact, it is quite clear from the Delegate's letter that he sought not only their response to the allegations, but also the production of any records they might have relevant to those allegations. The fact that this document, which if accepted would provide substantial evidence in favour of the Campbells, was not produced to the Delegate, raises serious questions in my mind about whether this document was, in fact, made contemporaneously with the employment.

I note, as well, as did counsel for Dvorakova, that not only was this document not produced to the Delegate, it was also produced late in the appeal process, namely in Campbell's reply and not even as part of the original appeal. In short, I am not convinced that this document was prepared at the material time and I am not prepared to admit this record into evidence and consider it.

In any event, if I am wrong in not admitting this record and if I were to admit and consider the "nanny-calendar", I have grave doubts about the origin of this document and the reliability of the evidence contained in it. According to the calendar, in January, Dvorakova worked 5.75 hours each day, and in February to May, the daily hours were 6.75. These figures are inconsistent with other evidence. First, under cross examination, Campbell stated that Dvorakova's hours of work in January, when she was on maternity leave, were from 7:45 to 8:15 a.m. and then from 10:30 a.m. to 3:30 p.m. That does not add up to 5.75 hours--only 5.5 hours. The hours in the calendar do not reflect that Campbell was in hospital for some time in January. As well, the hours of work between February and May were explained to be from 7:45 to 8:15 a.m. and then from 10:30 a.m. to 4:30 p.m. That does not add up to 6.75 hours--only 6.5 hours. Second, the October 22, 1999 letter to the Delegate--the detailed summary--stated the hours in January to be 5.5, consistent with the testimony regarding the hours of work but inconsistent with the calendar. The hours of work for February to May were, however, stated to be 7.5 hours per day in the October 22 submission to the Delegate, inconsistent with both the testimony and the calendar. Campbell's explanation was that this was "what [Dvorakova] was paid for" and that "Ray Campbell put it in" is not, in my view, persuasive. This submission was written by Ray Campbell. She agreed that the correct hours should be 6.75. The 7.5 hours were carried forward in the document from February through May.

In the circumstances, I do not find the evidence contained in the so-called "nanny-calendar" reliable and would, if I were to admit it at all, place no weight on it.

ANALYSIS

First, in my view, the evidence must be viewed in the context that the legislation imposes an onus on the employer to keep accurate and contemporary records of hours of work (*Nelson*, BCEST D512/97). Second, I am mindful that Campbell, as the appellant, has the burden to persuade me that the Determination is wrong. For the reasons stated below, I am of the opinion that the Appellant has succeeded insofar as I have decided to refer the determination of Dvorakova's wage entitlement, if any, back to the Director.

The issues on appeal are, in part, as suggested above, of a factual nature and, in part, turn on the proper interpretation of Sections 1 and 35 of the *Act*.

As I indicated to the parties at the hearing, I would not shy away from making the necessary decisions with respect to credibility if necessary and, in that regard, adopt the often cited words of the B.C. Court of Appeal 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."

In the circumstances of the issues before me, and the evidence, it is, however, my view that I can decide the appeal on relatively narrow legal grounds. As it is my decision to refer the matter back, I expressly refrain from making any decision with respect to credibility.

The Section 35 provides:

> 35. An employer must pay overtime wages in accordance with section 40 or 41 if the employer *requires or, directly or indirectly, allows* an employee to work
>
> (a) over 8 hours a day or 40 a week, or
>
> (b) .... (emphasis added)

The other relevant provision is Section 1 "work":

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

In his Determination, the Delegate found that the summary of hours provided by the Employer was detailed but was in essence no more than the "expected hours" to be worked by Dvorakova. The Delegate accepted that the Campbells were "sincere and credible". All the same, the records did not meet the requirements of Section 28 of the *Act*. I agree with his conclusion that the records did not meet the requirements of the *Act*.

The Delegate then noted that Dvorakova did not agree with the Employer's summary. He accepted that her summary was based on her calendar, which, in his view, was a contemporaneous record. Based on the evidence before me at the hearing, that is an over-simplification. It is clear to me that there are errors in the diary and, in turn, these errors are carried over into the Delegate's award.

The Delegate contrasted the definition of "work", set out above, and the definition of "domestic":

> "Domestic" means a person who
>
> > (a) is employed at an employer's private residence to provide cooking, cleaning, child care or other prescribed services, and
> >
> > (b) resides at the employer's private residence;

In the Delegate's view:

> "According to these definitions, the complainant is deemed to have been at work while on call unless she was at her own residence. By definition, a domestic worker is one who "resides at the employer's private residence". The premises occupied by the complainant were the "employer's private residence" not the "employee's residence".
>
> Since the employer required the complainant to be at the residence (there is no evidence to suggest otherwise) the complainant could be said to be at a place designated by the employer which was not the employee's residence.
>
> Had the employer provided the complainant with a pager or a phone during her "break periods and had she been free to come and go, the complainant might have been considered to be on call and only liable to be paid for hours actually spent working.
>
> This did not appear to be the arrangement in operation in the case at hand. It must be assumed for the purposes of this analysis that the complainant was required to be at the employer's residence at available to perform work."

In my opinion, the delegate erred in his analysis. It does not follow, as the delegate seems to have concluded, that because the definition of "domestic" provides that work is performed in the employer's "private residence", that *same* residence cannot also be the employee's residence. The courts and the Tribunal have considered the meaning of "residence" in a number of decisions, including Corner house, BCEST #D254/98:

> Residence seems to be a notion which the courts and legislatures have rarely clearly defined. It seems to be a notion which is accepted in a common sense way. Residence then is something short of domicile, i.e. the intention to remain in that place permanently, but something more than temporary or intermittent. It has some degree of permanence; it is the person's settled abode; it is the place they carry on the settled routines of life. It would be the place one hangs one's hat, keeps one's clothes, stores treasures and family memories; a place of privacy protected in law from state intrusions; and a place of retreat from the turmoil of the workplace. It would be a place to entertain one's friends. It would be an address of one's own, a phone number, and a place to receive mail.
>
> This is not to say that there are not situations where an employee gives up some of the benefits of a private residence to live communally or at a place of work. For a workplace to also be considered a residence the place of work must assume some of the qualities of a residence. There must be some degree of privacy; a space, all be it limited, to call one's own. There must be some degree of settlement to carry on as much of those everyday things as possible, subject only to the minimum necessary intrusions of the requirements of the employment. There must be some element of permanence as opposed to the intermittent or temporary.

I do not agree that Dvorakova was at work because she was not, as the Delegate concluded, in her own residence. The Campbells' home was her home. That is where she lived. There is, in my view, no evidence whatsoever to suggest that this was not her residence. I disagree with counsel for Dvorakova in that regard and I am satisfied that the Delegate erred in law.

The Delegate's analysis, in my view, put the cart before the horse. Unfortunately, it would appear, that the legal assumption directed the Delegate's conclusions and that he, therefore, did not properly address the legal and factual issues before him. While, on the one hand, the Delegate accepted that the Campbells were "sincere and credible", on the other, he stated that there was "no evidence to suggest" that "complainant was [not] required to be at the employer's residence".

At the hearing, the evidence presented by the Appellant was that Dvorakova was not required to stay at the Campbell residence. Raymond Campbell testified that Dvorakova was free to leave the home during those hours—"it was entirely up to her" and that it was "her free time". Dvorakova denied that he had the responsibility for baby Raymond when he was at home in the morning: in her words: "I had full responsibility for the baby".

Moreover, it is simply incorrect, as stated in the Determination, that there was "no evidence" that complainant was [not] required to be at the employer's residence. In a letter to the Delegate, dated October 22, 2000, addressed to the Delegate, an part of the file submitted to the Tribunal, the Campbells clearly stated that Dvorakova's had a break between 8:15 and 10:30 a.m. The Delegate failed to address and assess the Campbells' factual assertion.

Some of the evidence that formed part of the Delegate's file, and submitted in these proceedings, could lend support to the Campbells' position. For example, Dvorakova's *third* work log, covering the period June 14 to 29 ("Log#3"), in her handwriting and is based on two hours per day breaks. Log#3 sets out start and finish times, and claimed overtime entitlement. This could be, as the Campbells argued, consistent with an 8 hour day, *i.e*., with the two hour break in the morning. As well, while the Delegate appears to have accepted that Dvorakova spent some time on the internet during the time in question, he did not address the Campbells' evidence, the Telus statement for October 1999, which could indicate that Dvorakova spent considerable time on the internet during the morning hours.

On the other hand, there is nothing in the Determination to suggest that the Delegate addressed and assessed Dvorakova's claim that she actually worked during these hours, i.e., that work day, in fact, generally, was from 7:30 a.m. to 5:30 p.m. The Delegate's deduction of .5 hours for meal break does not make sense if, in fact, her hours of work were as she claimed. Possibly this aspect of the determination may be an attempt to compromise the Employer's liability. In the circumstances, I have some sympathy for that. All the same, I fail to see the statutory basis.

The positions of the parties was based on diametrically conflicting versions of the material facts. In my opinion, the Delegate was obligated to properly investigate and determine the material facts and the applicable law. Where the parties present conflicting versions of the facts, the Delegate may be required to assess the credibility of the parties or their witnesses and the reliability of the evidence.

On the issue entitlement to overtime wages, I am satisfied that the Delegate erred in his conclusions.

In the circumstances, I refer the matter back to the Director. I do not make any findings whether Dvorakova actually worked those hours, I leave that for the Delegate. The real question--in my mind--is what her *actual* hours of work were. The delegate did not address this question. If she was not required to work, directly or indirectly, or allowed to work, and was "free to leave" or "do as she wished", as argued by the Campbells, then, in my view, these hours ought not to count as hours worked. If she was required, directly or indirectly, or allowed to work, then these hours ought to count as hours worked. It may well be, at the end of the day, that the Delegate finds in favour of Dvorakova.

In short, I refer the matter back to the Director in accordance with this decision. However, I recommend to the Director that a meeting between the parties be convened to discuss a possible settlement.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 9, 2001, be referred back to the Director.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal