

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 -

Leslie P. Gondor

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE No:	97/935
DATE OF HEARING:	March 05, and May 07, 1998
DATE OF DECISION:	July 2, 1998

DECISION

APPEARANCES

Guy Gondor	Spokesperson on behalf of Leslie Gondor
Leslie Gondor	
Lorene Novakowski	Counsel for PBSC Computer Training Centre
Sandi Waterfield	Human Resources Manager, PBSC

OVERVIEW

This is an appeal by Leslie P. Gondor ("Gondor") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination (File No. 083582) dated December 09, 1997 by the Director of Employment Standards (the "Director").

Gondor was employed by PBSC Computer Training Centres ("PBSC"), a business owned by I.B.M., as a part-time instructor from February 15, 1996 until December 31, 1996 and as a full time instructor from January 01, 1997 until her termination on March 31, 1997. On her termination there were a number of issues regarding overtime, a statutory holiday, and compensation which were all resolved prior to the Determination. After these issues were resolved, Gondor claimed that during the time that she was working part-time she worked a total of 48 days @ \$130.00 per day at home doing preparation for her teaching assignments for which she was not paid by PBSC. She claimed that PBSC required her to work at home on her own time without pay in order to develop the knowledge and skills to teach the courses assigned to her.

The Director found that PBSC had paid for all preparation time submitted by Ms Gondor through the established procedures and in conformity with PBSC policy.

Ms Gondor appeals on the grounds that, while she was paid for submitted prep-time, PBSC required her to work on her own time to become sufficiently knowledgeable to teach the large number of different courses assigned to her. She claims that PBSC knew that she was working on her own time but declined to pay her for such work.

ISSUE TO BE DECIDED

The issues to be decided in this case are whether Gondor worked at home on the days claimed in addition to authorised prep-time and, if so, whether she is entitled to be paid for such time in addition to the prep-time submitted to and paid by PBSC.

BC EST #D300/98

FACTS

The hearing of this case extended over two days during which I heard extensive evidence on the nature of the computer training necessary for instructors, the content of various courses taught by PBSC to the public, and the skills and preparation required to enable an instructor to teach these courses. I also heard detailed evidence and documents showing the courses taught and the preparation time allowed and paid for. I heard that Ms Gondor had daycare for her child so that she could work at home undisturbed and that she worked very hard and long hours to ensure that she would be able to teach the courses assigned to her. I was also provided with copies of documents including Ms Gondor's resume, submitted at the time of her job application, and the Instructor Handbook.

In addition I received lengthy written submissions from the parties.

I have listened carefully to all of this evidence and read all of the documents and materials submitted. However, I do not intend to recite all of this evidence in this decision but I will summarize the facts here and refer to specific evidence as necessary.

Ms Gondor wrote to PBSC on December 14, 1995 seeking employment. She stated in her letter that she was a certified teacher with a Bachelor of Education Degree with over 10 years experience. She stated that she had completed her first year of computer science. She recited her teaching skills and experience and added that she would bring with her a "strong knowledge of Microsoft Office Products coupled with a developing knowledge of Windows'95 Microsoft Office. Furthermore...I am experienced in LAN's."

She attached a resume to this letter in which she stated that her B.Ed. degree concentrated in Mathematics and Computers. The resume contained a heading "Computer Skills" in which she listed Windows 3.11 and noted that she had completed a Microsoft Office Certificate Program with MS Word, Powerpoint, Excel and Access. She noted that she was currently establishing a strong foundation in Window's 95 Microsoft Office. She further claimed a knowledge of hardware such as IBM P.C.s, Macintosh, VAX minicomputers and Sun Workstations. A further heading in the resume was "Integrated Computer Applications". Under this heading Ms Gondor said that she had Microsoft Office training on IBM compatible P.C.s, that she had designed and implemented a Computer Studies 11 MS-DOS course and that she had used a Macintosh to design a mathematics curriculum for tutoring.

Ms Gondor was interviewed twice and hired effective February 15, 1996 on a part-time basis at the rate of \$130 per day. The appointment letter indicated that the part-time work would probably merge to full-time in September or October. In fact it was not until the following January that Ms Gondor was given a full-time position. The issue of part-time/full-time was a matter of some contention between Ms Gondor and PBSC in the fall of 1996 as Ms Gondor was disappointed that it didn't come soon enough.

There is no doubt that from February 15 to December 31, 1996 Ms Gondor was employed part-time. The prep-days claimed by Ms Gondor are all in the time frame when she was working part-time.

