

An appeal

- by -

Jacobus and Marie-Laure Bakker
(“Bakkers”)

- 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: Lorne D. Collingwood

FILE No.: 2003A/066

DATE OF HEARING: May 29, 2003

DATE OF DECISION: June 27, 2003

DECISION

OVERVIEW

Jacobus and Marie-Laure Bakker (“the Appellants” in this decision) have appealed, pursuant to section 112 of the *Employment Standards Act* (the “Act”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 18, 2002. Hollyburn Properties Limited (“Hollyburn” and “the employer”) is by that Determination ordered to pay Mr. Bakker \$2,478.29 in wages, interest included.

In the Determination, the Bakkers are advised that resident caretakers, unlike the common garden-variety of employee, are not entitled to daily or weekly overtime wages. Jacobus Bakker (“Jac”) is, for reason of section 39 of the *Act*, awarded pay for ‘weekend’ work, 9 days at regular wages and another 9 days of pay at double-time. The delegate goes on to decide that there is not a basis for awarding Marie-Laure Bakker (“Marie-Laure”) wages for work on weekends, nor is there reason to award statutory holiday pay.

The Bakkers, on appeal, allege that the Determination reflects a failure to observe principles of natural justice and an error or errors in law. In doing so, they complain of an inadequate investigation and an illogical Determination. They argue that it is obvious that that they worked statutory holidays given that there was no one to relieve them. The Bakkers also claim that there is evidence to show that Marie-Laure worked weekends.

I have in this decision decided that the Determination should be confirmed. The delegate asked for proof that they worked statutory holidays and that Marie-Laure worked weekends. None was provided and the Determination was issued. The decision is reasonable given the evidence before the delegate and I have not been shown that there was a failure to investigate matters.

An oral hearing was held in this case. The appellants were represented by Jacobus Bakker at the hearing. I was advised that Marie-Laure Bakker was unavailable to attend the hearing in person as she is in France.

APPEARANCES

Jacobus Bakker	For the Appellants
Michael Lensen	For the employer

ISSUES

Is there an error in law such that the Determination should be varied or cancelled or a matter or matters referred back to the Director?

Has there been a failure to observe principles of natural justice?

FACTS

The Bakkers were employed by Hollyburn as resident caretakers of an 85 suite building (“the Crystal Court”) from November 1 2001 to February 21, 2002. The Bakkers were paid \$1,850 each, a rent benefit included.

It was agreed and understood at the outset of the employment that the Bakkers were to work an eight hour day, 5 days a week and that they would have 2 days a week off (“weekends”). As resident managers of the Crystal Court they were to collect rents, keep the apartment building clean, and perform banking, office work, maintenance and minor repairs. Jac was also expected to renovate apartments as tenants moved out of the building. That proved to rather time consuming as the renovations were extensive but there is not evidence to establish that the renovation work turned out to be a seven day a week job. It has been decided that Jac worked seven days a week but that is for reason of the fact that there was no relief caretaker.

The Bakkers complained of the fact that the employer had not arranged for a relief caretaker. Jac wrote the employer. Marie-Laure told Michael Jensen in no uncertain terms that she did not want to work seven days a week and that she had no intention of working seven days a week.

The employer interviewed a person for the job of relief caretaker but no one was hired and the Bakkers ending up doing the work that would have been performed by a relief caretaker, had there been one. The question is, How much of this work was there?

Jac, in filing his complaint, complained that he had to work 24 hours a day, 7 days a week for 9 weeks. Marie-Laure claimed that she worked 7 weekends. They both claimed that they worked both Christmas day, 2001 and New Years Day, 2002.

There is no record of hours worked or even days worked in this case.

Jac argued at the investigative stage that there are cell phone records to show that he and his wife worked 24 hours a day. He has been advised by the delegate in an email dated October 29, 2002, and the delegate is correct, that cell phone records are not proof that he worked 24 hours a day. Jac was again asked in that email to “provide ... whatever evidence you may have that shows you worked those days as claimed”. Jac’s response was to send the delegate an email which said that he was not claiming 24 hours of pay a day but 8 hours of pay a day, that neither he or his wife had any days off, and that both worked the Christmas and New Year’s Day holidays. That is to restate what is claimed but it is not to submit evidence to show days worked or even refer to such information.

The position of the employer was that the Bakkers should be paid for just one extra day a week in the weeks that the Bakkers performed the work of relief caretaker and that the practice in the industry is to have just one relief caretaker for a building the size of the Crystal Court, not two. Faced with conflicting claims by the employer and the employees and a lack of records as he was, the delegate decided that it is likely that someone performed the chores of relief caretaker on the weekends and that the work was performed 2 days a week, not one. He then awarded Jac pay for working 7 days a week for 9 weeks and Marie-Laure nothing at all.

ARGUMENT AND ANALYSIS

It is not for the Tribunal to second guess the Director and her delegates. The appellant is expected to show that the determination which has been appealed should be varied or cancelled, or a matter or matters referred back to the Director, for reason of either an error in law, failure to observe principles of natural justice, or evidence which was not available at the time the determination was made. In this case the Appellant complains of an error in law and a failure to observe principles of natural justice.

On complaining of an error in law and a failure to observe principles of natural justice, the Appellant goes on to complain of the investigation and the Determination. I am satisfied that this is not a case where I should refer a matter or matters back to the Director so that she may have a delegate conduct an investigation of some sort. There must be a compelling reason for doing so. There is not in this case.

The Director's investigations are to be fair and efficient. It is a purpose of the *Act* to provide fair and efficient procedures (section 2 of the *Act*).

The delegate's investigation is adequate so far as I can see. The delegate correctly identified the issues and he conducted an investigation. On doing so, he discovered that he had not been provided with evidence to establish days worked. The employees were at that point asked to provide additional evidence of days worked. None was provided. Rather than producing evidence of days worked or, at least, identifying evidence of days worked, the employees did nothing but state their claim once again. It was clearly time for a decision by the delegate.

The Determination is in favour of Jac but it is, in effect, a decision to award the Bakkers 9 days of pay at regular wages and another 9 days of pay at double-time. The decision is based on an underlying decision, the conclusion that the work of relief caretaker was likely performed on Sundays as well as Saturdays, not just one day a week, the employer's claim.

The delegate clearly had reason to believe that one person could perform the work of relief caretaker. He had been told that it was the practice of the industry to have one relief caretaker, not two. The employer had sought to hire one person to act in relief of the Bakkers, not two. And Jac Bakker, in complaining of the lack of a relief caretaker had suggested that the employer hire one person as a relief caretaker, not two people.

The delegate did not have a compelling reason to believe that one or both of the Bakkers worked statutory holidays. The Bakkers had not provided evidence that supported their claim.

The Bakkers appeal the Determination but I am not shown that it flies in the face of common sense and/or the evidence which was before the delegate. They claim that it logically follows from the fact that there was no relief caretaker that they had to work Christmas, 2001 and New Year's Day, 2002. It does not. The delegate had no way of knowing whether they worked those days or not.

Jac Bakker also claims that he worked 7 days a week renovating apartments and so it follows that it is Marie-Laure that performed the work of relief caretaker. That is a logical argument but the problem with this particular argument is that I have not been provided with a compelling reason to believe that Jac performed renovations on a 7 day a week basis. Again, there is no record of the work. It was a condition of employment that he work a five day week. Finally, there does not appear to have been any need to perform the work as claimed.

I have not been shown an error in law or a failure to observe principles of natural justice such that the Determination should be varied or a matter or matters referred back to the Director. The Determination is therefore confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated December 18, 2002 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal