

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Walter Evans and the Estate of F. Margaret Evans

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/701

DATE OF HEARING: February 10, 1997

DATE OF DECISION: February 18, 1997

DECISION

APPEARANCES

Walter Evans

Cecilia Policarpio

OVERVIEW

This is an appeal under Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 004510 which was issued by a delegate of the Director of Employment Standards on October 31, 1996. The Determination has been appealed by both the employer (Walter Evans and the estate of Mrs. F. Margaret Evans) and the employee (Cecilia Policarpio). The Determination finds that the employer is required to pay Ms. Policarpio the sum of \$3,457.92 (plus interest) as a result of unpaid overtime wages, minimum daily pay, statutory holiday pay, vacation pay and “severance pay.”

While Mrs. Evans was alive, Walter Evans had power of attorney to act on her behalf during the time that Ms. Policarpio was employed. Mr. Evans became the executor of Mrs. Evans’ estate upon her death.

The employer’s reasons for appealing include the following:

- the Director’s delegate did not address in the Determination the concerns set out by legal counsel for Walter Evans and the estate of F. Margaret Evans in a letter dated October 29, 1996;
- the Director’s delegate relied primarily on information provided by Policarpio’s representative, rather than information provided directly by Policarpio;
- payroll records provided by the Employer were not taken into consideration by the Director’s delegate;
- the delegate’s finding that vacation pay was not paid is incorrect; and
- the start date of Policarpio’s employment shown on the Determination is incorrect.

The reasons for the appeal which were given on behalf of Ms. Policarpio by her representative were stated as follows:

“RECALCULATION OF PAYMENT OF WAGES OWED, OVERTIME PAY, IMPROPER VACATION AND SEVERANCE PAY. SUBJECT TO A

REVIEW BY THE APPELLANT OF ALL ORIGINAL PAYROLL RECORDS GROSS AND NET EARNINGS AND ORIGINAL PAYROLL CHEQUES, AND REVENUE CANADA TAX REMITTANCE RECORDS..”
(sic)

The Director of Employment Standards was not represented at the hearing held on February 10, 1997.

Walter Evans and Cecilia Policarpio gave evidence under oath.

PRELIMINARY ISSUE

In a document dated March 28, 1996 Ms. Policarpio granted limited power of attorney to Western Paralegal Collection Services and James P. Kairns to act on her behalf in this appeal. That document describes James P. Kairns as “legal assistant”. Other documents sent to the Tribunal by Mr. Kairns describe him variously as “Domestic Worker Consultant”, “Employee/Employer Labour Consultant”, “Senior Citizen Counsellor”, and “Commissioner for Affidavit.”

At the beginning of the hearing Ms. Policarpio requested that the hearing be adjourned to allow her time to find representation. She said that she was “surprised by Kairns’ inability to represent her” and she needed assistance to prepare her submission to the Tribunal.

Mr. Evans objected to the granting of an adjournment for several reasons. He submitted that the Tribunal had given ample notice to the parties about the date and time of the hearing. Mr. Evans also argued that Mr. Kairns knew about the consent order since the Supreme Court had issued it on December 24, 1996 and he should not have waited until February 4, 1997 to comply with that order. In addition, Mr. Evans explained that since he is the regular care-giver for his daughter he had had to arrange alternate child care arrangements to attend this hearing. He urged the Tribunal to proceed with the hearing as any adjournment would be a significant detriment to him as he was in the process of starting a new business venture.

I reviewed various facts such as the date of the Determination (October 31, 1996), the date of the Notice of Appeal (November 27, 1996), the date of the Notice of Hearing (January 20, 1997) and the facsimile received on February 4, 1997 from Ms. Policarpio’s representative. Mr. Kairns’ facsimile stated:

Owing to the contents of your fax dated 02/04/97 (Tue.), I will not be assisting Miss Policarpio at the Hearing before the Tribunal scheduled for 9:00 a.m. 02/10/97. I beg the Tribunal to consider this Appeal on the facts documented in this file and not allow Mr. Evans allegations to attempt to show that my efforts to assist Miss Policarpio in anyway alter the facts regarding the claim for unpaid wages. Thank you
James P. Kairns

On February 5, 1997 the Tribunal's registry staff left a telephone message at Ms. Policarpio's residence to confirm the date and time of the hearing. On February 6, 1997 the Tribunal sent, by courier, a Notice of Hearing to Ms. Policarpio's residence. Ms. Policarpio did not communicate with the Tribunal prior to the hearing on February 10, 1997.

Prior to February 4, 1997 all correspondence from the Tribunal to Ms. Policarpio was directed to James P. Kairns c/o Western Paralegal Services at the address shown on the appeal form.

On February 5, 1997 the Tribunal received a facsimile from Mr. Kairns requesting that a "reasonable adjournment" be granted. The Tribunal did not reply to that request given the actions taken to contact Ms. Policarpio directly. The Tribunal received an additional facsimile from Mr. Kairns on February 7, 1997.

Section 2(a)(d) of the *Act* sets out one of the *Act*'s purposes as:

to provide fair and efficient procedures for resolving disputes disputes over the application and interpretation of this Act.

For all these reason I decided to deny Ms. Policarpio's request for an adjournment of the hearing.

Mr. Kairns sent four additional facsimiles to the Tribunal (dated February 10, 13, 15 and 16, 1997). I have not considered any of these documents and will not respond to any of them.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. What wages, if any, are owed to Ms. Policarpio? and
2. Is Ms. Policarpio entitled to any compensation under Section 63 of the *Act*?

FACTS

Ms. Policarpio was employed by Mrs. F. Margaret Evans as a "domestic" from May 23, 1995 to March 18, 1996. Mrs. Evans has since died.

In all matters related to the employment of Ms. Policarpio, Mr. Walter Evans acted as Mrs. Evans' agent and had power of attorney to do so.

From the oral evidence given by Ms. Policarpio and Mr. Evans it is clear that Ms. Policarpio's employment began on May 23, 1995. The contract of employment between Mrs. Evans and Ms. Policarpio is in a standard form on the letterhead of Ace Personnel Domestic Services Inc. It shows a starting date of May 23, 1995 with a term of 52 weeks. Wages are shown as "\$900 NET" with room and board provided. Daily hours of work are shown as 8:00 a.m. Monday to Saturday 10:00 a.m. The contract also shows flexible hours (8 hours) and extra days are to be paid at \$78.00 per day. The contract was signed by Ms. Policarpio on May 1, 1995 and by W. Evans on May 4, 1995. The contract describes Ms. Policarpio's duties as "cook", "Housekeeper" and "companion". Mrs Evans lived in an apartment which had approximately 1500 square feet of living space.

The Determination finds that the employer contravened the following sections of the *Act*:

Section 18(1)	(payment of wages when employee is terminated)
Section 27(1)	(give employee a wage statement)
Section 28	(payroll records)
Section 31(1)	(requirement to display hours-of-work notice)
Section 31(2)	(hours of work notice)
Section 40(1)	(daily overtime of employees not on flexible work schedule)
Section 40(2)	(weekly overtime for employees not on flexible work schedule)
Section 46(2)	(employee who works entitled to extra day off)
Section 58(3)	(if employment terminates, vacation pay to be paid according to section 18 of the <i>Act</i>)
Section 63(1)	(Liability resulting from length of service)

The Director's Delegate states in the Reasons Schedule attached to the Determination that:

Information and submissions which I reviewed and considered came from various sources, including the employer, the complainant's representative, the complainant, the employment agency which places the complainant, the *Employment Standards Act* and the *Employment Standards Regulation*.

Following a review of submissions made and information received, the Director's delegate states:

It is my finding, based on the evidence and information considered and provided, and on a balance of probabilities, that this employee worked in excess of 8 hours in a day and 40 hours in a week. I am also of the view that her Monday to Friday work periods were at least 8 a.m. to 6 p.m., and that work was performed on some Saturdays and Sundays. Further, I believe that work was performed up to 8 p.m. or later on some evenings. Probable break or rest periods were taken into consideration regarding this determination.

On the issue of liability under Section 63 of the *Act*, the Director's delegate stated:

The claim for termination pay under the *Act* and Section 63, would require that the Employer give the employee 1 week's written notice, or pay 1 week's wages in lieu. An exception would be where 'just cause' for dismissal was proven to have occurred. I have considered the information provided from both sides on the employee's leaving, and I am of the view that the employee was of the understanding that she had been dismissed, and given the reported circumstances, I am not sufficiently satisfied that the employer had 'just cause' to dismiss her. Compensation pay of one week, pursuant to the *Act*, is payable.

Mr. Evans acknowledged in his evidence that, as a result of this appeal (and an appeal concerning Ms. Policarpio's entitlement to UIC benefits), "...it has been brought to my attention (my mother and I) perhaps did not follow the 'rules' sometimes." However, Mr. Evans testified that there was never any intention to contravene the *Act* or any other statute. He also testified that he relied on the employment agency to bring the relevant part of the *Act* to his attention.

Hours of Work

Mr. Evans stated in his evidence that he "has no problem paying for honest errors and omissions." However, he disputes vigorously the hours of work which Ms. Policarpio alleges she worked. According to Mr. Evans' evidence, Ms. Policarpio was required to carry out the following duties each day. His estimate of the time actually taken by her to complete each task is set out below:

- | | |
|-----------------------------------|----------|
| • prepare breakfast & medications | 1/2 hour |
| • prepare lunch | 1/2 hour |
| • housekeeping (laundry, vacuum) | 2 hours |
| • prepare dinner | 1 hour |
| • prepare snack and medications | 1/4 hour |
| • blood sugar checks | 1 hour |

He acknowledged that specific rest periods or meal times were not designated. However, he testified that Ms. Policarpio was well aware that "...she was expected to take adequate breaks and not to work excessive hours." In general, Mr. Evans testified, Ms. Policarpio's duties amounted to a maximum of six hours per day and, as Mrs. Evan's health deteriorated, "...she slept more and, therefore, there was less for Ms. Policarpio to do."

There is no dispute about the fact that Ms. Policarpio normally prepared breakfast at 8:00 a.m. and that she was required to serve Mrs. Evans a snack at 8:00 p.m. However, there is considerable divergence in the evidence concerning Ms. Policarpio's duties between 8:00 a.m. and 8:00 p.m.

Ms. Policarpio testified that her priority was to look after Mrs. Evans. She testified that she was required to work for 12 hours per day and sometimes longer. However, she also gave contradictory evidence that she had a rest period after dinner was finished (at approximately 5:45 p.m.) until Mrs. Evans' snack was served at 8:00 p.m. Ms. Policarpio testified that she wanted to work fewer hours because she wanted more time for herself and because she was experiencing leg cramps.

Under cross-examination, Ms. Policarpio disputed the amount of time which Mr. Evans estimated each of her duties took her to complete. Ms. Policarpio gave the following evidence

- prepare breakfast and medications 3 times/week - 1 hour
- prepare lunch 3/4 hour
- housekeeping 1 hour
- prepare dinner every day - no specific time estimate
- prepare snack and medications 2-3 1/2 hours
- blood sugar checks 1 hour
- laundry 1 hour
- grocery shopping twice/week - no time estimate
- walking dog 1/2 hour (fine days)
- cleaning dog porch 1/4 hour per day
- polishing silver everyday - no time estimate

Mr. Evans lived and worked in the same building as Mrs. Evans' apartment. He testified that he and his young daughter were "...always under foot" and had lots of daily contact with both his mother and Ms. Policarpio. Mr. Evans gave the following evidence:

I personally observed Ms. Policarpio relaxing. Aside from her meal breaks I used to see her reading by the front window, writing letters - she always seemed to be writing letters - I would come to visit my mother, and Ms. Policarpio would be up in her own room, talking on the phone, watching TV, reading or sleeping. I am also aware of her using our exercise equipment and I know that she went for walks and often went for a run in the morning. I can't pretend to tell you how many times I witnessed these and other incidents, but I can't say that they were the norm rather than the exception.

In an affidavit sworn on January 30, 1997 Ms. Policarpio states that she was "on call 24 hours per day, if there was no night person on duty, otherwise I worked 12 hours per day." In an unsigned letter of January 30, 1997 Ms. Policarpio (or her representative) sent the Tribunal a "work hour time log" which, she stated, "was prepared to the best of my reflection and my personal knowledge and belief shortly after my dismissal."

On March 17, 1996 Ms. Policarpio, Mr. Evans and Mrs. Evans discussed the need to employ a housekeeper/caregiver who would work from 8:00 p.m. to 8:00 p.m. each day.

Ms. Policarpio testified that on March 18, 1996 she asked Mr. Evans if preparing breakfast for Mrs. Evans would continue to be part of her duties. Mr. Evans confirmed that it would. Mrs. Policarpio testified that she felt “confused” and “hurt” by this decision because the employment of another caregiver would not reduce her hours of work. She said “it didn’t seem fair to me.” Ms. Policarpio also testified that when she told Mr. Evans that she would not cook breakfast, he told her that “...he would have to fire me.” Ms. Policarpio did not prepare lunch for Mr. Evans on March 18, 1996 although she did prepare and serve Mrs. Evans’ lunch on that day.

Mrs. Evans suffered a diabetic reaction on March 18, 1996. According to Mr. Evans testimony, Ms. Policarpio did not respond to Mrs. Evan’s alarm bell. He also testified that after he responded to the alarm, he discovered Ms. Policarpio packing her belongings.

Ms. Policarpio testified that she did not ignore Mrs. Evans’ emergency alarm on March 18th. She stated that she was packing her belongings when the alarm sounded and she went to see Mrs. Evans, but “...did not tell her what was happening” (in reference to her imminent departure).

As noted earlier, the Director’s delegate determined that he was “...not sufficiently satisfied that the employer had ‘just cause’ to dismiss” Ms. Policarpio.

ANALYSIS

Liability resulting from length of service

Section 63 of the *Act* creates a liability for employers to pay compensation to employees based on the length of their employment. Section 63(3) states that this liability is deemed to be discharged if any employee is “...dismissed for just cause.”

Mr. Evans argues that he had just cause to terminate Ms. Policarpio’s employment. Ms. Policarpio’s argues that she was dismissed without cause.

In *Stein v. British Columbia Housing Management Commission* [(1992) 65 BCLR (2d) 181] the BC Court of Appeal described the common law test for just cause in the following terms at p.183:

Did the plaintiff conduct himself in a manner inconsistent with the continuation of the contract of employment?

In the same case, the Court of Appeal adopted the following passage from *Laws v. London Chronicle Ltd.* [(1959) 2 All E.R. 285 (C.A.)] as a generally accepted statement of the law on this point:

It is, no doubt, therefore, generally true that willful disobedience of an order will justify summary dismissal, since willful disobedience of a lawful and reasonable order shows a disregard - a complete disregard - of a condition essential to the contract of service, namely, the Canadian that the servant must obey the proper orders of the master and that, unless he does so, the relationship is so to speak, struck at fundamentally....

I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that disobedience must at least have the quality that it is "willful": it does (in other words) connote a deliberate flouting of the essential contractual conditions.

Madame Justice Southin, writing for the Court of Appeal in the *Stein* case, went on to state at Page 185:

I begin with the proposition that an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. If is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.

It is not an answer for the employee to say: "I know you have laid down a rule about this, that or the other, but I did not think that it was important so I ignored it" (emphases added).

In my view, one of the essential conditions of the employment contract between Evans and Policarpio was that she would cook breakfast. There is no dispute in the evidence given by Ms. Policarpio and Mr. Evans concerning the fact that cooking breakfast was a normal, everyday part of Ms. Policarpio's duties. The contract of employment includes "cooking" as one of Ms. Policarpio's duties. On her own evidence, Ms. Policarpio recognized that her failure to cook breakfast on March 18th was likely to give her employer reason to terminate her employment. Her refusal to cook breakfast constituted willful disobedience and was a deliberate flouting of the employment contract.

I find that Evans had “just cause” to terminate Policarpio’s employment and, therefore, is not liable to pay her compensation for length of service under Section 63 of the *Act*.

Hours of Work

The Reason Schedule attached to the Determination sets out, at some length the information which was considered and which led to make the following finding by the Director’s delegate:

“It is my finding, based on the evidence and information considered and provided, and on a balance of probabilities, that this employee worked in excess of 8 hours in a day and 40 hours in a week. I am also of the view that her Monday to Friday work periods were at least 8 a.m. to 6 p.m. and that work was performed on some Saturdays and Sundays. Further, I believe that work was performed up to 8 p.m. or later on some evenings. Probable break or rest periods were taken into consideration regarding this determination.”

A central issue in deciding this issue is the credibility of the evidence given by the witnesses. A number of factors must be considered in assessing the credibility of a witness: demeanor; opportunities for knowledge; powers of observation; judgment and memory; ability to describe clearly what has been seen and heard; the probability of the event happening in the manner suggested [*Faryna v. Chorny* (1952) 2 DLR 354 (BCCA)].

On balance, I find Ms. Policarpio’s estimate of the amount of time taken to complete her duties to be improbable. I also find her “work hour time log” to be unreliable since it was prepared after her employment terminated. It was not a contemporaneous document. Often, Ms. Policarpio did not give a direct response under cross-examination about her hours of work and sometimes gave contradictory evidence when answering a simple question.

Mr. Evans was unequivocal in his evidence that Ms. Policarpio did not work ten hours per day. He acknowledged candidly that while rest periods or meal breaks were not scheduled, Ms. Policarpio had regular breaks each day. This was corroborated by Ms. Policarpio’s evidence that she had a break each day between approximately 5:45 p.m. (completion of dinner) and 8:00 p.m. (Mrs. Evans’s snack time). In addition, Mr. Evans’s evidence concerning Ms. Policarpio’s meal breaks, letter writing, reading, TV-watching, sleeping and use of the family’s exercise equipment was uncontroverted.

When I subject the witnesses’ testimony to the test described in *Faryna v. Chorney* (supra), I find that Mr. Evans’ evidence is more in harmony with the preponderance of the probabilities than Ms. Policarpio’s evidence. For that reason, I find that I must vary the Determination in so far as it calculates wages owing based on 10 hours of work per day.

When I consider all of the evidence I find, on the balance of probabilities, that Ms. Policarpio’s normal hours of work did not exceed eight hours per day.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination be varied by calculating the amount of wages owed to Ms. Policarpio based on her normal hours of work being 8 hours per day for her “Monday to Friday work periods.” Section 34 of the *Act* (minimum daily hours) would apply to any Saturday or Sunday where Ms. Policarpio worked. I further order that the Determination be varied to reflect my finding that there was “just cause” to dismiss Ms. Policarpio and, therefore, there is no liability under Section 63 of the *Act*.

Geoffrey Crampton
Chair
Employment Standards Tribunal