Ms Gondor was informed, and I am satisfied on the evidence that it was accepted PBSC policy and practice, that she would be allowed, and would be paid for, one prep-day per course if she was required to teach a course that was new to her. She would also be allowed to audit certain courses and be paid for the day provided that prior authorization was obtained. Ms Gondor was also advised, and again I am satisfied that it was company policy and practice, that if she required any additional prep-time she should seek prior authorization and if approved it would be paid. The PBSC policy manual provided that any additional preparation time would be discussed and approved by the manager in advance of being worked. The payroll documentation demonstrates clearly that Ms Gondor submitted prep-time and was paid for every day that she submitted. She also sought prior authorization for audit days, submitted these for payment on her time-sheets, and was paid. She also, on occasion, sought prior authorization for extra prep-time, submitted this for payment, and was paid.

Ms Gondor's evidence is that the courses she was required to teach were very difficult and required a lot of preparation. She claims that she was told that she had to become competent to teach 20 courses by September if she were to be given full time. This evidence was denied by the witnesses for PBSC. PBSC says that if Ms Gondor's resume was accurate she would have no problem teaching the level of courses which she was assigned at first and thereafter she was allowed paid prep-time if she needed to upgrade for newer courses.

Ms Gondor claims 48 days additional prep-time which essentially amount to every week day for which she had not previously been paid. In effect she would have been working full-time. Ms Gondor claims that she did, in effect, work full time on her preparation for teaching. In her evidence she stated that she did not put these days on her time sheet and admitted that she knew she would not get paid if they were not put on the sheet. She says she did not submit this time because of "lack of experience". She says that she believed it was expected of her that she would work full-time at home. She claims that PBSC knew and tacitly approved her working these hours at home. She claims that PBSC inferred that it was a reasonable expectation that part-time employees learn the course material on their own time. She also points out that she was allowed to take training manuals home and that this must confirm that she was expected to work at home.

Ms Gondor submitted a detailed schedule of all of the courses she taught and their various levels and claimed that she was not paid prep days as required even by the company policy. In the written submissions Ms Gondor referred to information contained in an internal administration program called S.T.A.R.S. but this information did not form part of the evidence in the hearing and can not be relied on.

Ms Gondor kept careful track of the courses taught and hours worked and was diligent during her employment to ensure that all teaching and approved non-teaching time was paid for. The days she

now claims were never submitted to PBSC for payment until long after her employment was terminated and after PBSC had settled all other outstanding issues.

Mr James Dantow, the PBSC manager, testified that, based on his experience and the work done by the other instructors, the one day preparation per new course was reasonable if the instructor was reasonably competent to start with. He said the PBSC relied on Ms Gondor's resume and job application letter to believe that she had the necessary basic skills to teach the courses assigned. He testified, however, that he had never denied an instructor paid overtime or preparation days if the instructor asked for them. He testified that when Ms Gondor asked for additional time it was granted and paid. He says that the 48 days now claimed were never requested and never submitted for payment. He says that Ms Gondor did not tell him that she was prepping at home every day while she was not working. He indicated that he would have had serious concerns about her performance capability under those circumstances and it would have been unlikely that she would have been offered full time work if she required so much time to prepare. He says that Ms Gondor never expressed any concerns to him about her inability to keep-up with the workloads.

ANALYSIS

The Tribunal has held that the burden of persuasion at an appeal from a Determination rests with the Appellant, see *World Project Management Inc.* BCEST #D325/96 (confirmed upon Reconsideration). The appellant in this case, Ms Gondor, has presented extensive and thorough submissions in support of this appeal but, as often is the case, this matter turns upon a few but significant findings of fact that I must base upon the credibility of the evidence. In assessing such credibility I am mindful of the advice of the B.C. Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 354 that I should assess the evidence to see if it is in harmony with the preponderance of the probabilities that a practical and informed person would readily recognise as reasonable under the circumstances.

I can not accept as reasonable the submission that PBSC expected the part-time employees to work full time on preparation for their teaching days. There is no indication in any of the documentation, handbooks, policies or procedures that would support this evidence. In fact it is inconsistent with the practice of allowing paid prep and audit time as the courses came along. Ms Gondor's evidence that she was expected to have 20 courses pre-prepared in case she would be required to teach them is simply not in harmony with the practice and procedures set-up for preparation time and audit time. It is also inconsistent with the ever changing software market. I can not find that the appellant has met the burden of persuasion for me to find that she was expected to work full time for free while employed and paid part-time.

The Company had a clear policy and practice in place that reasonable preparation time would be paid. One day was paid without prior authorization and more could be requested. Mr Dantow testified, and I accept, that he had never turned down a teacher's request for extra preparation time. On the evidence before me, it is very clear that Ms Gondor understood this practice and procedure. She submitted time sheets including all her prep-time and audit time. She had been

diligent in keeping track of her hours, statutory holidays etc. and yet never claimed these extra 48 days until after her employment ended.

It seems clear to me, on the evidence, that Ms Gondor inflated her abilities in her resume (a not uncommon practice unfortunately) and found that she was unable to teach the courses without an enormous amount of preparation. She was not open and honest with the employer about the problems she was experiencing in learning the material and indeed may have worked the inordinate number of hours she now claims. I accept that PBSC had no knowledge of the hours she was working in excess of the time on her time sheets.

Ms Gondor gave extensive evidence in relation to all of the courses taught by her and the prep days paid for. She claimed that even on the basis of the policy in place there were some prep days for which she was not paid. After cross examination and my review of these schedules I am satisfied that she was paid for every preparation day due for teaching assignments that were in reality "new" assignments.

PBSC had a system in place for keeping track of overtime, preparation time, and course audit time. Ms Gondor was well aware of the system and was diligent in keeping her time sheets accurately and claiming what she was entitled. She had always been paid for the time she submitted. There was a procedure in place for requesting additional preparation time which required prior authorization. Ms Gondor was aware of this procedure and in fact had occasion to make such a request and have it approved in advance.

Counsel for PBSC referred me to the decision of this Tribunal in *Trish Helene McKeen*, BCEST #D082/96 and submit that it is very similar and that I should be persuaded to follow it. Ms McKeen was employed as a chemist at a laboratory referred to in the decision as "ASL". She started work for ASL in 1987 and became an acting supervisor for three months in the spring of 1995. Her employment terminated in September 1995. After she left she claimed overtime wages for the period of February 1995 to September 1995. The Tribunal found that ASL had a policy in place for handling overtime claims and that McKeen was fully aware of the system and at times complied with it. The employer argued that there was a system in place for claiming and receiving overtime known to all employees and that no overtime should be paid because she had not filed her claims for the period in question. The Tribunal upheld the Director's Determination in refusing to pay overtime to Ms McKeen.

I am not sure that I accept this reasoning and believe that the *McKeen* decision really turned on a question of credibility. If approved overtime was in fact legitimately worked then payment was due under statute. Company policy regarding recording, filing, or claiming can not override the statutory duty to pay in accordance with the legislation. If Ms Gondor was expected or required to work days at home for which she was not paid then the legislation requires that she be paid despite any company policy or procedure to the contrary.

Ms Gondor's case is different from *McKeen*. Ms Gondor is claiming payment for days she claims that she worked but which were unauthorized by, and unknown to, the employer. The employee can

not create a liability for the employer to pay wages simply by working at home without the prior knowledge, consent, and approval of the employer.

The significance of the policy in Ms Gondor's case is that there was a clear and understandable system in place to acquire prior approval for extra work. Ms Gondor was aware of the system and simply decided not to seek such prior approval from the employer. I do not find credible Ms Gondor's assertion that the employer "inferred" that she should work at home. It is clear from the evidence that there were unambiguous policies and procedures in place. This company did not rely on "inference" to communicate its procedures. I accept the evidence from the employer that the 48 days claimed were not authorised. I do not accept Ms Gondor's evidence that there was an implicit expectation that she work full-time when only employed part-time.

"Work" is defined in the *Act* as meaning the labour or services an employee performs for an employer whether in the employee's residence or elsewhere. It might be said that Ms Gondor was performing "work" for the employer in her residence. However the definition of "employer" includes a person who has or had the control or direction of an employee. In my opinion the employer must be able to control and direct when an employee works overtime. To be able to control or direct such work the employer must have knowledge that the employee is purporting to work overtime.

I have considerable doubt that Ms Gondor worked the days she claims as it appears that she simply filled-in on the calendar all the week days that she was not otherwise teaching and called them prep days. On this issue alone I would be inclined to deny the appeal.

I conclude that even if Ms Gondor worked the days she claims it was without the knowledge, approval, direction, control, or consent of PBSC. In my opinion there is no requirement for the employer to pay wages under these circumstances.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

John Orr
Adjudicator
Employment Standards Tribunal