

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 -

Karen Culley, Kelly Deschambault-Wills, Lyn Savage
("the Appellants")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John L. McConchie

FILE NOS.: 97/400, 97/401 & 97/402

DATES OF HEARING: October 30 & December 23, 1997,
February 19 & March 27, 1998

DATE OF DECISION: July 8, 1998

DECISION

APPEARANCES

Karen Culley	appellant
Kelly Deschambault-Wills	appellant
Lyn Savage	appellant
Christopher Green	counsel for Valco (until February 19, 1998 hearing date)
Peter Coulombe	for Valco
Valerie Pfenniger	for Valco

OVERVIEW

This is an appeal by Karen Culley, Kelly Deschambault-Wills and Lyn Savage ("the Appellants"), under Section 112 of the *Employment Standards Act* (the "Act"), against Determinations issued by a delegate of the Director of Employment Standards (the "Director") on August 26, 1997. The respondent, Valco Discount Club Inc., vigorously disputes the appeal.

As is sometimes the case in the employment setting, the relationship between the appellants and the principals of Valco began in a spirit of co-operation and common purpose and ended in an atmosphere of accusation and bitter acrimony. Ultimately, this emotion helped to generate what can be most charitably described as an untidy set of proceedings. It is first necessary to sketch the essential background.

The Appellants filed complaints with the Employment Standards Branch in Abbotsford on March 17, 1997. Their employment with Valco had come to a conclusion abruptly. They alleged that they were owed wages by that company. The Director's delegate in this matter issued a Determination dated April 28, 1997 in which he dismissed the complaints. The appellants appealed the Determination. On July 18, 1997, the Tribunal upheld the appeals on the basis that the reasons for the Determination were not sufficiently stated in it (see BC EST #D323/97). The matter was referred back to the Director's delegate who then issued a varied Determination in each case in which he once again dismissed the complaints. The Reason Schedule to each of the three individual Determinations reads as follows:

Reason Schedule

"In support of your claim you submitted extensive records on a form used by the Employment Standards Branch for calculating overtime. You also submitted records bearing the title "Valco Discount Club Incorporated Time Sheet".

I asked Mr. Peter Coulomb [sic], president of the company, for his records in order to verify your claims. He advised me that all his records

disappeared with the departure of the three employees who filed complaints with our branch, yourself included.

Mr. Coulombe viewed the records you prepared and said not only did you not work the hours claimed but he himself kept no such records as "Valco Discount Club Incorporated Time Sheet". He did however, recognize the ESB form used for calculating overtime and said it was given to him by another officer of the ESB on a previous occasion. His conclusion was that you came into possession of this form when you took his records.

Without having any records of the employer, I am obliged to consider your records alone and decide on the probability of their correctness and reliability. In doing so I have to consider whether or not the records were kept in the course of your employment on a daily basis.

The records have a regularity to them which indicate their preparation all at one time. In addition they bear striking similarity to those of the other employees who filed complaints. This leads me to conclude they were not kept on a daily basis from the beginning of your employment.

My conclusion is bolstered by your recitation of experiences with the company which deteriorated considerably over time. Your compilation of overtime appears to be a method of seeking compensation from the employer for other grievances. Indeed, the comments of all complainants indicate a desire for revenge more than anything. Because of this I do not believe your complaints were filed in good faith.

You provided statements of supposed witnesses to the fact that you worked long hours at the offices. Mr. Coulombe explains this by saying some of you stayed overnight in the offices because of lack of anywhere else to sleep or because you found it a convenient place to have a party. It may very well be that Mr. Coulombe's statements are untrue and you did work some overtime for which you were not compensated; however, without reliable records to demonstrate conclusively what hours were worked I cannot merely estimate these hours and issue an order to the employer to pay.

I showed your records to the seven remaining employees of the company and all were of the opinion that your claims are greatly exaggerated or ridiculous. These witnesses are: Ken Chandler, Shelly Ketchum, Dan Chandler, Darrin Stellings, Shawn Ferris, and Valerie Pfennige [sic].

Mr. Stellings, who does the payroll, queried why these over-time claims were not brought forward after the first week in which they were supposedly earned. The answer to this is that likely there were no claims until disputes over other things arose.

In summary, I am dismissing your complaint."

As can be seen, the fundamental decision of the Director's delegate was that the time-sheets submitted to him by the appellants were not genuine. He did not find it necessary to make a detailed consideration of the hours of work and overtime claims of the appellants.

The appellants appealed this Determination, and the matter came on for hearing before this adjudicator on October 30, 1997. Near the outset of the hearing, the appellants brought on an application seeking to have the Tribunal exercise its jurisdiction to dismiss the appeal without a hearing on the basis that the respondent's appeal was "frivolous, vexatious or trivial or is not brought in good faith." The basis for the application was the respondent's allegation that the appellants had filed a fraudulent statement purporting to be under the signature of a Mr. Sidhu. The respondent filed an affidavit from Mr. Sidhu in which he deposed that he had not signed the statement filed by the appellants. I ordered that Mr. Sidhu be made available to the appellants for cross-examination, but Mr. Sidhu did not ever thereafter attend the hearing, and the application appears to have been abandoned. However, to bring certainty to this particular issue, I am satisfied that the evidence does not support the allegation that the documentation filed by the appellants bearing the signature of Mr. Sidhu is fraudulent and I order that the preliminary application be dismissed.

During the first day of hearing, it also became apparent that the appellants and respondent were preparing to call numerous witnesses in order to support their respective positions on the issue of the actual hours of work performed by the appellants. The threshold issue in the proceeding was whether the time-sheets submitted by the appellants were genuine time-sheets or, as the Director's delegate had found, whether they were in effect fabricated documents. In order to ensure an efficient proceeding, I made an order that the proceeding would be bifurcated. At this stage of the hearing, the parties were to confine themselves to two issues: (1) whether the Director's delegate had erred in finding that the time-sheets were not genuine recordings of the appellants' time; and (2) what were the terms and conditions of employment of the appellants, and, in particular, Ms. Savage. The latter consideration took into account the issue of the actual start dates of the appellants, an issue which became hotly disputed during the hearing. Unfortunately, as matters proceeded, the hearing was only marginally assisted by this order. The emotional aspects of this dispute led the parties on frequent occasions to venture outside the terms of my order in seeking to buttress their respective positions respecting the actual working hours of the appellants. Nevertheless, the order stood. This means that this decision is limited to a determination of the two issues on which this matter was ordered to proceed. The implications will be discussed in due course.

The hearing continued on December 23, 1997. Near the conclusion of the hearing day, company counsel, Mr. Green, called Ms. Savage as his witness and produced to her copies of a number of cheques which purported to be true copies of cheques paid by the respondent to the appellants. The cheques purported to show that certain monies had been paid to the appellant, Savage, as advances on regular pay. The cheques were relevant to the issue of Ms. Savage's verbal employment agreement with the company. Ms. Savage took issue with the authenticity of the copies, testifying that they had been altered by the company and that the cheques which had actually been received by her and the other appellants did not contain certain writing at the time of their issuance. On the application of the appellants, I directed the respondent to request of its bank that true copies of the cheques be sent simultaneously to the respondent's counsel and to Ms. Savage.

Although the hearing was scheduled to resume on February 12, 1998, the appellants requested an adjournment on the basis that the cheques had not been received from the respondent's bank. The adjournment was granted and a further order made whereby the respondent was ordered to produce the cheques no later than February 16, 1998 or provide good reason why they could not be produced. The respondent subsequently informed the Tribunal that there had been a miscommunication between it and the bank and the cheques would be some time yet in coming. The hearing proceeded on February 19, 1998 in the knowledge that the matter would not conclude until the cheques had been secured. By this time, the respondent's business had closed and it was conducting its own case, having discharged Mr. Green as counsel because of the closure. At the hearing on February 19, 1998, both Ms. Pfenniger and Mr. Coulombe gave evidence about the matters in dispute in the hearing. The appellants requested and were granted the right to defer cross-examination of both these witnesses until the next hearing date since the banking records were not yet in their possession.

At the end of the hearing day, an incident occurred which essentially brought Mr. Coulombe's personal involvement in the proceedings to a conclusion. The issue of the banking records once again arose and it was apparent that they were required in order to complete the hearing. The hearing was to resume as soon as they were available. However, Mr. Coulombe had secured a position outside British Columbia and sought an adjournment through to August, 1998. In response, I made the observation that it was more likely that, if the banking records became available shortly, the hearing would be resuming within the next two or three weeks and not at the end of August. At or shortly after this point that Mr. Coulombe lost his temper and proceeded to berate the appellants in a manner which they interpreted as being both personally insulting and threatening. This was not the first occasion on which this kind of behaviour had occurred. Mr. Coulombe then left the hearing. I adjourned the proceedings at that point, and subsequently issued a direction that Mr. Coulombe would not be permitted to personally attend at the subsequent hearing date or thereafter except by further order. Ms. Pfenniger, whose conduct throughout was exemplary, was not affected by the direction.

The banking records were finally received directly by the Employment Standards Tribunal and the hearing re-established for March 27, 1998. No one appeared for the company on this final day of hearing. The banking records confirmed the accuracy of the copies held by the appellants and established that the writing on the copies held by the respondent had been placed on the cheque copies at a later time than when the cheques had been issued. This is not a conclusion that the respondent has made an active attempt to mislead the Tribunal; I would not reach such a conclusion lightly, and it is not necessary in order to properly dispose of this case. In any event, both principals of Valco gave evidence in chief which could not be subjected to cross-examination. The implication of this is that wherever the appellants have given credible evidence on a point in contention, I have preferred that evidence to the evidence of the respondent.

At the conclusion of the proceedings, I asked that the appellants provide their final argument in writing so that it could be shared with the respondent, despite the respondent's failure to attend the hearing. I was mindful, in particular, that Ms. Pfenniger had conducted herself entirely appropriately throughout the proceedings, and that the loss of their business could be expected to have affected the respondent's principals in a predictable way. I thought they should have the opportunity to reply if they chose to do so. However, the Registrar has informed me that efforts to reach the respondent have failed and no submissions have been received in reply.

ISSUE TO BE DECIDED

The issues to be decided in this case are:

- (1) Are the time-sheets presented by the appellant in this proceeding authentic time-sheets which were used by them for the purposes of keeping their time while in the employment of Valco?
- (2) What were the terms and conditions of employment of the appellants during their employment with Valco?

It is important to observe that I am not deciding in this particular case whether the hours claimed by the appellants were authorized by the respondent and actually worked by the appellants. If necessary, that issue must be decided later.

ANALYSIS

I have reviewed the evidence given by the parties and their witnesses in this proceeding, and the voluminous documentation filed with the Tribunal. I will deal with each issue in its turn.

Are the Time -Sheets Authentic?

The evidence in this proceeding left no doubt that the Director's delegate had erred in finding that the time-sheets submitted by the appellants were not genuine time-sheets. The evidence established that when the appellants joined the company in early January, 1997, the company did not have any time-sheets. In or around this time, it was visited by an officer of the Employment Standards Branch who provided a form of time-sheet for use by the company. When Ms. Savage was hired as business administrator in mid-January, she undertook to create a time-sheet based on the Branch model which could be used for all Valco employees. This time-sheet was completed by the third or fourth week of January, and all employees thereafter used it and submitted it weekly to Ms. Savage. Initially, the employees had had to catch up two or three weeks' of time and therefore filled out several time sheets at once. The time-sheets were thereafter submitted to Ms. Savage on a regular basis. Several witnesses appeared for the appellants and confirmed that each had used the time-sheets during his or her tenure with the Company. Ms. Pfenniger herself agreed that she had seen the time-sheets in use by early February. It is my conclusion that the time-sheets are authentic documents in that they were used and filled in while the appellants were in the employment of Valco.

Findings with respect to Karen Culley's Employment

Ms. Culley was employed by Valco on January 9, 1997 in the capacity of telemarketer, and as of January 15, 1998 in the capacity of secretary - receptionist. Her normal hours of work were 9 a.m. to 4 p.m. She was paid on a weekly rather than hourly basis until the pay period beginning February 28, 1997. Her weekly wage was \$140.00. As of February 28, 1997, she was paid at the minimum wage of \$7.00 per hour. I accept that Exhibit 1 is a genuine document which was used for time-keeping purposes at the company as of the third or fourth week of January, 1997. Exhibit 1 are her time-sheets, but she is missing time-sheets for the week of January 21, although she did work that week. She left Valco along with the other appellants on March 14, 1998.

Findings with respect to Kelly Deschambault-Wills Employment

Mr. Deschambault-Wills was employed by Valco on January 7, 1997 in the capacity of "business consultant". Initially, he was paid on commission but as of the third or fourth week of January, he was paid on the basis of hours worked. This occurred after Mr. Bull of the Employment Standards Branch paid a visit to Valco and spoke about the obligations of the company to commission salespersons. On or about January 26, 1997, Mr. Deschambault-Wills became Valco's "membership supervisor". His time-sheets are Exhibit 4, and constitute a genuine document maintained by him during his employment. He is missing the final two weeks of his time-sheets as he had no opportunity to photocopy them prior to his departure from the company. His normal hours of work were to be about 9 a.m. to 5 p.m. or 6:00 p.m. depending on when the office closed. Like Ms. Culley, he was also promised by Mr. Coulombe that his wages would improve when the company was in a position to afford an increase. His agreement with the company was that any overtime worked by him would be paid at \$7.00 per hour (the minimum wage) or taken in days off to be arranged at a mutually convenient time. He left Valco along with

the other appellants on March 14, 1998.

Findings with respect to Lynn Savage's Employment

I find that Lyn Savage began her employment with the Company on January 7, 1997. This is the date indicated on correspondence sent by Mr. Coulombe to Revenue Canada and submitted in evidence by the appellants in support of their own position in the proceedings. Like Ms. Culley, she was paid on commissions during this period. Also like Ms. Culley, she also quickly concluded that telemarketing was not for her and informed Mr. Coulombe on January 13, 1997 that she was leaving her employment. However, the company had a need for a "business administrator" to run its office. She had a meeting with Mr. Coulombe on January 13, 1998 at which they discussed salary.

It is necessary to detail the key evidence concerning this meeting because it is Ms. Savage's assertion that it was at this meeting that Mr. Coulombe promised her a salary of \$2500.00 per month. It was Ms. Savage's testimony that she told Mr. Coulombe she needed at least \$2500.00 per month to act as the company's business administrator. She testified that he said that the company could not afford to pay such a salary at that time but would "catch her up later" for it. In the meantime, Mr. Coulombe agreed to pay her \$300.00 per week and pay certain costs on her behalf. These included her monthly vehicle payment of approximately \$600.00, certain vehicle repair costs, and incorporation costs still owing by her to her accountant of \$700.00 (she had been operating a private company which was now dormant). She testified that later in her employment Mr. Coulombe approached her and asked her to reduce her wage to \$2000.00 per month since the company was not doing well. She agreed to do so since the company had paid her monthly vehicle expense. However, shortly after this, Ms. Pfenniger talked to her and told her that she did not have Ms. Pfenniger's agreement to this and she was not prepared to give it. At the time of her final paycheque, Ms. Savage confronted Mr. Coulombe about their agreement and he told her he had agreed to pay her only \$300.00 per week. As she put it in her testimony, this led to "quite a confrontation."

Mr. Deschambault-Wills testified that he was at the meeting at which Ms. Savage and Mr. Coulombe discussed Ms. Savage's salary. He believed that Ms. Pfenniger was there as well. He recalled in his testimony that Mr. Coulombe told Ms. Savage that he would "pay her \$300 a week and look after her bills personally". One of those bills was the vehicle payment. Ms. Savage also had repairs to her vehicle to be paid for and an accounting bill for incorporation costs. He recalled Mr. Coulombe telling Ms. Savage that if there was anything left over owing to her (from the \$2500.00), he would make it up at a later date. He said that the company was in an unstable financial position.

Both Mr. Coulombe and Ms. Pfenniger in their direct testimony disputed that there was ever any agreement to pay Ms. Savage \$2500.00. Ms. Pfenniger said that she was not present at the meeting between Mr. Coulombe and Ms. Savage and was never told about the alleged \$2500.00 monthly salary. She thought that the agreement to pay for the monthly vehicle costs was an advance, as Mr. Coulombe had reported to her. Mr. Coulombe also insisted that the payments were in the nature of an advance and not wage

payments, and that the original cheques would verify this claim. When the original cheques finally did arrive from the bank, however, they did not verify the company's claims.

In attempting to determine Ms. Savage's terms and conditions of employment, the importance of confirming important agreements in writing once again recommends itself with crystal clarity. Ms. Savage's claim is that the company promised her that she would be paid \$2500.00 per month on a retroactive basis once it was in a position to do so. The company's claim is that no promises were ever made but that it certainly expressed its hope that it could meet the employee's demand once the business was financially stable. No witness purports to recall the precise words used during the discussion. No written agreement setting out a salary of \$2500.00 was ever signed. No correspondence was exchanged that mentioned this promise. What we have is a history of signed cheques in the amount of \$300.00 per week and a written explanation by the company to Revenue Canada, submitted by the complainants themselves for other purposes, which states that Ms. Savage's wage was \$300.00 per week.

It is my conclusion that Ms. Savage and Mr. Coulombe were talking past one another during their discussion about her salary. These were still friendly times at the company and neither Ms. Savage nor Mr. Coulombe were making their points in a heated way. Ms. Savage spoke about her need for \$2500.00 per month in order to pay her debts. Mr. Coulombe spoke of the company's inability to pay at present. Mr. Coulombe then effectively parried Ms. Savage's wage request by agreeing to pay certain indebtedness of Ms. Savage in order to take the pressure off her immediate economic situation.

In my view, the parties did make a contract during the discussion of January 13, 1998 and it took the following form. Ms. Savage was to have a basic salary of \$300.00 per week. This was to be supplemented by monthly payments by the company on her behalf in the amount of approximately \$600.00 for her vehicle payments. The company would also supplement her salary by paying for her incorporation costs of \$700.00 and for certain repairs to her vehicle. In short, it is my conclusion that during this meeting the company effectively agreed to pay Ms. Savage a monthly salary of \$1800.00 and to make a further payment of \$700.00 to her accountant and pay for her vehicle repairs. Contrary to the claims of the company, none of the "supplementary" payments were advances. They were promised to Ms. Savage as part of the agreement whereby she would work as the company's "business administrator".

As business administrator, I am satisfied that Ms. Savage was not a "manager" within the meaning of the Employment Standards Act. There was no suggestion on the evidence that she had authority to hire, fire, discipline or evaluate performance. Nor did she have executive authority. Her role was to ensure the smooth operation of the office, maintain the payroll and other related duties.

It is difficult from the evidence to ascertain Ms. Savage's normal hours of work. However, on a review of all of the testimony, it appears that Ms. Savage's normal work day was expected to be from 9:00 a.m. to 6:00 p.m. Ms. Savage testified that she

discussed the issue of overtime with Mr. Coulombe on several occasions and they ultimately arrived at an agreement whereby Ms. Savage would keep track of her hours and her overtime hours would be banked and paid out every six months at \$7.00 per hour.

Implications of the Findings in this Decision

It is my conclusion that the Director's delegate erred in his conclusion that the time-sheets submitted to him by the appellants were not genuine in that they were not kept in the course of the appellants' employment. I have also determined on the evidence the terms and conditions of employment under which the appellants worked. In order to complete the process of determining the rights of the appellants, the matter should now be referred back to the Director of Employment Standards for completion of this matter. The relatively informal process employed by the Employment Standards Officers for assessing the merits of claims of overtime will be well-suited to this dispute. I am attaching to this decision for the benefit of the Director, the relevant exhibits which represent the time-sheets of the appellants. In view of the circumstances, it would not be appropriate for the Director to refer this matter to the delegate who issued the first two Determinations.

ORDER

Pursuant to Section 115 of the Act, I order that the Determinations issued on August 26, 1997, be referred back to the Director of Employment Standards for further investigation and, if necessary, the issuance of varied Determinations.

Although I believe that it is unnecessary to make a formal order to this effect, I would ask that the Director proceed expeditiously to bring this matter to a final conclusion.

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John McConchie
Adjudicator
Employment Standards Tribunal

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