

An appeal

- by -

Rondivills Kennel Ltd.  
("Rondivills")

- 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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2004A/9 and 2004A/13

**DATE OF DECISION:** March 22, 2004

## DECISION

### SUBMISSIONS

Robert Scott	on behalf of Rondivills Kennel Ltd.
Sherri Nordmarken	on her own behalf
J.R. Dunne	on behalf of the Director

### OVERVIEW

This decision considers an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by the Rondivills Kennel Ltd. (“Rondivills”) of two Determinations that were issued by a delegate of the Director of Employment Standards (the “Director”). One of the Determinations, dated December 22, 2003, concluded that Rondivills had contravened Part 3, Section 18, Part 4, Section 40, Part 5, Section 46, Part 7, Section 58 and Part 8, Section 63 of the *Act* in respect of the employment of Sherri Nordmarken (“Nordmarken”) and ordered Rondivills to pay Nordmarken an amount of \$2,988.59. The other Determination, dated December 23, 2003, imposed an administrative penalty of \$500.00 on Rondivills under Section 29 of the *Employment Standards Regulation* (the “Regulations”) for a contravention of Section 46 of the *Act*.

In the appeal, Rondivills says the Director failed to observe principles of natural justice in making the Determination and asks that it be varied by re-calculating vacation pay, overtime pay and interest and by setting aside the finding on entitlement to length of service compensation. The appeal also takes issue with the decision of the Director to disallow some evidence and argument which Rondivills sought to introduce during the investigation hearing and alleges bias in respect of that decision.

The Tribunal has carefully reviewed the submissions and materials on file and has decided an oral hearing is not necessary in order to decide this appeal.

### ISSUE

The issue in these appeals is whether the Rondivills has shown there is any error in the Determination that justifies the Tribunal exercising its discretion under Section 115 of the *Act* to vary the Determination as requested.

### THE FACTS

The reasons for Determination provide the following background facts:

Rondivills Kennel Ltd. (the employer) operates a pet boarding, grooming and training facility which falls under the jurisdiction of the Act. Sherri Nordmarken (the complainant) was employed as a manager/labourer from April 21, 2002 to October 23, 2002. The complainant was paid a salary of \$640.00 every two weeks. The complainant did not receive any overtime pay. The complainant also received free accommodation in a house located on the business property.

Both parties confirm that the office was open from 8:00 AM to 6:00 PM on Monday through Saturday and 1:00 PM to 4:00 PM on Sunday and statutory holidays.

The Director conducted an oral hearing on the complaint on October 28, 2003 and the Determinations were issued on December 22 and 23, 2003.

The Director made several findings of fact in the Determination:

- That Nordmarken's pay rate was \$640.00 every two weeks;
- That the daily record of hours worked kept by Nordmarken was not accurate;
- That Rondivills' records, including a record of hours worked on a daily by Nordmarken, were incomplete;
- That the best available record of hours worked by Nordmarken, and an accurate reflection of the actual hours worked by her, was the employer's work schedule;
- Nordmarken was paid for 80 hours work in a two week period;
- That Nordmarken's regular wage rate was \$8.00 per hour;
- That Nordmarken was entitled to be paid 139.5 hours at 1½ times her regular wage rate and 20.5 hours at 2 times her regular wage rate, for a total amount of \$2002.00;
- That Nordmarken was entitled to be paid for five statutory holidays that occurred during her period of employment;
- That Nordmarken had not been properly paid for three of those statutory holidays and was owed an amount of \$96.00;
- That Nordmarken was not paid any annual vacation pay;
- That Nordmarken was entitled to be paid an amount of annual vacation pay equivalent to 4% of total wages, an amount that included gross wages paid to Nordmarken by Rondivills, which according to Rondivills' payroll summary was \$8000.00, together with any amounts awarded as owing in the Determination;
- That Nordmarken did not quit, but was terminated without cause or written notice; and
- That photographs sought to be introduced into evidence were not shown to be relevant to the issues arising in the complaint.

## **ARGUMENT AND ANALYSIS**

The burden is on Rondivills to show an error in the Determination that justifies the intervention of the Tribunal under Section 115 of the *Act*. An appeal to the Tribunal is not a re-investigation of the

complaint nor is it simply an opportunity to re-argue positions taken during the investigation or fill in perceived evidentiary gaps.

The appeal submission filed by Rondivills addresses five matters: annual vacation pay calculation; compensation for length of service; bias, in disallowing the photographs presented as evidence and closing off argument on the “subject of rent”; overtime; and interest.

