Employment Standards TRIBUNAL

An appeal

\- by -

Sandra O'Gorman

\- 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: Cindy J. Lombard

FILE No.: 2003A/88

DATE OF HEARING: March 28, 2003

DATE OF DECISION: April 8, 2003

Employment Standards Tribunal
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DECISION

APPEARANCES:

The Appellant employee, Sandra O'Gorman ("O'Gorman") appeared and gave evidence.

The Respondent employer, Okanagan Tarps Ltd. was represented by the principal of the company, Murray Newman ("Newman") who gave evidence as well as the following two witnesses:

Peggy Newman, the mother of Newman
Allen Gunnlaugson

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") by O'Gorman of a Determination which was issued on December 17, 2002, which made the following findings:

1. Newman owes wages to O'Gorman for November 1 and 2, 2001, in the amount of $70.72 inclusive of vacation pay plus Section 88 interest of $3.40 for a total of $74.12.

2. Newman did not owe wages to O'Gorman for noon hours worked.

ISSUE TO BE DECIDED

Did the delegate of the Director of Employment Standards (the "delegate") make a reviewable error in finding that Newman did not owe wages to O'Gorman for noon hours worked?

FACTS

Newman operates a company which manufactures and sells truck tarps. O'Gorman was employed between August 23, 2001 to November 2, 2001, as a general laborer/assistant at a rate of $8.50 per hour.

The appellant was employed on a fulltime basis working Monday to Friday 8:30 a.m. to 5:30 p.m. with a half an hour lunch break. The appellant was regularly off for two hours each Friday to deal with personal business. She was paid on a weekly basis.

O'Gorman usually stayed at the business during her one half hour break because it was not long enough to go anywhere but, says Newman, it was never a requirement that she stay and work the break. To the contrary, O'Gorman says that she did have to remain on the premises during the break and was required to answer the business phone as she was usually the only one there. O'Gorman admits that she did spend the time eating lunch and making personal calls in between answering the company telephone.

On October 31, 2001, O'Gorman gave Newman two weeks notice that she was going to leave her employment due to the symptoms of an ongoing work related injury. On November 1, 2001, the appellant reported to work but after one hour (says Newman) to three hours (according to O'Gorman), O'Gorman stated that she could not continue "heat sealing" the tarps which weighed between 65 and 85

pounds. Newman told her to get a doctor's note that she was only capable of light duties and to call him if she was unable to come to work the following day. O'Gorman says that Newman in fact said to her, "You must be here at 8:30 a.m. ready to work or you will be fired."

On November 2, 2001, the appellant reported to work. She says ready and willing to work. Newman says that she could not work. Newman did then proceed to let her go.

ANALYSIS

Did the delegate make a reviewable error in finding that Newman did not owe wages to O'Gorman for noon hours worked?

Pursuant to section 112 of the Act the onus is on the appellant, O'Gorman to show on a balance of probabilities that the delegate made a reviewable error in finding that Newman did not owe wages to O'Gorman for noon hours worked. Reviewable grounds are as follows:

a) the delegate erred in law;

b) the delegate failed to observe the principles of natural justice;

c) new evidence has come available since the making of the Determination

The delegate found that there was insufficient evidence with respect to O'Gorman's claim that she worked and was not paid for the one half hour lunch break each day.

The appellant did often remain on the business premises as agreed by both parties. It is not clear whether she did so because she did not have to go anywhere else for lunch or did not wish to or whether she voluntarily stayed, had her lunch and made personal calls and as well of her own volition answered the business telephone as well. The appellant did not at any time request to be paid for that one half hour prior to filing her complaint following her dismissal. Therefore it is more likely in these circumstances that the appellant voluntarily remained on the premises and as a favor to her employer answered the business phone from time to time without any expectation prior to her dismissal of being paid.

The delegate did not err in law, nor did he fail to observe the principles of natural justice and the appellant presented no new evidence that satisfied the onus on her to show that the Determination was wrong.

The appeal is therefore dismissed.

ORDER

Pursuant to section 115 of the Act the Determination is confirmed.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal