

An appeal

- by -

Vanessa Campbell

- 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: Carol L. Roberts

FILE No.: 2004/1

DATE OF DECISION: March 24, 2004

DECISION

SUBMISSIONS

J. Geoffrey Howard

On behalf of Vanessa Campbell

Pat Douglas

On behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Vanessa Campbell, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director").

On May 9, 2001, a delegate of the Director issued a Determination finding that Ms. Campbell owed Jana Dvorakova \$5,543.22 for overtime wages. Ms. Campbell appealed that Determination. The Tribunal held an oral hearing on August 30 and 31, 2001. The adjudicator concluded that the delegate had failed to properly investigate the conflicting claims of the parties, and referred the matter of overtime wages back to the Director. The adjudicator also recommended that the delegate attempt to settle the matter. (*Campbell* BC EST #045/02)

On the referral back, the delegate who had originally investigated the file went on sick leave, and then left the Branch. The file was transferred to another delegate, who attempted to settle the matter. Although Ms. Dvorakova, who had since returned to her home in the Czech Republic, was willing to do so, Ms. Campbell was not.

The second delegate reviewed the material in light of the adjudicator's directions, and concluded, in a decision issued January 16, 2004, that Ms. Dvorakova was entitled to overtime wages in the amount of \$6,430.61.

Ms. Campbell seeks to have the second decision set aside and the complaint dismissed.

The parties were advised by the Tribunal's Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held.

ISSUES TO BE DECIDED

At issue is whether the delegate erred in law in concluding that Ms. Dvorokova was entitled to overtime wages, and in determining the amount of wages owed to her.

FACTS

Ms. Dvorakova worked as a domestic for Mr. and Ms. Campbell from January 11, 1999 until November 15, 1999. After her employment ended, she filed a complaint alleging that she was entitled to overtime wages.

The Determination

The delegate determined that the employer, Ms. Campbell, had not maintained a record of Ms. Dvorakova's work that complied with the Act. Ms. Dvorakova disputed Ms. Campbell's records of her hours of work. Ms. Dvorakova maintained her own daily hours of work on a more or less contemporaneous basis, which the delegate accepted as the best evidence of her hours of work, and which he used as a basis for his calculations. He deducted one half hour per day from her daily hours of work as an unpaid eating break, and determined that Ms. Dvorokova was entitled to wages in the amount of \$5,543.22.

Ms. Campbell appealed the Determination, contending that the delegate erred in relying on Ms. Dvorakova's calendar, and in deeming that Ms. Dvorakova was at work at all times while in the Campbell residence.

The appeal hearing

Mr. and Mrs. Campbell and Ms. Dvorakova all testified at the appeal hearing. The issue at the hearing was whether Ms. Dvorakova had two hours free from work each morning. The adjudicator considered several documents relating to Ms. Dvorakova's hours of work as well as the oral evidence of the parties.

The first document considered by the adjudicator was prepared by Ms. Campbell for the nanny agency. It indicated that Ms. Dvorakova was to work from 7:30 to 5:30 during the summer, and 8:00 to 5:00 during school days. The second document was one Ms. Campbell testified she gave to Ms. Dvorakova upon picking her up from the nanny agency. This document indicated that Ms. Dvorakova was to work from 7:45 to 8:15, and again from 10:30 to 11:00 a.m., and that Ms. Dvorakova was free to do as she wished between 8:15 and 10:30 a.m. Ms. Dvorakova denied seeing this document until July 2001, as part of the Campbell's submissions to the Tribunal.

Mr. Campbell's oral evidence was that he did not leave for work until 11:00 a.m., and that he looked after the youngest of the two children for two hours in the morning, including changing diapers and feeding. It was his evidence that this was Ms. Dvorakova's "free time". In cross-examination, Mr. Campbell agreed that he woke up between 8:00 and 8:30 a.m., watched the news, and showered. He also agreed that he might relax for ½ hour and make calls to his office around 9:00 a.m. Mr. Campbell further conceded that he did not record Ms. Dvorakova's hours of work.

Ms. Dvorakova's evidence was substantially different from that of Mr. Campbell. She testified that she woke the oldest child up at 7:30 a.m. and made sure he was ready for school, prepared breakfast and lunch, cleaned the kitchen, and changed the youngest child's diapers and dressed him. She denied that Mr. Campbell looked after the youngest son. It was her evidence that she had "full responsibility for the baby" between 8:15 a.m. and 10:30 a.m.

Mr. and Mrs. Campbell asserted that Ms. Dvorakova spent considerable time on the internet during the day. While Ms. Dvorakova conceded she did spend some time on the internet during the day, it was mainly in the afternoon when the baby was sleeping. The Campbells submitted a Telus statement for October 1999 that showed internet usage of 49 minutes between 8:19 a.m. and 10:38 a.m. on October 11, and 39 minutes in approximately the same time period for October 12, 1999.

The Campbells argued that, because there were inconsistencies between Ms. Dvorakova's logs, the delegate ought not to have relied upon them. The adjudicator found that the first of the logs was prepared by the delegate, albeit on information provided by Ms. Dvorakova. The second log was based on a diary maintained by Ms. Dvorakova on a relatively contemporaneous basis. This record showed that Ms. Dvorakova worked from approximately 7:30 a.m. until 5:30 p.m. It was her evidence that she recorded her hours in advance, and adjusted them if she did not in fact work the hours as recorded. Ms. Dvorakova acknowledged some errors in this record under cross-examination.

Two other documents submitted at the hearing consisted of a record of Ms. Dvorakova's hours of work for the period June 14 to June 29, and a summary of the entitlement Ms. Dvorakova believed she was entitled to.

At the hearing, Ms. Campbell attempted to introduce a "nanny calendar". This calendar had not been provided to the delegate during the course of the investigation. The adjudicator held that the calendar was not admissible as it had not been disclosed when it was sought. The adjudicator wrote:

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 evidence contained in it.

...

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.

The adjudicator then concluded that the matter ought to be referred back to the delegate. He noted that the matters were of a factual nature, and that the delegate had not made any assessment of credibility. The adjudicator himself expressly refrained from making any decision as to credibility.

The adjudicator found that the records maintained by Ms. Campbell did not comply with the requirements of section 28 of the Act. He also found that Ms. Dvorakova's diary contained errors that were carried over into the delegate's award.

The adjudicator concluded that the delegate erred in law in determining that, because Ms. Dvorakova's residence was the same as her employer's, she was required to be at the employer's residence available to perform work. The adjudicator concluded that this error directed the delegate's conclusions that Ms. Dvorakova was required to be at the employer's residence. He also found that the delegate failed to address and assess the Campbell's factual assertions that Ms. Dvorakova had a break between 8:15 a.m. and 10:30 a.m.

Thus, the adjudicator referred the matter back to the delegate to determine what Ms. Dvorakova's actual hours of work were, and in doing so, to assess the credibility of the parties and the reliability of their evidence.

The referral back

As noted above, on the referral back, Ms. Dvorakova had returned to the Czech Republic, and the delegate who conducted the initial investigation had left the Branch. The delegate on the referral back did not attempt to contact Ms. Dvorakova by telephone. Therefore, no assessment of the parties' credibility was made, although I accept that would have been difficult for the second delegate to do over the telephone.

The delegate set out the issues as follows: what hours did Ms. Dvorakova work, and was she properly paid for those hours? The delegate spoke to Mr. and Ms. Campbell and to Ms. Dvorakova's counsel for clarification about the evidence and material on the file.

The delegate declined to consider the "nanny-calendar". She noted the Tribunal's decisions in *Tri-West Tractor Ltd.* (B.C. EST No. D268/96) and *Kaiser Stables Ltd.* (BC EST #D058/97) as well as the adjudicator's comments about the reliability of the calendar, and considered only the material provided to the first delegate prior to the Determination being issued.

The delegate found that Ms. Campbell's records were not helpful in determining Ms. Dvorakova's hours of work, since they did not match documents supplied later on appeal or the documents provided to the nanny hiring agency. She also noted discrepancies in the records submitted by Ms. Campbell.

The delegate agreed with the adjudicator that there was no statutory basis to deduct .5 hours for a meal break.

The delegate reviewed the Telus statement and, because the calls were made at times when both Mr. Campbell and Ms. Dvorakova were at the house, was unable to determine who used the computer during those times.

The delegate also reviewed a six page letter provided by Ms. Campbell to Ms. Dvorakova which was given to her shortly upon her arrival at the Campbell home. The delegate drew the inference that it was the same document provided to the adjudicator at the appeal hearing, with some handwritten alterations. She noted that this document did not include any time for a morning break, and wrote:

The list of tasks is extensive and very detailed. The only reference to start or stop times of work is a note to wake up [the oldest child] at 7:45, make lunches, then drive [the oldest child] to school. There is no reference to any break during the morning or when Dvorakova's day ended. It would seem logical that if Dvorakova were to have a break in the morning, that this would have been mentioned in this document.

The delegate found that this document did not support Ms. Campbell's claim that Ms. Dvorakova was free from work for two hours each morning.

The delegate also reviewed Ms. Dvorakova's logs and noted that Ms. Dvorakova testified at the hearing that she maintained one of the logs on a relatively contemporaneous basis. The delegate noted that there were many discrepancies between the diary and the hours submitted with the complaint form. She concluded:

It is quite possible that the discrepancies between the diary and Log #2 are the result of transcription errors. I find the diary is more credible because it was kept up to date on a regular

basis, and it is detailed in terms of start and stop times, and lists various events that occurred during her employment. As I have concluded that Dvorakova did not have a 2 hour break in the morning, it is apparent that overtime was worked. I must calculate her wages and I find that the more reliable document to use is her diary.

ARGUMENT

Ms. Campbell argues that, in light of the referral back on the issue of hours of work, the delegate ought to have examined all the evidence available. She contends that the delegate breached natural justice in not reviewing the “nanny-calendar”.

