

An appeal

- by -

Dianne Guthrie and Don Guthrie operating as Dianne & Don's Cleaning
(the "Guthries")

- 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: Carol L. Roberts

FILE No.: 2001/79

DATE OF DECISION: May 1, 2001

DECISION

This is a decision based on written submissions by Donald Guthrie on behalf of Dianne & Don's Cleaning, Jeff Bachert on his own behalf and Linda Naso on behalf of the Director of Employment Standards.

OVERVIEW

This is an appeal by Dianne Guthrie and Don Guthrie operating as Dianne & Don's Cleaning (the "Guthries"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued January 9, 2001. The Director found that the Guthries contravened Section 34 of the Act in failing to pay Jeffrey Bachert ("Bachert") minimum daily hours while he worked part time, and Ordered the Guthries to pay \$7,371.60 to the Director on Bachert's behalf.

ISSUE TO BE DECIDED

At issue is whether the Director erred in finding that Bachert was entitled to four hours pay for those days he worked fewer hours per day.

FACTS

The undisputed facts as found by the delegate are as follows.

The Guthries operate a janitorial service. Mr Bachert worked as a janitor for the Guthries from November 1996 to December 6, 2000. There is no dispute that Mr. Bachert worked less than 4 hours per day, and was only paid for those hours he worked. There is also no dispute that neither the Guthries nor Mr. Bachert had applied to the Employment Standards Branch for a variance to the minimum daily pay provisions of the Act.

The Guthries argued that they were not obliged to pay Mr. Bachert minimum daily pay because he is disabled, not capable of working four hours per day, and that he was "not capable of working to standard". Furthermore, the Guthries contended that they had an agreement with Mr. Bachert to work reduced hours, and that the hours were reduced because of his "continuing inability to meet standards".

Mr. Bachert contended that he did not want to work less than four hours per day, and that, after he had filed his complaint, Mr. Guthrie approached him, asking that he sign a paper agreeing to work less than the minimum daily pay. Mr. Bachert says he signed it because he became confused and was frightened.

The delegate also spoke to Vern Rockwell, Mr. Bachert's support worker. Although Mr. Bachert is mentally challenged, Mr. Rockwell stated that he was very capable of working four hours per day.

The delegate requested payroll records from the Guthries, and, although the payroll records did not indicate which days of the week Mr. Bachert worked, Mr. Guthrie agreed that Mr. Bachert usually worked 7 days per week.

On December 5, following a review of the Guthries' records, the delegate sent Mr. Guthrie a letter setting out the calculation of Mr. Bachert's wages, and asked him to either provide payment or evidence disputing the findings by December 14.

Mr. Guthrie requested two extensions to that deadline, and, as of January 9, had provided the delegate with no evidence in support of his claim that Mr. Bachert did not show up for work on some days, and had taken a vacation on other days.

The delegate concluded that Mr. Bachert worked less than four hours per day, seven days per week, and determined that he was owed wages of \$7,138.38, plus interest of \$233.22 on that amount.

ARGUMENT

As I understand his argument, Mr. Guthrie contends that it was his understanding that a variance was established in the summer of 1998, and that the variance was confirmed by the actions of the Ministry of Human Resources ("MHR"). His submission is that the variance was that Mr. Bachert's hours of work was limited to three hours per day, and that MHR was aware of that agreement.

Mr. Guthrie also argues that MHR and DRS Vocational Services, two agencies that he had been dealing with in employing Mr. Bachert, were able to set a variance agreement.

Finally, Mr. Guthrie argues that MHR was responsible for assisting Mr. Bachert to enter into a "legally acceptable agreement" or to "inform all parties" on "how to work it out with all concerned". In short, as I understand it, Mr. Guthrie suggests that MHR was under an obligation to assist him, as the employer, in his obligation to comply with the Act.

After Mr. Bachert filed his complaint, Mr. Guthrie contends that he became aware of the legislative requirements, and entered into an agreement with Mr. Bachert, which he says constitutes a variance.

Mr. Guthrie also made submissions regarding Mr. Bachert's job performance, which I do not consider relevant to this appeal, since there was no issue that Mr. Bachert was dismissed for cause.

The delegate argues that the appeal should be dismissed. She states, however, in response to Mr. Guthrie's suggestion that various Ministries were under an obligation to advise him about the requirement for a variance, that she attempted to advise Mr. Guthrie on several occasions about the minimum daily pay provisions, how to apply for a variance to that provision, as well as other matters, and each time, Mr. Guthrie hung up the telephone.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am not persuaded that the Director erred.

Section 34 of the Act provides as follows:

- (1) If an employee reports for work on any day as required by an employer, the employer must pay the employee for
 - (a) at least the minimum hours for which the employee is entitled to be paid under this section, or
 - (b) if longer, the entire period the employee is required to be at the workplace.
- (2) An employee is entitled to be paid for a minimum of
 - (a) 4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or
 - (b) 2 hours at the regular wage, in any other case...

This section, which is a minimum requirement, provides that, once an employee reports to work, the employer must compensate the employee for 4 hours pay at regular wages.

Section 72 provides that

An employer and any of the employer's employees, in accordance with the regulations, join in a written application to the director for a variance of any of the following:

...

- (e) section 34 (minimum daily hours)

There is no dispute that the Guthries did not obtain a variance under section 72. The "variance" that Mr. Guthrie refers to was nothing more than a letter he presented to Mr. Bachert. There is no dispute that no request was never presented to the director for approval, nor that the director

ever issued a variance. Consequently, section 34 applies to the employment relationship between the Guthries and Mr. Bachert.

Mr. Guthrie also appears to argue that the agencies he was dealing with in employing Mr. Bachert, were negligent in failing to inform him about the law governing their employment relationship, and specifically, the minimum daily hours and the variance provisions.

As an employer, Mr. Guthrie is obliged to inform himself of the relevant laws and regulations governing his business affairs. Attempting to shift that burden onto third parties with whom he has no relationship is not an answer for his failure to do so. The agencies he dealt with in employing Mr. Bachert, including DRS Vocational Services and MHR, are under no duty to inform Mr. Guthrie of his obligations as an employer, and I am unable to agree that their failure to do so constitutes negligence. In any event, the evidence is that the delegate attempted to advise Mr. Guthrie of the variance provisions of the Act, advice Mr. Guthrie was not inclined to take.

I conclude that the delegate did not err in arriving at her Determination, and dismiss the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated January 9, 2001 be confirmed, together with whatever interest has accrued since that date.

CAROL L. ROBERTS

Carol L. Roberts
Adjudicator
Employment Standards Tribunal