

**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 -

Nicole Serdar  
("Serdar")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Norma Edelman

**FILE NO.:** 98/746

**DATE OF HEARING:** March 17, 1999 and April 1, 1999

**DATE OF DECISION:** April 22, 1999



rate of pay increased to \$10.00 per hour. Marcia Husson (“Husson”) also commenced employment at K & R in 1996.

On January 26, 1998 Serdar went on pregnancy and parental leave. Her daughter was born on February 9, 1998.

Under Part 6 of the *Act*, an employee is entitled to 18 weeks of pregnancy leave and 12 weeks of parental leave. In Serdar’s case, the 30 week leave period would have ended during the last week of August, 1998.

Dianne Harrison (“Harrison”) was hired to replace Serdar while she was on her leave. Harrison started work in November 1997 and was dismissed in May 1998. Subsequently, Serdar was asked if she could return to work early. Serdar advised her employer that she was not able to do so.

Sherry Klemovich (“Klemovich”) was hired to replace Harrison. Husson, however, took over the payroll duties, and began working 3 days per week. Previously, she worked 3 days per month in the office. Klemovich and Husson are still employed by K & R.

At the end of her leave, Serdar did not return to work at K & R. On August 31, 1998, she filed a complaint at the Employment Standards Branch in Abbotsford claiming 100 hours of overtime wages for the period August 15, 1996 to January 26, 1998, vacation pay and severance pay on the basis that she was unable to return to work because her position had been filled by another person. Subsequently, Serdar amended her complaint from a claim for severance pay to a claim based on a violation of Section 54 of the *Act* which provides that an employer must reinstate an employee as soon as her leave ends.

The vacation pay claimed by Serdar has been paid by K & R and is not an issue in this appeal.

On November 16, 1998, the Director’s delegate issued a Determination in which he found that there were no records to confirm that overtime wages were owed to Serdar and accordingly he dismissed that aspect of her claim. Regarding Serdar’s complaint that she was not reinstated, the Director’s delegate outlined K & R’s position on this issue as follows: Bell and Huttema said that when Serdar refused to return to work early, she was advised that they would have to hire another person to replace Harrison and that Serdar agreed if the new employee worked out she would not come back because she intended to start a home based business, and that further, when Serdar contacted K & R to return to work she was told that the new employee was satisfactory and that there was no position for her. The Director’s delegate stated that Serdar, on the other hand, claimed she only told K & R about starting a home based business at the end of July when she sought to have her job back and she never agreed to quit. The Director’s delegate concluded that the “preponderance of evidence” supported K & R’s position that Serdar agreed to quit her employment.

Serdar appeals on the basis that K & R refused to reinstate her to her job in contravention of Section 54 of the *Act* and K & R failed to pay her overtime wages in contravention of Section 40 of the *Act*.

Serdar testified that she regularly worked 40 hours per week plus overtime while employed at K & R. Her shifts would range from 8:30 a.m. to 4:30 p.m. or “whenever”. She said when she started her job she was paid overtime, but near the end of February, 1997 the company stopped paying overtime and the cheques she received did not reflect her actual hours of work. She said the overtime occurred when she would have to stay late waiting for Bell or Huttema to return from Vancouver with the deposits and then she would make the deposits on her way home. As well, sometimes she would be called back to work to do paperwork for exports. She said Husson and Harrison knew she worked overtime and she told Bell and Huttema that she was accumulating overtime hours. They said her overtime would be paid with time off, but she never took any time off.

Serdar said she kept track of her actual daily hours on timesheets. She said that Huttema and Bell did not ask to see her timesheets, nor did she volunteer to show them her records. Hussan and Harrison, however, did see her timesheets. The timesheets were kept in the office in an unsecured area. She did not keep a copy of her timesheets.

K & R submitted Serdar’s timesheets for six pay periods, as well as Employee Detail sheets for Serdar and their other employees. Serdar’s timesheets show daily hours for each of the pay periods and the shifts, for the most part, range from 7:00/7:30 a.m. to 3:00/3:30 p.m. and 8:30 a.m. to 4:30 p.m. Her Employee Detail sheet, which lists total hours worked in a bi-monthly pay period, indicates that she worked and was paid some overtime up to the end of January, 1997.

On two of the timesheets, for the pay periods ending March 14, 1997 and January 15, 1998, Serdar does not indicate that any overtime was worked. On the remaining four timesheets, for the pay periods ending October 14, 1996, January 31, 1997, February 14, 1997 and February 28, 1997, she indicates she worked either one-half hour or one-hour of overtime. Serdar’s Employee Detail Sheet shows that she was paid the amount that was written down on two of these timesheets, including the overtime, but that she was paid straight time for the hours written down on the timesheets for the pay periods ending February 14, 1997 and February 28, 1997. In cross, Serdar stated that she was paid accurately for the pay period ending February 14, 1997 and, with respect to the pay period ending February 28, 1997, she said she “shorted herself” one-half hour and that when she took her cheque to Bell and Huttema to sign, she told them she was owed overtime but had not included it in her cheque.

Serdar said that she is owed 100 hours of overtime up to September, 1997 and 30 hours of overtime from October, 1997 to January, 1998, which she says would be confirmed by her other timesheets. She said she worked an average of one and one-half hours of overtime per day. Asked to explain why she wrote on her complaint form that she was owed 100 hours of

overtime for her entire period of her employment, she replied she really meant to say she was owed 100 hours for the period up to September, 1997, and that her advocate later advised her that she should include the other hours. She further said that where her Employee Detail record showed she worked 104 hours, this meant she worked 80 hours of straight time and 24 hours of overtime, but was only paid straight time wages for all hours worked.

Serdar said when she told Bell in June, 1997 that she was pregnant she said she intended to take a minimum amount of time off work. She never gave a specific return date but it would be as soon as she was physically able to return to work.

Serdar stated that Huttema called her, just after Harrison was dismissed, and asked when she was going to return to work. She said she was not sure, but it would be when her baby was better and put on some weight. She expected it would be around the beginning of August, 1998 at the latest. She said that Huttema was not pleased with her response.

At the end of June, she met Bell and Bird and they said they needed someone immediately as they were desperate and they asked her to return to work full-time. She told them she could not return until August 4, 1998 as her baby was still underweight and had to be nursed every two hours.

She suggested that they hire "Amy" or someone from a temp agency. They replied that they could not do either and were unwilling to hire someone for a month. Bell also said that he might have to hire someone permanently if she was unwilling or unable to return to work right away. Serdar replied that it was not her problem, and they could do what they had to, and she would be back to work in the first week of August. She denied telling them she would not be back to work if the new person they hired turned out to be satisfactory. She said she never told them she was not coming back to work and they did not suggest she could bring her baby to work or come in on a part-time basis. Further, she never indicated that she was planning to start up a business at that time.

During the last week of July, Serdar met Huttema and Bell to discuss a return to work on August 4, 1998. They said they had hired a new person and she was working out and they no longer had a job for her. She said she was surprised and shocked but did not challenge their decision. She said they then asked her what she planned to do, and she said she might start a business at home "doing books" She said she asked for severance pay and they said they would pay it if it was owed by K & R. She then left the employer's premises.

Subsequently, she went to Employment Insurance and was advised to go to the Employment Standards Branch. Employment Insurance phoned K & R and received a statement from Bell. She said she was told that her statement matched Bells' statement and as a result she received benefits.

Serdar said that during her leave she did not tell Husson that she was not coming back to work. Once, prior to commencing her leave, she told Husson she wanted to quit after she had a fight with Bell, but Husson told her not to do anything hasty.

She said that she did not voluntarily quit her job. Financially, she had to return to work. She said she has never had a business and was not working on one during her leave and it is not true that she only intended to return to work after her business failed. After she was told she had no job at K & R, she inquired at Employment Insurance about starting a business. As well, she looked for other work and on January 8, 1999 she commenced employment at Friendly Computer as a bookkeeper at \$10.00 per hour working 40 hours per week.

Serdar's advocate called Paul Serdar, Bernie Loewen ("Loewen"), Husson and Harrison as witnesses.

Paul Serdar and Loewen said that they picked Serdar up at work at 3:00 to 3:30 p.m. on the first Saturday in May, 1997. In cross, Loewen said he had no idea when Serdar started work on that day. Paul Serdar also said that he was not sure when his wife started work that day, but she left home before 8:00 a.m. He believes she worked a full day and he said she worked the previous 5 days. He further said that Serdar usually worked from 7:00 a.m. to 3:00 p.m. and although she started work at the same time, she often did not arrive home at the same time because she had to work late. He said Serdar would not be late for maybe a couple of weeks, and then she would be late every night or sometimes she would be late every day for a month, then she would not be late for a week or two. He stated that he did not see her records. He further said he did not want his wife to quit her job at K & R and start her own business.

Husson testified that she has never accumulated any overtime hours at K & R. When she worked three days a month, her shift was from 8:30 a.m. to 2:00 or 3:30 p.m. She said she never saw Serdar's records prior to Serdar filing a complaint with the Employment Standards Branch and she did not think Serdar kept records on a consistent basis. She said after K & R was advised of Serdar's complaint, she phoned Serdar and asked her where she kept her timesheets. Serdar said they were kept in an archives box, which was in an unsecured area. Husson said she and Klemovich only found 6 timesheets. She said she did not destroy any of Serdar's timesheets.

Husson said she knew that Serdar had to do bank deposits on her way home from work. As well, sometimes Serdar would call her from work saying she was upset because she had to stay late. On one occasion, a few days before Christmas in 1997, Serdar phoned her and said she was called back to work one hour of overtime after the end of her shift. She further said that around the same time she and Serdar worked on one Saturday from 9:00 a.m. to noon and she described that occasion as being overtime for Serdar. However, she also stated that she did not know with any certainty what Serdar's start and end times were per day.

Husson said Serdar called her at the end of July, 1998 to set up a meeting with Huttema and Bell concerning a return to work on the following Monday or Tuesday. She said she advised Bell that they needed a meeting and he said he did not know why, as there was no job for Serdar. She then told Serdar that Bell was reluctant to meet with her. Nevertheless, Serdar came in to the office on Thursday and caught Bell and Huttema off guard. After the meeting, Husson said that she learned Serdar was told there was no job for her at K & R. She said that Serdar was upset and was fighting back tears, and asked for her vacation pay. Serdar then left the office. Subsequently, Husson spoke with Huttema who suggested that they offer Serdar 2 weeks severance pay and her vacation pay and then she would go away. Husson said she felt the wrong thing was happening and she told Huttema that things did not feel right and that it would be prudent to call the Employment Standards Branch and get some information. After she called the Employment Standards Branch, she told Huttema that K & R was not obligated to pay severance pay, but it may be obligated to give Serdar her job back. She also asked him if he understood how upset Serdar was and that she had been fighting back tears, and he replied he didn't think she really was upset.

Husson said when Serdar was on her leave she said she was nervous about coming back and did not want to return to work, but she did not say absolutely that she was not coming back. Rather, she said many times that she had to return to work. Husson said everyone knew that Serdar had to bring in an income. Husson further said that Serdar wanted to start up a business and her husband had bought a computer and was keen for her to start up a business. She said she cautioned Serdar not to close doors and told her it would not be as easy as she thought to start up a business.

Husson further testified that sometime before Serdar met Huttema and Bell at the end of July, Serdar said if they needed to hire someone else and she didn't get her job back that was OK. Husson said that Serdar felt if she did not get her job back she would get Employment Insurance for enough time to start up a business. However, when she called in to set up a meeting with Huttema and Bell, she wanted her job back.

Harrison testified that Serdar regularly told her she would be returning to work after her leave. Harrison said her shift was from 6 a.m. to 2:30 p.m. and Serdar's normal shift was 8 a.m. to 4 p.m. She said she worked overtime and kept her hours in a calendar in her drawer. She said she was told to keep her own records of overtime and go to the bosses and tell them how much she had worked, and she did this on several occasions. She said Serdar told her that she worked late/overtime and was not paid for it, but she did not observe it because they worked different shifts. Once or twice, she saw Serdar write down her hours on a pad of paper and on a couple of occasions Serdar showed her some records. Once Serdar told her that she had accumulated over 800 hours in overtime up to November 1997.

Counsel for K & R called Bird and Huttema as witnesses.

Bird testified that he has no recollection of Serdar working overtime hours and she never complained about not being paid overtime. He said after Harrison was dismissed, he and Bell talked to Serdar and told her they were desperate and asked her if she could return to work, even on a part-time basis. He said they were not confident that Klemovich, who was hired that morning, would be any good. Serdar said she could not return as her baby was not well enough to be left with other persons. He said they found themselves in a quandary and they explained to Serdar if they continued with Klemovich, and it worked out, and then she returned, there would be too many staff. They also explained that they were concerned about the expense of hiring and training someone for a short period of time. He said Serdar replied "You do what you want if you want to keep the person" or "You do what you have to. I'll manage" or something of that nature. He said he could not recall either him or Bell telling Serdar that they couldn't hold her job any longer and he cannot recall Serdar saying she would be back after her leave. He says she gave no specific return date during their meeting. Bird said they wanted Serdar back, but they were left with the impression at the end of the meeting she might not return, and therefore they could focus on the new person and not worry about the expense of hiring and re-hiring staff.

Huttema said Serdar was paid overtime wages for all overtime hours worked at K & R. He said she never complained to him or others about overtime. He said he never told her he would not pay overtime. Although Bell and Serdar agreed that she would take any overtime in time and not in pay, this practice was not established at the company. He further said that Serdar would sometimes go home early to do bank deposits and sometimes she would stay late, but he does not know her exact hours of work.

Huttema said that Serdar never gave them a definite date when she expected to return after her leave. Further, there were indications that she was not coming back at all. He had heard via Husson that she wasn't coming back and might start a home based business and this caused him to be concerned because Harrison was a problem by that time.

Huttema also said that when Harrison was dismissed, Klemovich was immediately hired to help them until things were sorted out. He then called Serdar and stressed the need for her to return. She sympathized and said the baby was fussy and she wasn't comfortable leaving her with someone else. He asked her if she could work 1 hour per day and take the baby to work. Huttema said the conversation was left open-ended and he hoped they could find a solution in a day or two. He also stated, however, that when Klemovich was hired he was comfortable knowing that if she worked out, she would be permanent. He believed all avenues were exhausted with Serdar and this was based on Husson telling him that Serdar was not returning and on an agreement Bell had made with Serdar. Huttema stated that Bell told him that he had a conversation with Serdar in which after she said she could not return to work early, she agreed that if the new person worked out, it would be OK, as she was not interested in returning to work anyway. She planned to start up a business. Huttema said that given what Bell told him, he felt Serdar was satisfied with the deal, although she might be disappointed because she was not 100% sure she would get her job back.



Huttema further stated that Serdar came in to the office at the end of July to find out how things were going with Klemovich and they said good. He asked how her home based business was going and she said she hadn't got too far yet. They mutually wished each other well. He said it was a cordial meeting. They thanked her for her time and said they would give her 2 weeks severance pay, although he later learned they did not have to pay it. She did not ask for her job back. He doesn't recollect that Serdar was upset. He said, however, there was a certain amount of emotion on both sides and they were sorry that she wasn't coming back. Huttema said there was no decision for Serdar to make at this meeting because Klemovich was working out and as per Serdar's agreement with Bell, she would get on with her business. Had Klemovich not been working out, then Serdar would have had to make a decision if she was returning, and in his opinion, she was not sure she wanted to return to work.

## **ANALYSIS**

The burden is on the Appellant to show that the Determination is in error.

### *The Overtime Issue*

I am not satisfied that Serdar has established that she is owed overtime wages.

First, Serdar's Employee Detail sheet does not indicate that she is owed overtime wages. The sheet shows some overtime was paid to Serdar prior to January 31, 1997. On certain occasions, the sheet indicates that Serdar worked in excess of 80 hours in pay period. For example, there are two pay periods which show Serdar worked 104 hours and was paid straight time wages. However, this does not necessarily mean that Serdar worked overtime. Serdar's pay periods were bi-monthly and not bi-weekly. It is possible to have a period of 13 days @ 8 hours per day for a total of 104 hours of straight time in a pay period.

Second, there are no records to substantiate Serdar's claim that she is owed 130 hours of overtime. The only records available are six timesheets of which two, for the pay periods ending February 14, 1997 and February 28, 1997, point to a possible violation of the *Act*. However, I am not convinced that these sheets are a true reflection of the hours worked by Serdar because of her testimony that she was paid accurately for the pay period ending February 14, 1997. This means the timesheet is not accurate. I am also not convinced that there are other timesheets. Harrison was the only witness who said she saw some of Serdar's records, but she provided no specifics. The records she saw may have been some or all of the six timesheets that were submitted on the appeal. Moreover, Husson testified that she didn't think Serdar kept records on a consistent basis. Finally, there is absolutely no evidence that K & R destroyed any of Serdar's records.

Third, Serdar's position on the number of overtime hours she is owed has been inconsistent. On her complaint form, she indicated she was owed 100 hours for her entire period of employment. Later, she increased the amount to 130 hours. She said she meant to say on her complaint form that she was owed 100 hours up to September, 1997. I find that to be unlikely. Serdar offered no explanation why she would claim for a period ending in September and not on her last day of work, some four months later. Counsel for K & R argued that the Serdar does not know her hours and has exaggerated them over time. I agree that Serdar does not know her exact hours. She was unable to state the exact hours she worked each day during the course of her employment, only that she worked an average of one and one-half hours of overtime per day, but if that is true then her claim for the period September, 1997 to January, 1998 should be significantly greater than 30 hours. Further, the six available timesheets do not reflect an average on one and one-half hours of overtime per day, and Harrison testified that Serdar told her she had accumulated 800 hours of overtime up to November, 1997.

Fourth, none of Serdar's witnesses presented precise evidence to support her claim for overtime wages.

Loewen and Paul Serdar testified that Serdar worked on May 3, 1997 but their evidence does not establish that daily or weekly overtime was worked by Serdar. They could not say the exact number of hours that she worked on the Saturday; Loewen provided no evidence on whether she worked the previous 5 or 6 days; and Paul Serdar did not indicate the exact hours Serdar worked on the 5 previous days. Paul Serdar's further evidence did not establish his wife's specific end times each day, and his evidence that she started at the same time each day was contradicted by the information contained in the six timesheets. As well, there was nothing to confirm his view that when Serdar arrived home late, it was because she worked late and not for some other reason.

Harrison testified that she never observed Serdar working overtime as their shifts did not directly overlap. Husson testified that Serdar sometimes told her she had to stay late; Serdar said she worked one hour of overtime a few days before Christmas in 1997; and once Serdar worked overtime on a Saturday. I am not satisfied that Husson's evidence establishes that any overtime is owed to Serdar on these occasions, particularly since she stated she did not know Serdar's exact hours of work, which is understandable since Husson only worked 3 days per month when Serdar was employed at K & R. Moreover, Husson never directly observed the alleged one hour of overtime or the other times that Serdar stated she was working late. Furthermore, working 3 hours on a Saturday does not necessarily mean that Serdar worked overtime unless she worked at least 40 hours in the previous 5 or 6 days, and Husson offered no evidence on that point.

Fifth, the Employee Detail sheets for other employees at K & R do not support a conclusion that K & R fails to pay overtime to its employees. In particular, the sheets show that Harrison was paid overtime for the pay periods ending December 2 and 16, 1997, and March 2 and 16,

1998. Moreover, Harrison, a dismissed former employee of K & R, did not testify that she was owed any overtime wages.

For the above reasons, I conclude that Serdar is not owed any overtime wages by K & R.

*The Section 54 Issue*

Sections 54(2) and (3) of the *Act* impose the following duties on an employer:

- (2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,
  - a) terminate employment, or
  - b) change a condition of employment without the employee's written consent.
  
- (3) As soon as the leave ends, the employer must place the employee
  - a) in the position the employee held before taking leave under this Part, or
  - b) in a comparable position.

I am satisfied, on the balance of probabilities, that Serdar did not quit her employment and that K & R failed to comply with Section 54(3) of the *Act* in not placing Serdar in the position she occupied before taking her leave and thus effectively terminated her employment contrary to Section 54(2) of the *Act*.

In *Burnaby Select Taxi Ltd.* (BC EST #D091/96) the Tribunal adopted the following test for determining whether an employee quit his or her employment:

The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her further employment.

I cannot find "clear and unequivocal" facts which would lead me to conclude that Serdar voluntarily quit her employment.

Although Serdar denied that she told her employer she would not return to work if her replacement turned out to be satisfactory as she planned to start up a business, I am persuaded that she said some words to that effect during her leave, which supports a finding that subjectively she formed an intent to quit. I base this conclusion primarily on the evidence of Husson. I was particularly influenced by Husson's testimony at the hearing. Husson, a friend of Serdar's and a current employee of K & R, presented her evidence in a forthright manner and gave me no reason to believe she adjusted her story to suit either party. Husson said that

Serdar wanted to start up a business and she made a statement sometime prior to her last meeting with Bell and Huttema that if they needed to hire someone else and she didn't get her job back that was OK. Husson said that Serdar felt she would receive benefits long enough to start up a business. Husson's evidence lends support to Huttema's evidence concerning the "deal" between Bell and Serdar, and Bird's "impression" that she might not return to work.

I am not satisfied, however, that Serdar voluntarily intended to quit her job. I believe she was induced to do so by K & R. Bird testified that he explained to Serdar that if Klemovich worked out and Serdar returned, there would be too many staff and they were concerned about the expense of hiring and training someone for a short time. In my view, these comments, which were made after Serdar said she could not return to work early, put pressure on Serdar to quit her job, and therefore, Serdar's response cannot be considered voluntary. I am reinforced in this conclusion by Huttema's testimony that Serdar might be disappointed because she was not 100% sure she would get her job back. There would be no reason for her to be disappointed if she truly and freely did not want her job back. For these reasons, I find the subjective element to be absent in this case.

I also find there is no confirmatory conduct on Serdar's part which satisfies the objective element. There is no evidence she ever started up a business. Indeed, even Huttema said that when he spoke to Serdar at the end of July she said she had not got too far with a business yet. Serdar stated that she did not secure another job until January, 1999 and that financially she had to return to work. This evidence was unchallenged by K & R and it supports a finding that Serdar did not quit her job. Further, Serdar did not provide her employer with a letter of resignation. There was no evidence she asked for a letter of reference. Finally, Husson testified that at the end of July, Serdar called to set up a meeting concerning a return to work. This is conduct inconsistent with quitting. Husson did not testify that Serdar called to find out how the new person was doing. Husson further testified that Serdar was upset and was fighting back tears after the meeting. As indicated above, I found Husson to be a very credible witness and her testimony supports Serdar's evidence that she was surprised and shocked to learn she had no job to return to, and in these circumstances, I do not believe it would be unusual for a person to fail, at the time, to demand their job back.

Serdar had until the end of August to return to work. Notwithstanding, any inconvenience or cost associated with hiring and training a replacement for a short period of time, K & R was obliged to place Serdar in her former position at the end of her leave. After considering all of the evidence, I can only conclude, on balance, that K & R failed to do so and Serdar did not quit her job. In making this conclusion, while I admitted the Employment Insurance document, I have attached no weight to it as the person who issued it was not at the hearing to testify and be cross-examined by counsel for K & R.

I further find that K & R terminated Serdar's employment when it failed to place her in her former position. I am unable to conclude that her termination of employment was for any reason other than her pregnancy and the fact that she was on a leave and was not able to return

to work early. K & R did not attempt to establish that there were any concerns about her work performance and did not suggest that there was “just cause” to terminate her employment.

For all these reasons, I find that K & R contravened the provisions of Sections 54 (2) and 54 (3) of the *Act*. The provisions of Section 79(4) of the *Act* give the Director various powers where an employer has contravened these sections of the *Act*. I refer the matter back to the Director to determine the remedy.

**ORDER**

I order under Section 115 of the *Act* that the Determination be referred back to the Director in order to determine what action should be taken pursuant to Section 79 of the *Act* as a result of K & R’s breach of Section 54 (2) and 54(3) of the *Act*.

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**Norma Edelman**  
**Registrar**  
**Employment Standards Tribunal**

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