Ms. Campbell further contends that, although no details of the information received by the delegate in the second decision are provided, the delegate erred in relying on hearsay information from Ms. Dvorakova’s counsel rather than Ms. Dvorakova herself.

Ms. Campbell submits that the determination should be set aside because of other errors committed by the delegate. Those errors, she argues, include the delegate’s reliance on the “family application” document provided by the Campbells to the nanny agency, her refusal to accept Mr. Campbell’s evidence that Ms. Dvorakova was free from work for two hours each morning which was corroborated by the Telus bill, her reliance on a six page letter submitted late in the process by Ms. Dvorakova, as well as her inferences of fact.

Finally, Ms. Campbell submits that the delegate erred in not drawing an adverse conclusion about the reliability of Ms. Dvorokova’s records of her hours of work. Ms. Campbell submits that, given the contradictory evidence from the Campbells, including the “nanny-calendar”, Ms. Dvorokova failed to meet the onus of proving that she worked overtime.

ANALYSIS

I am unable to find that the delegate failed to observe the principles of natural justice when she refused to consider the “nanny-calendar”. While this document does constitute some evidence of the hours Ms. Dvorakova worked, it had not been provided to the first delegate during the initial investigation. The delegate relied on Tribunal jurisprudence in declining to consider this “new evidence”. Furthermore, in my view, the delegate was under no obligation to consider the nanny calendar in light of the adjudicator’s comments about the reliability of that document. The adjudicator concluded, after having considered the submissions of the parties on appeal, that the calendar was too unreliable to have been accorded any weight. Consequently, even if the delegate had considered this “new” evidence, she would properly have given it little evidentiary weight.

The delegate sought clarification from Ms. Dvorakova’s counsel on documents already in her file. As Ms. Campbell notes, there is no reference in the Determination to any supplementary information that might have been obtained. However, since counsel cannot give evidence, I infer that any “clarification” sought by the delegate was on information already before her, either in documentary form or in the adjudicator’s decision. I am unable to find that there is any breach of natural justice in this respect. The delegate is entitled to consider all relevant information.

The delegate also considered a six page letter that she inferred was part of the record from the adjudicator’s references to it. I have reviewed the record, the “new document” and the decision and have

arrived at the same conclusion. The document considered by the delegate was the nanny agency application prepared by Ms. Campbell. I do not find that the delegate erred in considering and giving weight to this document since it was part of the original record. I agree with Ms. Campbell that, simply because the document does not expressly indicate that Ms. Dvorokova had a break for two hours each morning that she did not in fact have one. Nevertheless, it was appropriately considered along with all of the other evidence.

I am also unable to conclude that the delegate erred in rejecting Mr. Campbell's evidence that Ms. Dvorokova was "free to do as she wished" for two hours each morning. Mr. Campbell acknowledged that he did not keep a record of hours since that was the job of Ms. Campbell, who was not present at the home during that time. Furthermore, Mr. Campbell acknowledged in cross-examination that he woke up between 8:00 a.m. and 8:30 a.m., took a shower, watched the news, relaxed and made calls to his office. This evidence suggests that Ms. Dvorokova was in fact, not free to do as she wished during this time.

Furthermore, although there is some evidence that Ms. Dvorokova used the internet, the evidence does not establish whether Mr. Campbell or Ms. Dvorakova used it during the times in question.

The burden is not on an employee to prove that overtime was worked, as argued by Ms. Campbell. The burden is on an employer to demonstrate what hours were worked.

In *478125 B.C. Ltd. v. British Columbia (Director of Employment Standards)* BC EST #D 279/98) the Tribunal held that it was the employer's responsibility to structure its affairs to comply with the *Act*.

The employer did not maintain records as required under the *Act*. In the absence of proper records, the delegate must examine all available information and arrive at a reasoned conclusion.

The "nanny-calendar" was determined by the adjudicator to be entirely unreliable. The delegate noted discrepancies in both Ms. Campbell's records as well as those of Ms. Dvorakova. The delegate ultimately preferred the hours recorded in Ms. Dvorokova's diary, as she found that these were the best representation of her hours of work since those were made relatively contemporaneously. Those hours were also consistent with Ms. Campbell's application to the nanny employment agency.

This Tribunal has long held that, in order address the purposes of the *Act*, in the face of a contravention of the *Act*, a delegate should not allow the absence of a record of hours worked interfere with a fair and reasonable judgement about the remedy to be afforded to an employee (see *Harrison and Lander* BC EST #224/96, *Reconsideration dismissed* BC EST #D344/96, and others).

I am unable to find that the delegate was unfair or unreasonable in her assessment of the evidence before her. She examined all relevant information, and arrived at a reasoned conclusion. As the Tribunal has held, in the absence of any legal basis for doing so, it will not second guess the conclusions of the delegate (*Rose Garden Senior Care Home* BC EST #D182/97). I find no basis to interfere with that conclusion.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated May 9, 2001 be varied to show total wages owing to Ms. Dvorokova is \$6430.61.

Carol L. Roberts
Member
Employment Standards Tribunal