

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 -

Sasinapa Prapakamol
("Prapakamol")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Barry Goff

FILE NO.: 96/257

DATE OF HEARING: June 11, 1996

DATE OF DECISION: July 2, 1996

DECISION

APPEARANCES

Sasinapa Prapakamol	For herself
Stuart Munro	Advocate for Prapakamol
Paul Eakkachaichanvet	Translator for Prapakamol
Inessa Tepper	Employer
Gillian McGregor	Delegate for the Director of Employment Standards

OVERVIEW

This is an appeal by Prapakamol pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against Determination CDET #001684 issued by the Director of Employment Standards on March 21, 1996. The Director found that the employer, Tepper, had not contravened the *Act* and accordingly that Prapakamol was not entitled to overtime. Prapakamol seeks by appeal to reverse the determination of the Director.

The hearing was held in Vancouver and all witnesses gave evidence under oath.

FACTS

The facts alleged by Prapakamol are as follows.

Prapakamol officially commenced working as a nanny-housekeeper for Mrs. Inessa Tepper ("Tepper") May 1, 1995. During the period of time she worked, May 1, 1995 to September 12, 1995, she contends she worked 6 days a week, 10 hours per day. She states she was not paid the overtime she worked.

Prapakamol gave evidence she started work at 7:00 AM each day and finished in the evening and was only free on Sundays. She stated she prepared breakfast and lunch for the Tepper's then two year old daughter and performed extensive cleaning duties. At the end of the day she retired to her private suite in the downstairs of the Tepper home.

Prapakamol called three witnesses who agreed she came to stay with them on Saturday nights and she always left on Sunday night despite being welcome to stay longer. Her advocate in argument asked that I infer from the duration of her stay with friends that she returned to the Tepper home because she had to work Monday, and from her late arrival Saturday that this was also a work day.

Her advocate also stated in argument that Prapakamol had not kept any records of the times she worked and her complaint was "entirely memory-driven" and was compiled following

the end of her employment with Tepper. This fact was confirmed by Mr. Wally Myles who assisted Prapakamol in preparing the record.

Tepper testified that she runs a restaurant on Granville island. Her normal days of work are Tuesday to Saturday. Tepper states that Prapakamol worked Tuesday to Saturday with Sunday and Monday off and occasionally, she would work Monday to Friday with Saturday and Sunday off.

Tepper did not see Prapakamol before 9:00 AM when Prapakamol would come upstairs. She would feed Tepper's daughter as Tepper was leaving for work. During the day she did some cleaning when the little girl napped. Tepper was home between 4 and 4:30 PM on working days at which point Prapakamol was free to do as she pleased. On the days Prapakamol had off, which coincided with the days Tepper had off, Tepper cared for her child herself.

Tepper's mother testified that she cared for her granddaughter "most Friday nights" and kept her until Saturday around noon. She was emphatic that Prapakamol did not care for the child on Friday nights or Saturday mornings.

In her evidence, Tepper said that if she required babysitting for her daughter in the evening, she hired her friend's 16-year old daughter and paid her cash. The babysitter supplied a letter confirming this arrangement and the babysitter's mother, Rosanna Maschevich, ("Maschevich") who also gave evidence, supported this arrangement.

Tepper's friend, Maschevich, gave evidence that she came over to Tepper's house at least once a week when Tepper came home from work. They would take Tepper's daughter to the beach to play and then return to the house to make dinner or to go out. Maschevich never saw Prapakamol at Tepper's home except for a birthday party in July, 1995. It is Maschevich's daughter Nicole who babysits when Tepper and Maschevich go out to dinner. Maschevich also confirmed that Tepper's schedule is normally Tuesday to Saturday. When Tepper visits Maschevich on Sundays, she always arrives with her little girl about noon. When Tepper visits Maschevich during the week, she is invariably accompanied by the little girl and they arrive around 4:30 PM.

ISSUE TO BE DECIDED

The issue to be decided is whether Prapakamol's appeal should be allowed and a finding made that she worked overtime and should be paid accordingly.

ANALYSIS

Prapakamol's claim does not stand up to scrutiny. She has no records which is not itself determinative but Tepper can point to specific dates which Prapakamol claims to have worked but Tepper can supply credible and corroborated evidence that Prapakamol did not work those days.

Tepper's schedule, again verified by witnesses, supports Prapakamol working Saturdays, but with Sunday and Monday off.

While Prapakamol claims to have worked 10 hour days, her own evidence is of 12 hour days and longer, yet she does not so claim. Her advocate maintained that the hours claimed were minimums rather than maximums. Further, if she commenced work at 7:00 AM, it must have been in her own quarters because Tepper was clear she did not see Prapakamol upstairs until 9:00 AM.

Prapakamol claimed she was required to make meals for the family but Tepper is a professional cook and it is unlikely Tepper would ask Prapakamol to prepare evening meals of a completely different ethnic style, Russian cuisine, than that with which Prapakamol had experience.

During the course of her investigation, the Director's delegate spoke to two other nannies employed by the Teppers, one currently and one previously. Both of them stated unequivocally that they worked 7 and one half to 8 hours a day and were not required to work overtime or extra days beyond 5 in a week whether Tuesday to Saturday or Monday to Friday. Both provided letters to this effect. This is not evidence concerning the working relationship between Prapakamol and the Teppers but does further support Mrs. Tepper's evidence of her schedule and the needs she had of a nanny-housekeeper.

There are other inconsistencies in Prapakamol's evidence. I do not propose to list them all although I have considered them and the evidence and demeanour of all the witnesses I heard in the course of the hearing.

I have carefully considered all the evidence before me. The onus is on Prapakamol to prove her case on the balance of probabilities. She has not done so and her appeal must be dismissed.

ORDER

I order pursuant to Section 115 of the *Act*, that Determination Number #001684 be confirmed.

Barry Goff
Adjudicator
Employment Standards Tribunal

BJG:sc