

An appeal

- by -

Wendy Shaw  
("Shaw")

- 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:** Mark Thompson

**FILE No.:** 2000/845

**DATE OF HEARING:** March 23, 2001

**DATE OF DECISION:** May 4, 2001

## DECISION

### APPEARANCES:

Wendy Shaw, for herself

Hans Podzun, for himself

### OVERVIEW

This is an application by Wendy Shaw (“Shaw”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 24, 2000. The Determination found that Shaw’s claim for overtime wages against her former employer, Hans Podzun (“Podzun”) was not substantiated, so that Podzun did not owe Shaw unpaid overtime wages.

Shaw appealed the Determination on the grounds that Podzun had deceived the delegate with the information he provided about Shaw’s hours of work. Shaw maintained that she had worked 105 hours of overtime in May, June and July of 1999 for which she had not been compensated.

Podzun replied that he had maintained accurate records of the hours Shaw had worked and that she had never claimed overtime while an employee or given any notice that she was working more than the 8-hour day provided in her contract of employment.

### ISSUE TO BE DECIDED

The issue to be decided is whether Shaw has shown that the Determination is based on factual errors.

### FACTS

Podzun practices as a notary public, and Shaw worked from July 17, 1997 until December 31, 1999 as a conveyancer. Her rate of pay was in 1999 \$3800 per month. The circumstances of Shaw’s termination were not in dispute. She resigned in writing on January 2, 2000, citing Podzun’s failure to provide her with a written employment contract. Her complaint under the *Act*, dated December 28, 1999, concerned her allegation that she had not been paid for overtime worked in the months of May through July 1999 at required by Section 40 of the *Act*. In particular, Shaw claimed that she had worked for 105 hours of overtime during that period and not received any compensation. She estimated that she should have been paid \$3,575.89 for the overtime worked.

Podzun presented a copy of a memorandum he sent to his employees on January 26, 1998, stating the conditions of employment. He cited discussions with a delegate of the Director who “instructed” him to notify employees of the requirements of the *Act*. The memorandum specified an eight-hour day between 9:00 a.m. and 6:00 p.m., with a flexible time for lunch. Podzun testified that the office was open from 9:00 a.m. until 5:00 p.m.

Podzun and Shaw differed on a number of factual issues in this case, but I concluded that Podzun began to practice as a notary in February 1996. Podzun stated, without contradiction, that he initially took over the practice of another notary, including his staff. Later in 1996, he found the work of the conveyancer in the office to be unsatisfactory, so he hired Shaw. Early in 1999, the volume of files Podzun received began to rise. According to Shaw, Podzun asked her if she would work overtime, and she replied that she preferred that he hire a part-time employee to assist her. Shaw stated to the Director’s delegate and in the hearing in this case that Podzun did not hire another employee, so she worked extra hours to clear the files. Later Podzun hired Christine Konishi to work for him, but did not admit that fact to the Director’s delegate.

The key document in support of Shaw’s allegation was a single sheet produced from a computer that contain a list of overtime hours worked in May through July 1999. It included the hours of overtime Shaw claimed by day and time during the three months. According to Shaw, she prepared the top third of the document at the end of May and showed it to Podzun, asking to be compensated. Podzun declined. At the end of June, she added another set of figures and again asked Podzun to be paid. Again Podzun refused. The process was repeated after the last day of July, with the same result. Shaw provided a copy of the complete document to the Director’s delegate. The copy submitted in evidence to the hearing contained hand-written calculations that were not part of the material Shaw said she gave to Podzun. Shaw stated that she had asked Podzun to be paid for overtime on a number of occasions, the last in December 1999, shortly before she resigned her employment.

Elmer Hurley (“Hurley”), Shaw’s cousin, testified that he lived with her during the period in question. He was aware of the overtime hours she worked, although he could not recall any dates. Hurley picked Shaw up after work in the evenings and Saturdays. On a few occasions, Podzun was present when Shaw worked overtime.

Shaw also presented lists of files she had closed in various months during her employment. Without repeating the data, it was clear that the number of files in May through July 1999 was higher than in the fall of 1997, although not substantially so except for July 1999.

Podzun testified that he did not require Shaw to work overtime. In 1999 he asked her if she wanted to work overtime or should he hire additional staff. She preferred to have extra help, so he then hired part-time staff to help her. Podzun presented an invoice from an individual for secretarial services provided between July 7 and July 29, 1999 for a total of 31 hours. A second person from a temporary help agency presented an invoice for 14 hours of secretarial services worked during the week ending July 25, 1999, 9.5 hours during the week ending August 1, 1999.

A third individual, also a notary public, presented an invoice for 16.5 hours worked on July 2, 27 and 28. Podzun testified that each of these individuals was experienced in her work and needed little direction or supervision from him. Shaw stated that these persons worked for Podzun when he was taking holidays.

Podzun denied receiving any invoice or time sheet from Shaw claiming overtime for three months in question. He did not know if Shaw worked in the evenings or on Saturdays, as she had her own keys to the office. Podzun testified that Shaw was in the office when he arrived around 8:45 a.m., but apparently not working. She normally left the office after working seven hours. Podzun asserted that Shaw's normal workday was seven hours per day. He presented payroll records for 1998 and 1999, including May and July 1999 showing a "-1" for virtually all days worked, meaning that Shaw had worked seven hours that day. He further stated that he frequently worked after the office closed and saw Shaw leave at 5:00 p.m.

Shaw made a number of allegations regarding Podzun's business practices, and Podzun presented evidence to rebut the allegations. This evidence did not bear directly on the issue before the Tribunal, and not witnesses appeared to verify the statements from either party, so it is not necessary to discuss them in this decision.

## ANALYSIS

The rules of the Tribunal are that the party launching an appeal of a determination has the burden of showing the determination was incorrect on the facts or its interpretation of the *Act*. No claim of an error in law existed in this case.

Except for the testimony of her cousin, Hurley, all of the evidence Shaw presented to the Tribunal was available to the Director's delegate. In particular, her records of overtime worked were imprecise and unsupported by other evidence. Shaw stated that she had asked Podzun to be paid for her overtime, and he denied hearing such a request. Even Hurley could not substantiate the dates on which she allegedly worked the extra time, merely that she did work late on a number of occasions. Only a computer-generated document Shaw admittedly produced supported her claim that she had worked overtime. The evidence presented indicated that Shaw normally worked seven hours per day, a fact she did not acknowledge in her complaint or appeal.

The number of cases closed in the months of May through July 1999 was not substantially greater than other months of the year. It was not possible to conclude that the workload for the office was so great during the months in question that Shaw must have worked overtime. Shaw did not challenge Podzun's evidence that he hired extra staff in July, except to say that Podzun had been away that month.

Podzun acted reasonably in monitoring the work of his employees. He was present in the office on most days and observed Shaw leaving the office after seven hours of work frequently. Shaw

did not keep a diary or other contemporaneous record of her hours worked. Nor did she complete any payroll records for Podzun based on the overtime she allegedly worked.

After reviewing the evidence before, I conclude that Shaw has not met her burden of demonstrating that the Determination contained serious factual errors.

### **ORDER**

For these reasons, the Determination of November 24, 2000 is confirmed.

***MARK THOMPSON***

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**Mark Thompson  
Adjudicator  
Employment Standards Tribunal**