### **Annual Vacation Pay Calculation**

Rondivills argues that annual vacation pay should have been calculated only on gross wages paid to Nordmarken, an amount of \$8000.00, but was incorrectly calculated on an amount of \$10,418.00. In reply, the Director points out that the Determination clearly indicates annual vacation pay was owed on the gross wages paid to the complainant by Rondivills, “plus any amounts awarded as owing to the complainant” in the Determination.

Rondivills has shown no error in the Determination on this matter. The *Act* dictates that annual vacation pay is to be calculated on “*the employee’s total wages during the year of employment entitling the employee to vacation pay*”. The definition of wages in Section 1 of the *Act* includes money that is paid, or payable to an employee for work, money, including the amount of any liability under Section 63, required to be paid to an employee under the *Act* and money required to be paid in accordance with a Determination, other than monies required to be paid under Section 79(1)(f). The Director was correct in including in the amount of “total wages” all amounts paid to Nordmarken by Rondivills and all amounts found owing to her under the *Act*.

### **Compensation for Length of Service**

Rondivills has done nothing more than reiterate its position that Nordmarken quit, or abandoned, her employment. That position was rejected by the Director for the reasons stated in the Determination. There is no reason to revisit that matter.

### **Bias**

Rondivills says the bias arises from the decision of the Director to refuse to accept photographs of the inside of the accommodation occupied by Nordmarken or let them argue the “subject of rent”. In the appeal submission, Rondivills argues the rental “value” of the accommodation, which is placed at \$800 a month, “should be in lieu of overtime pay”. Rondivills says this argument was closed off by the Director when the pictures weren’t admitted. The Director says the parties agreed during the investigation that Nordmarken received accommodation in the house rent free, suggesting it was therefore unnecessary to hear Rondivills on that matter. While I appreciate the Director may have felt that concession disposed of any issue regarding the accommodation or its “value”, I also appreciate that Rondivills may not have perceived such concession prevented them from arguing the “value” of that accommodation should be set off against any entitlements Nordmarken may have had under the *Act*.

I will state at the outset of my analysis that there is no basis for the allegation of bias. Rather, the substance of the appeal being made by Rondivills is whether the Director denied Rondivills a fair hearing by precluding evidence and argument on the “subject of rent”.

This matter is resolved on an assessment of whether the evidence and argument which Rondivills sought to provide had any relevance to the issues before the Director. If the argument made by Rondivills in this appeal was relevant to the issues being considered by the Director, then the Director should have allowed representations and evidence relating to it and a refusal to do so is a denial of natural justice. The reasons provided in the Determination quite clearly indicate, however, the Director was not convinced the photographs of the “rent free” accommodation provided to Nordmarken had any relevance to the claims for wages being made by Nordmarken.

I agree with the Director. Whether or not the parties had agreed the accommodations were rent free, as a matter of law, the *Act* does not allow the “value” of accommodation to be taken into account as wages or set off against wages owed (see *Clint Heichman operating as Blue Ridge Ranch*, BC EST #D184/97). Accordingly, there was no denial of natural justice by precluding evidence and argument on the “subject of rent”.

### **Overtime Pay**

This matter simply expresses disagreement with the findings of fact made by the Director on the amount of overtime worked by Nordmarken. No reviewable error is shown.

### **Interest**

Rondivills submits that the Director advised the parties that a Determination on Nordmarken’s complaint would be issued within three weeks following the oral hearing and questions why interest should be payable when it took almost two months to issue the Determination.

The answer to this question lies in subsection 88(1) of the *Act*, which says:

- 88 (1) *If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of*
- (a) the date the employment terminates, and*
  - (b) the date a complaint about the wages or other amount is delivered to the Director to the date of payment.*

There is no error in the Determination on the matter of interest.

Finally, Rondivills says it was unaware it was contravening Section 46 of the *Act* and says a warning, rather than a \$500.00 administrative penalty, would have been sufficient.

Rondivills has not shown the Director made any error in issuing the administrative penalty. Rondivills’ professed ignorance of the requirements of the *Act* is irrelevant, as is my view of whether a warning, instead of a penalty, would have sufficed. A contravention of Section 46 of the *Act* has been established and the material on file indicates the administrative penalty imposed was the correct response to that contravention.

For the above reasons, the appeal is dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated December 22, 2003 be confirmed in the amount of \$2,988.59, together with whatever interest has accrued on that amount under Section 88 of the *Act*, and the Determination dated December 23, 2003 be confirmed in the amount of \$500.00.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**