Employment Standards TRIBUNAL

An appeal

- by -

Whitehorn Publishing Ltd. operating the Valley Sentinel

- 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: Wayne R. Carkner

FILE No.: 2002/056

DATE OF HEARING: May 30, 2002

DATE OF DECISION: June 17, 2002

DECISION

APPEARANCES:

Bill Mahoney	For the Appellant
Dorothy Simpson	For the Respondent
No appearance	For the Director

OVERVIEW

This is an appeal by Whitehorn Publishing Ltd operating the Valley Sentinel pursuant to Section 112 of the *Employment Standards Act* (the "Act") of a Determination issued by the Director of Employment Standards (the "Director") on January 23, 2002.

The Appellant operated an entity that publishes a newspaper in the Valemount/McBride area. The Respondent worked as a reporter from August 16,1995 until April 30, 2000 when her employment was terminated by the Appellant. Subsequent to her termination she filed, in a timely manner, a complaint alleging that she was owed overtime payments from the Appellant. The Director investigated the complaint and determined that the Appellant had contravened Sections 36, 40 and 46 of the *Act*. The Director concluded that the Respondent was entitled to $4955.42 as remedy for wages owed. The Appellant appeals on the basis that the Director erred in concluding that the Respondent was entitled to wages and, in the alternative that the Director erred in the calculation of remedy owed to the Respondent.

ISSUES

1. Did the Director err in determining that the Respondent was entitled to overtime wages?

2. Did the Director err in calculating that the Respondent had not been paid $1416.94 in vacation wages that she was owed?

3. Did the Director error in calculating the hours based on the Respondent's records?

FACTS

The Respondent worked as a reporter for the Appellant located in McBride. The offices of the Appellant were located at Valemount, some 86 km distant. The Appellant was required to file 6 photographs and at least 10 stories a week. The Respondent worked without close supervision. There was no contract of employment in place. The Appellant did not maintain any records of hours or dates worked by the Respondent. The Director made the calculations of remedy based on the Respondents daily diaries and reporter's notebooks.

The Appellant testified that the Respondent had been instructed not to work overtime or statutory holidays and that if she did she was to take time off in lieu of the overtime worked. The appellant further testified that the Respondent worked a flexible work schedule and had control over the hours and dates

she worked and that, he had not been aware of overtime being worked until the complaint was filed by the Respondent. The Appellant did admit that he had not complied with the Act or Regulation to establish a flexible work schedule.

The respondent testified that she was not instructed not to work overtime and statutory holidays and that the work schedule rarely allowed her to take time off in lieu of overtime worked. She testified that she could not control when she worked as the function of a reporter was to cover stories when they occurred. She further testified that the employer had to have known she was working on rest days and statutory holidays due to the stories that were filed and the timing of the stories filed. The Appellant stated that a lot of the stories could be covered by telephone after the story had occurred. There was no evidence presented that this direction had been given to the Respondent.

Both parties testified that the Respondent had been paid her vacation on an ongoing basis and that the Director had erred in calculating an entitlement of $1416.94 for vacation earned.

The Director concluded that the respondent worked 8 hours a day 5 days a week with Sunday and Monday as rest days. The Director concluded that the records retained by the Respondent were credible and that the Appellant had failed to meet the requirements of the *Act* and was liable for overtime and statutory holiday pay. The Director further concluded that the Appellant had to be aware that the respondent was working overtime hours and on statutory holidays and that the principles outlined in *Leslie P. Gondor* (BC EST #D300/98) did not apply.

ARGUMENT

The Appellant argues that the principles of *Gondor* should apply as he was unaware of the overtime and statutory holidays being worked and that the liability for wages diminishes as a result of this. The Appellant further argues that the Appellants hours should be based on a 7 hour work day as the work she performed did not justify an 8 hour work day. The Appellant asserts that the respondent had a flexible work schedule and that based on this all calculations are incorrect. The Appellant further asserts that the credibility of the records and of the Appellant are in question as the documentation became more detailed after the Appellant was chastised for faxing documents on the Appellants fax which became embroiled in a court case over municipal elections in the McBride area. In the alternative the Appellant argues that the remedy must be recalculated after the $1416.94 earned vacation is deducted from the gross wages.

The Appellant argues that her records are accurate and that the prime reason for keeping them was to track her mileage claims and to support those claims.

The Respondent supports the Directors reasoning in the Determination and submits that the appeal be denied.

The Director relies on the reasons provided in the Determination.

ANALYSIS

The Tribunal has held that the burden of proof is on the Appellant to show that the Director has erred in a Determination to the extent that the Determination should be varied or canceled, see W*orld Project Management Inc.* BC EST #325/96. The test to be utilized is the Balance of Probabilities Test, i.e. the evidence is to be assessed on the basis of the preponderance of probabilities that a practical and informed

person would readily recognize as reasonable under the circumstances, see B.C. Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 354.

The Director concluded that the Respondent worked 8 hours a day, 5 days week based on the records of the Respondent. The Appellant's argument that the Respondent worked a flexible work schedule must fail. The *Act* and *Regulation* are very clear on the requirements to be followed to implement a flexible work schedule. It is clear from the evidence and the argument that none of these requirements were met. The Director then had to make a reasoned decision as to what the Respondent's hours of work were, based on the Respondent's records as the Appellant kept no records of the Respondent's hours and days of work, also a contravention of the Act. I find that the Director's conclusion on this issue is reasonable in the circumstances.

The Appellant argued the credibility of the Respondent's records. Based on the Respondent's credible evidence I find that the Respondent's reasoning for maintaining the records was viable and conclude that the records are a reasonable reflection of the Respondent's work history.

The Appellant argued that the Director erred in calculating the hours worked based on the Respondent's records. It is clear from the Determination and the wage calculations affixed to the Determination and from a review of the diaries of the Respondent, that the Director made an honest and reasonable effort, based on the test of a balance of probabilities, to accurately determine the work history of the Respondent.

Turning to the Gondor argument I must conclude that based on the timing of the stories filed, the Appellant had to be aware of the overtime being worked and support the Director's finding on this issue.

Dealing with the issue of vacation earned, as both the Appellant and the Respondent concur that the Director erred in adding this component in the wage calculation I agree that this calculation is incorrect.

CONCLUSIONS

I find that the Director erred in concluding that the Respondent was entitled to $1416.94 for vacation earned and the appeal succeeds on this issue. Turning to remaining issues under appeal I find that the Appellant has failed to meet the burden of proof to show errors by the Director. Accordingly the appeals on these issues must fail.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination dated January 23, 2002 be referred back to the Director to recalculate the remedy without the inclusion of the earned vacation component of $1416.94 but including any interest accrued pursuant to Section 88 of the *Act*. All other aspects of the Determination are confirmed.

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal