Employment Standards TRIBUNAL

An appeal

- by -

Sport Central Enterprises Ltd.
("Sport Central" or the "Appellant")

- 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.: 2002/606

DATE OF HEARING: February 25, 2003

DATE OF DECISION: March 4, 2003

DECISION

APPEARANCES:

Ms. Pauline Hui	on behalf of the Appellant
Ms. Leah Ragetli	on behalf of herself

OVERVIEW

This is an appeal by the Employer, Sport Central, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director issued on November 22, 2002. The Determination concluded that Ms. Leah Ragetli was owed $827.90 by his Employer on account of overtime, vacation pay and compensation for length of service.

Ms. Ragetli's employment came to an end around February 26, 2001. She had worked from November 13, 2000 to February 26, 2001, as a child care worker at the hourly rate of $9.00.

FACTS AND ANALYSIS

The Employer, as mentioned, appeals the determination. As the Appellant, it has the burden to persuade me that the Determination is wrong. In the circumstances, I am not persuaded that it has met the burden and, therefore, for the reasons set out below, the appeal is dismissed.

The parties agree that the issues before me are whether the Delegate erred (1) with respect to the amount of overtime worked by Ms. Ragetli and (2) with respect to his conclusion that she did not "quit" her employment.

With respect to overtime, Ms. Hui--who works in payroll and not in the daycare with Ms. Ragetli--concedes that overtime is owed. In her estimation, the appropriate amount is about $150 less than awarded by the Delegate. She says that the appropriate amount is $334.45. She candidly acknowledges that the Employer does not know the actual hours worked and how much overtime Ms. Ragetli worked in the period November 13 to December 15, 2000. She says that the Employer's position for the initial period is based on notes of hours worked from a manager, who no longer works for the Employer, and, importantly, did not testify. For the balance of the time Ms. Ragetli worked for the employer, until February 26, 2001, the Employer's position is based on work schedules (for January and February), showing when Ms. Ragetli was supposed to work, and computerized "entry" and "exit" records. Generally, it is fair to say that the Employer's position with respect to hours worked in the latter period is based on the schedules.

Ms. Ragetli explains that she worked "8 to 8" when she started, and during the first month of employment, and, thus, had 12 hour work days. She also says that even if the schedule indicated an 8:30 start time, she was told by Janet Truong, the manager for most of the time of her employment, to come in early to set up, vacuum clean etc. While the sports centre operated by the employer apparently operated on a 24 hour basis, the daycare was only open on an "8 to 8" basis. Ms. Ragetli was surprised that Ms.

Truong did not attend to testify. Ms. Hui, according to her, has limited (or no) direct knowledge of her hours of work because she worked in payroll, away from the daycare.

With respect to the first month of employment, November 13 to December 15, I am not persuaded that the Delegate erred. The employer concedes that overtime was worked and that it does not know the actual hours of work. While the Employer takes issue with the Delegate's distribution of hours, it is not, on the evidence, in a position to seriously dispute those hours.

Generally, the "entry" and "exit" records are at variance with the scheduled hours. According to the computer records, Ms. Ragetli spent more time at the work place than she was scheduled to work. January 8, 2001, for example, Ms. Ragetli was scheduled to work 8:30 a.m. to 1:30 p.m., *i.e.*, 5 hours. The computer records indicates that Ms. Ragetli "clocked in" at 7:58 a.m. and "clocked out" at 1:25 p.m., i.e., 5 hours and 27 minutes. The employer paid her for the 5 hours. The Delegate gave Ms. Ragetli credit for 5.45 hours. This pattern is recurring. Ms. Ragetli, as mentioned above, says she came to work before her shift because she was instructed to do so to set up etc. Ms. Hui is not in a position to contradict this testimony. Ms. Truong, Ms. Ragetli's manager, did not testify. On the evidence, I am not satisfied that the Delegate erred.

Briefly put, I am not persuaded that the Delegate erred in his award of overtime wages.

I now turn to the question of whether Ms. Ragetli "quit," as is the Employer's position, or whether she was fired, as she claims.

Ms. Hui says that the daycare business did not fare as well as had been expected and, as a result, staff work hours were reduced. It is clear from the schedule that, after a two week closure at the end of December 2000 and early January 2001, Ms. Ragetli's scheduled hours were reduced substantially. Ms. Hui explains that at the end of February, Ms. Truong had a discussion with Ms. Ragetli regarding a further reduction of her hours (and those of other employees) and that Ms. Ragetli did not accept the reduction (of around 50%), left and did not return.

Ms. Ragetli, on the other hand, explains that her relationship with Ms. Tuong worsened over time. She said that the manager, who initially hired her, had promised her a higher hourly rate and benefits. She found her hours reduced in January and February, was asked to do "free work" in connection with a "gala" opening event (after the December-January closure), and she was asked several times by Ms. Truong (in late February) to clean toilets. She said that she told Ms. Truong did not want to do that as she was hired as a daycare worker. On February 25, 2001, she was asked to take some stuffed toys to the cleaner and bring them back the following day. She was unable to get them cleaned and told Ms. Truong, on February 26, that she could bring them in tomorrow. Ms. Truong then told her that she would not be working tomorrow because "you do not want to work."

The Delegate accepted Ms. Ragleti's version of the events. On the evidence before me, I am not persuaded that he erred. Ms. Truong did not testify. Ms. Ragetli testified under oath. While the Employer argued that I accept its position, it too turned on Ms. Truong's testimony, only in this case, it was presented through Ms. Hui, who was not present for the conversations in question. Essentially, the Employer is suggesting that I prefer hearsay evidence over direct testimony.

I am of the view that the Delegate did not err on the issue of the termination of Ms. Ragetli and, in short, therefore, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated November 22, 2002, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal