

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Health Ventures Ltd. Operating as Lifestyle Markets
("Lifestyle")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/369

DATE OF HEARING: June 17, 1997

DATE OF DECISION: July 24, 1997

DECISION

APPEARANCES

N. David McInnes on behalf of Health Ventures Ltd. Operating as Lifestyle Markets

Peter Muller on his own behalf

OVERVIEW

This is an appeal by Health Ventures Ltd. Operating as Lifestyles Markets (“Lifestyle”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination made by a delegate of the Director of Employment Standards on April 17, 1997. The Determination found that Lifestyles owed additional wages to Peter Muller in the amount of \$4,378.81 (including interest to April 17, 1997) for hours worked by him during the period February 25, 1996 to November 26, 1996.

Lifestyle submits that the Determination is wrong because of the finding that Muller worked hours for which he had not been paid for during his period of employment. Lifestyle filed its appeal for the following reasons:

- (i) The Director’s delegate erred in declining to accept, as an accurate record of hours actually worked, the work schedule which was prepared contemporaneously, on an ongoing basis throughout Muller’s employment; and
- (ii) The Director’s delegate erred in accepting instead, as a record of hours actually worked, a calendar of hours which Peter Muller and Brian Roberts stated had been prepared contemporaneously by Muller and initialed by Roberts. The existence of this calendar was never mentioned or in any way identified by either Muller or Roberts until after both had been dismissed.

Lifestyle argues that the calendar was not prepared contemporaneously over the course of Muller’s employment and it falsely refers to hours worked which in fact were not worked by Muller.

Muller was the manager of Lifestyle’s Health and Beauty Department and his regularly scheduled hours of work were 8 hours per day, 40 hours per week. Brian Roberts was Lifestyle’s general manager as well as being one of the owners of the business.

The Determination contained the following reasons to support a finding by the Director's delegate that additional wages were owed to Muller:

“... I can find no record on any schedule of Mr. Muller ever working more than 8 hours in a day or 40 hours in a week. I find it difficult to accept that a manager of a department in grocery/health food business would not work any overtime over the course of about 9 months. I am therefore not prepared to accept that these schedules are an accurate record of Mr. Muller's hour of work.

As the employer has no accurate records of Muller's hours of work, I am obliged to consider Muller's own records have also been verified by his direct supervisor (Brian Roberts).

Although Lifestyles disputes Muller's records, it only directly challenges these records on 2 specific days where security log entries suggest that Mr. Muller started approximately 1 hour after he claims. The real basis to Lifestyle's challenge of Muller's records is that it believes they have been concocted. It reasons that the store manager and the comptroller would have had to have known about the overtime arrangement between Roberts and Muller if one in fact existed. I am not persuaded that this is the case. Roberts as General Manager of Lifestyles was in operational control of the business and was Lagadyn's and Sparanese's superior. He was also Muller's direct supervisor. While it would be perfectly natural for the store manager and the comptroller to be aware of an arrangement to bank additional hours, it does not follow that because they were not, it did not exist. Roberts has unequivocally testified to the existence of the banking arrangement and to the accuracy of Muller's hours. He describes a process whereby Muller's work plan and hours were reviewed on daily and weekly basis. He confirms that he initialed the calendar kept by Muller's which was submitted to the Branch as evidence of Muller's hours. On a balance of probabilities, I find that the record of hours submitted by Muller is correct, with the exception of the 2 hours contested by Lifestyle.

The Director's delegate also gave the following reason for his Determination:

Lifestyle has made serious allegations as to the conduct and credibility of both Muller and Roberts by suggesting that this wage claim is a conspiracy to fraudulently obtain money from Lifestyle. Based on the information provided to me by the parties, I am not prepared to make this finding. I find that the employer's argument in this regard are, at best, speculative.

A hearing was held at the Tribunal's offices on June 17, 1997 at which time evidence was given under oath by several witnesses. Witnesses were excused from the hearing room until each was called to give evidence.

ISSUES TO BE DECIDED

The principal issue to be decided in this appeal is whether Muller owed additional wages as set out in the Determination. However, to decide that issue I must also decide whether I should rely on Lifestyle's records of hours worked by Muller or whether I should rely on Muller's own records (i.e. his personal calendar).

EVIDENCE

Lifestyle Markets is a retailer of natural foods, vitamin supplements and sports nutrition products. During the period of Peter Muller's employment, Bryan Roberts was the general manager, Carmine Sparanese was the Controller. Peter Muller was employed initially to work in the Grocery department and was promoted, in mid-March 1996 to be manager of the health and beauty department. Lifestyle employed approximately 30 employees in 4 different departments (Grocery; Produce; Health and Beauty; Deli/Cashiers). Carmine Sparanese gave evidence that as the controller, he was responsible for all of Lifestyle's financial record-keeping including preparation of the business' payroll every two weeks. Sparanese testified that each department manager prepared a bi-weekly "work schedule" and posted it, in advance, for the staff in that department. Any differences between the "work schedules" and the actual hours of work would be noted on the "work schedule" by the department managers. The "work schedules", with any amendments, were given to Sparanese at the end of each bi-weekly payroll period and he prepared cheques and statements of earnings for each employee. The department managers, including Muller, recorded their own scheduled and actual hours of work on the "work schedule" for the department which they managed.

Muller was employed by Colin Lagadyn on Bryan Robert's recommendation and reported to Lagadyn most of his employment.

Lifestyle's work schedules and payroll input documents were put into evidence through Sparanese. These records show that Muller was paid for 40 hours during the payroll period ending February 11, 1996 and for 80 hours in each subsequent bi-weekly payroll period up to and including the period ending November 17, 1996. In his final cheque Muller was paid 16 hours plus his vacation pay and one week's "severance" pay. During the months of February, March and April, 1996 the "work schedules" from which Sparanese paid Muller were submitted to him by Bryan Roberts. Effective the payroll ending May 5, 1996 the "work schedules" for the health and beauty department were prepared by Muller and submitted to Sparanese so that he could prepare the payroll. After June, 1996 Muller did not always submit his hours on the "work schedule" but when that occurred, Sparanese testified, Muller would tell him: "I worked 80 hours."

Sparanese testified that Muller never told him, at any time during his employment, that he was working any hours other than those recorded on the "work schedule". He also testified that Muller never requested him to pay any additional wages while he was employed and never told him that he was recording his hours in a personal calendar rather

than on the department “work schedule”. Sparenese also testified that Bryan Roberts never told him that he was approving a separate record of Muller’s hours nor that the payroll/record-keeping for Muller would be different than the system adopted by Lifestyle for all other employees. Sparanese became aware of Muller’s calendar for the first time during the investigation of his complaint by the Director’s delegate.

According to Sparenese’s evidence, Bryan Roberts discouraged all employees from working overtime hours and signs were posted in the store in October or November, 1995. Sparanese also testified that the reason for these signs being posted was that a former manager of the grocery department had been paid additional wages after he was dismissed and had filed a complaint under the *Act*.

Sparanese gave evidence about the two additional payments which were given to Muller during his employment (\$135.00 on March 1, 1996; \$80.00 on April 26, 1996). The cheque for \$135.00 was prepared and signed by Bryan Roberts with no explanation given to Sparenese as to the reason for the payment. Sparenese testified that he coded it as overtime because he “couldn’t put it to anything else.” The cheque for \$80.00 was given to Muller to supplement his regular payroll cheque to reflect an increase of \$1.00 per hour in his regular wage rate.

Sparanese described the store’s security system to the extent that it was necessary to explain the “activity report” records the time at which the store’s entrance/door is opened for the first time each day and the system is turned on at the end of each business day. An “activity report” for the month of November, 1996 was entered into evidence as an exhibit.

Colin Lagadyn has been Lifestyle’s store manager since December, 1995. He testified that Bryan Roberts had given clear instructions (which were posted on signs in the store) that employees were not to work overtime hours unless those hours were approved by either Roberts or Lagadyn. Furthermore, if overtime hours were authorized, they were to be reported on the “work schedules” and submitted to Sparenese for payment. Lagadyn testified that he was not aware of any special arrangement by which Muller would be treated differently than any other employee. He also testified that he had several discussions with Muller concerning his hours of work and told him “... not to stay in the store after shift.” Lagadyn explained that he did not want to “... get into a liability for overtime wages.” Lagadyn recalled a staff meeting in September, 1996 at which he told Muller not to come to the store on his days off.

Lagadyn also gave the following evidence:

- Muller never told him that he was authorized by Roberts to work extra hours;
- Muller never told him that he recording his hours of work in a personal calendar;
- In discussions with Roberts about Muller’s hours of work, Roberts never told him about any special arrangement for Muller; and
- Roberts never gave him instructions that Muller’s hours of work were to be recorded differently that any other employee.

Bryan Roberts was Lifestyle's general manager during the period of Muller's employment. He was also a shareholder and a director/officer of the company.

Roberts testified that he made a decision, shortly after Muller was employed by Lifestyle, that he "... would allow Muller to work extra hours and be reimbursed at a later date." The reason for this, he testified, was that "... the vitamin supplement component of the business had to grow to improve the financial position of the company." Roberts confirmed in his evidence that he reviewed the hours recorded by Muller in his calendar and that he (Roberts) initialed it each week to indicate his approval of those hours. While Roberts was on vacation, he testified, he relied on Muller to record his hours in the calendar and approved them on his return. Roberts also testified that when Lagadyn discussed Muller's hours of work with him, he told Lagadyn "not to worry, it was taken care of." Lagadyn denied that Roberts told him that.

Under cross examination, Roberts agreed that he had made Sparenese responsible for all payroll records and had instructed him that all overtime hours were to be recorded in those records. When asked if he ever told Sparenese that he was dealing with Muller in a different manner, Roberts responded "I don't recall." Also under cross examination, Roberts testified that he didn't recall discussing Muller's calendar while discussing his hours of work with Lagadyn. When asked if the law prevented Muller's hours to be recorded in the payroll records and time taken off to be taken at a later date, Roberts responded that "... it would not be appropriate for other staff to see his hours of work." Roberts also testified that this arrangement between him and Muller was unique - there were no similar arrangements with other employees.

Karmen Wall testified that she was "dating and/or living with" Muller while he was employed by Lifestyle and that he left home before 7:50 a.m. and never arrived home before 6:00 p.m. In addition, she testified that it was common for her to accompany Muller on his days off "... to do price-checking" and she would bring dinner to him at Lifestyle "...three or four times per week."

Under cross examination, Ms. Wall gave evidence that Muller was at work until 11:00 p.m. on approximately ten occasions during his employment. She also recalled one occasion when she brought dinner to Muller and Lagadyn remarked about the cream sauce with which it had been cooked. Lagadyn testified that he did not ever see Ms. Wall at the Store in the evening and could not recall ever commenting on a dinner which she had brought for Muller.

When asked by Lifestyle's counsel if anyone else was at the store when she was there in the evening, she answered: "No, all staff would be gone." When asked the same question in re-direct, Ms. Wall testified that Bryan Roberts was there.

Peter Muller testified that shortly after his employment began, Bryan Roberts told him to "... do whatever it takes to get the job done" and when he told Roberts about Lagadyn's instructions concerning hours of work Roberts told him: "Don't worry ... keep track of your hours." He went on to testify that Roberts told him: "Don't expect to be paid ... hours

worked in excess of 40 per week will have to be taken as time off.” He also testified that Roberts told him to “ ... put 40 hours per week on the ‘work schedule’ in perspective of how many hours you work.”

Muller gave evidence that he did not record all hours of work in his calendar. Rather, he recorded only what he considered to be “reasonable” as he “ ... knew that the company could not afford to pay me overtime.” However, given what he observed about how Sparenese had been compensated, Muller testified that there was “ ... no doubt in (his) mind that Bryan Roberts would compensate me.”

According to Muller, Lagadyn spoke to him three or four times and told him not to work extra hours. However, Muller did not tell Lagadyn about the arrangement between him and Roberts. Muller testified that in his mind Roberts was the owner and his direct supervisor and that “ ... he (Roberts) would call me at home and tell me what to do.” Muller also believed that he “ ... was a threat to Lagadyn because he was young, determined and had lots of drive.” Nevertheless, Muller testified, he worked with Lagadyn and Sparenese to count, catalogue and transfer inventory from Lifestyle to a new franchise operation (Lifestyle Select) which Sparenese and Lagadyn were to own and operate.

Muller acknowledged, under cross-examination, that if Sparenese had asked him about his bi-weekly hours of work he would have said: “80 hours.”

ANALYSIS

Section 108(2) of the *Act* gives this Tribunal the power to “ ... decide all questions of fact and law arising in the course of an appeal ... ” The central questions which I must decide is whether the relevant evidence supports a finding that the Director’s delegate erred when he did not accept record of the hours worked by Muller. To answer that question I must examine the basis on which the Director’s delegate made the Determination. The Director’s delegate gave several reasons for concluding that Muller was entitled to wages ad interest as set out in the calculation schedule attached to the Determination. In summary, these reasons were:

- Lifestyle’s weekly work schedules are flawed.
- These work schedules are not “ ... an accurate record of Muller’s hours of work.”
- Lifestyle acknowledges two overtime payments to Muller “ ... with no record on a schedule of him having worked overtime hours.”
- Muller’s records for his first week of employment and for April, 1996 are consistent with the overtime payments made by Lifestyle.
- Muller’s records have been “ ... verified by his direct supervisor, Roberts, who was in operational control of the business.
- Lifestyle disputes Muller’s records and directly challenges them only on 2 specific days.

- “The real basis to Lifestyle’s challenge of Muller’s record is that it believes they have been concocted.”
- Robert’s has unequivocally testified to the existence of the banking arrangement and to the accuracy of Muller’s hours.
- Muller was a manager and, therefore, is not entitled to be paid at “time and a half as he has requested.”
- “Lifestyle has made serious allegations as to the conduct and credibility of both Muller and Roberts by suggesting that this wage claim is a conspiracy to fraudulently obtain money form Lifestyle.”
- The Director’s delegate was not prepared to make a finding on the alleged motives for Muller’s wage claim.

With respect, I find that the reasons set out by the Director’s delegate are both confusing and contradictory. The reasons are confusing because they do not explain satisfactorily why the Director’s delegate rejects the “work schedules” which were prepared by Roberts and Muller (and given to Sparenese as legitimate payroll records) are “flawed” and inaccurate. The contradictory nature of the delegate’s reasons is seen most clearly by comparing the following statements:

“Although Lifestyle disputes Muller’s records, it only directly challenges these records on 2 specific days where security log entries suggest that Muller started approximately 1 hour after he claims.”

“Lifestyle has made serious allegations to the conduct and credibility of both Muller and Roberts by suggesting that this wage claim is a conspiracy to fraudulently obtain money from Lifestyle.”

Not only are these two statements completely contradictory, the latter one cries out for a finding on the issue of credibility by the Director’s delegate. Also, the delegate’s reasons make no mention of statements made by Lagadyn or Sparenese during the investigation and, furthermore, offer no assessment of their credibility vis-à-vis that of Muller and Roberts.

The reasons set out in the Determination do not contain an answer to important questions, such as the following, which arise from the facts of this appeal:

- Why did Muller record different hours of work for payroll purposes than he recorded in his personal calendar?
- Given that Lifestyle was not found to have contravened Section 28 of the *Act* (payroll records), why should Muller’s personal records be preferred?

My review of the oral and documentary evidence in this appeal leads me to disagree with the finding made by the Director’s delegate that Lifestyle’s work schedules were “obviously flawed.” Sparenese gave uncontradicted evidence that the \$80 payment to

Muller in April, 1996 was not for overtime but was to reflect a wage increase of \$1.00/hour for the pervious bi-weekly payroll period. Similarly, the evidence does not establish that the payment of \$135.00 to Muller was for overtime.

The Director's delegate reasons state: "As the employer has no accurate records of Muller's hours of work , I am obliged to consider Muller's own records." On his own evidence to this Tribunal, Muller's record (i.e. his calendar) is not accurate because he did not record all hours of work on it, only those that he considered to be "reasonable." The delegate prefers Muller's records, in part, because they "... have been verified Muller's records, in part, because they "... have been verified by his direct supervisor." However, the evidence shows that Lagadyn, not Roberts, was Muller's direct supervisor. Furthermore, Roberts own evidence is that he "... relied on Muller to record his hours in the calendar" and he would approve them at some later date. This "approval" should not, in my opinion, give any weight whatsoever to the reliability or validity of Muller's calendar.

In summary, a number of facts which were established through the evidence which I heard cast serious doubt on the wisdom of relying on Muller's calendar in preference to Lifestyle's payroll records as the basis for determining the amount of wages owed to him by Lifestyle.

Where there is a conflict in evidence, the views of the late Mr. Justice O'Halloran of the Court of Appeal of British Columbia in *Faryna V. Chorny*, (1952) 2 DLR 354 (BCCA) have been widely accepted. He made the following comments at page 357, on how the issue of creditability ought to be assessed by a decision - maker:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its cocsistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ...(pp.356-57)

...

A Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all elements by which it can be tested in the particular case.

When I consider all of the oral evidence which I heard and the documentary evidence which was presented to me I find that the existence of an oral agreement between Muller and Roberts is not "in harmony with the preponderance of probabilities" and is not reasonable in all of the circumstances as I have described them above. There is uncontroverted evidence that Roberts gave clear instructions in late 1995 that employees were not work overtime without approval by him Lagadyn. Signs to that effect were

posted in the store where all employees could and would see them. Lagadyn was Muller's supervisor and spoke to him several times about his hours of work, yet Muller never mentioned his calendar to Lagadyn. Muller prepared the work schedule for the health and beauty department and submitted it for payroll purposes to Sparanese but never advised Sparanese of having worked any hours in excess of 80 hours bi-weekly. Similarly, Roberts never advised either Sparanese or Lagadyn of any special arrangement that he made with Muller.

For all of the reasons which I have set out above, I find that Lifestyle's "work schedules" and related payroll records are the best evidence available on which to decide Muller's hours of work.

ORDER

I order, under Section 115 of the *Act*, that the Determination be cancelled.

Geoffrey Crampton
Chair,
Employment Standards Tribunal

GC/sr