

An appeal

- by -

Esmail Shokri operating as D Video
("Shokri" or "employer")

- 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: Paul E. Love

FILE No.: 2000/832

DATE OF DECISION: February 20, 2001

DECISION

OVERVIEW

This is an appeal by the employer of a Determination dated November 14, 2000. I dismissed the appeal as the employer did not show that the Delegate erred in the Determination. The Determination made by the Delegate rested primarily on the Delegate's assessment of the credibility of the parties, in a situation where the employer did not keep any employment records. The employer also advanced to the Delegate and to the Tribunal, a version of the facts contradicted by a letter which he wrote during the employment relationship. The employer alleged an agreement that the employee accepted videotapes as payment of wages, however, this agreement was disputed by the employee. The employee was entitled to be paid wages for the work she performed for the employer in setting up a new video store.

ISSUES TO BE DECIDED

Did the Delegate err in determining that the employee was entitled to wages?

FACTS

This appeal proceeded on written submissions, without an oral hearing.

Tanya Megeth was employed by Esmail Shokri operating as D Video (the "employer"), as a cashier/customer service clerk, from April 17 to May 8, 2000. The video store was located at #140 - 6350 120th Street, King George Highway, Surrey, British Columbia. Ms. Megeth filed her complaint on June 28th, 2000. The Delegate found that Ms. Megeth kept records of when she worked, and how long she worked. The employer did not keep records. Ms. Megeth was advised at the time of hiring, by the employer, that she would be trained to work at the counter when the new store opened. Instead of receiving training, Ms. Megeth assisted in the set up of the store by sticking store stickers on movies, alphabetizing movies, and moving and shifting cases. Ms. Megeth applied for a babysitting subsidy with the Ministry for Children and Families. She kept track on a calendar of the hours that she engaged the babysitter. The calendar notes also corresponded to the dates and times she worked.

During the Delegate's investigation, the employer advised the Delegate that Ms. Megeth only worked 3 hours per night, five days per week, and that she was willing to accept video tapes (Walt Disney movies) as payment for her services. The employer acknowledges writing a letter, "To whom it may concern", dated May 2, 2000, indicating that Ms. Megeth started work on April 17, 2000, and was working Monday to Thursday from 5:00 pm to 10:00 pm. The employer indicated that he prepared this letter, at the request of Ms. Megeth, for the purpose of Ms.

Megeth obtaining a babysitting subsidy from the Ministry for Children and Families. Ms. Megeth admits that she received \$17.00 in cash from the employer but denies that she agreed to accept video tapes as payment for her wages.

The Delegate accepted the information of Ms. Megeth and determined that she was entitled to wages in the amount of \$457.60, vacation pay in the amount of \$18.30 and interest in the amount of \$17.32. The Delegate calculated the wages on the basis of \$7.15 per hour for 5 hours per day, less the sum of \$17.00 received in cash.

Another Delegate also issued a zero penalty determination for a violation of sections 16, 18(1)(2), 20, 40(1)(a) and 58(1)(a)(3) of the *Act*.

EMPLOYER'S VERSION:

In his appeal submission, the employer agrees that he posted an ad in the window of his store for part time work. The employer alleges that Ms. Megeth came in seeking volunteer work, and asked to be paid no money for two hours of work per day. The employer says that within one week he recognized that she was not suitable as an employee, and he asked her not to come any more. The employer wanted Ms. Megeth to bring back the tapes and he would pay her \$7.15 per hour for hours worked. In his appeal submission he indicated that he would pay Megeth at 7.15 per hour for 15 hours (5 - 3 hour shifts).

The employer alleges that there was some blackmailing of him going on by four former employees, all of whom went to the same high school. The employer appears to be raising an issue of credibility, and he also indicates that the Ms. Megeth is owed less than what they claim.

I have not canvassed the claims of the three other employees, whose claims were settled before this matter was assigned to me as an adjudicator of Ms. Megeth's claim.

ANALYSIS

The burden is on the appellant, in this case the employer, to demonstrate that there is an error in the Determination such that I should vary or cancel the Determination. This case rested on the Delegate's assessment of the credibility of the parties. I note that the employer's version of the facts was not corroborated by any records. As an employer, Mr. Shokri has a duty, under the *Act* to keep records. The Delegate placed significant weight on Ms. Megeth's statements, records, and on the letter written by Mr. Shokri for delivery to the Ministry of Children and Families by Ms. Megeth confirming Ms. Megeth's employment for 5 hours per day 4 days per week.

I am not in a position to prefer the evidence of the employer over the employee, and in the absence of demonstrated error, I am not prepared to interfere with the Delegate's assessment of the credibility of the parties. The Delegate was in a better position to assess the credibility of the

employer and the employee than am I, reviewing this case on written submissions. I note that the Delegate apparently dealt with similar claims of other employees, two of which settled during the investigation, and one of which settled after the Determination was issued. I also note that the employer has advanced a number of different versions of the facts to the Delegate and to this Tribunal, whereas the position of the employee is consistent and supported by documents.

An employer is required to pay an employee wages in money as set out in s. 20 of the *Act*. Even if the employee accepted video tapes in payment of wages, which is disputed, payment in kind does not amount to payment of wages under the *Act*: *Sanpreet Enterprises Inc. c.o.b. Xanavision, BCEST #D 556/98 (Crampton)*.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination dated November 14, 2000 is confirmed.

Paul E. Love

Paul E. Love
Adjudicator
Employment Standards Tribunal