

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 -

Teresa Penner
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE No.: 2000/405

DATE OF DECISION: August 11, 2000

DECISION

OVERVIEW

This is an appeal by Teresa Penner (the “Appellant”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued by the Director of Employment Standards (the “Director”) against the Appellant on May 19, 2000. The Determination ordered the Appellant to pay to Penelope Ferguson (the “Respondent”) \$1684.26, made up of reimbursement for unauthorized deductions from her last pay cheque, overtime, vacation pay and interest. The Appellant asks the Tribunal to overrule the Determination in 4 areas where she maintains that the Determination is incorrect: overtime, application of the *Act* to the Respondent, deductions from wages and the amount already paid to the Respondent.

ANALYSIS

Overtime

The Appellant says that when she interviewed the Respondent, she explained that she herself worked shifts and didn't get overtime, so she would not be able to pay overtime to the Respondent.

The agency that the Appellant used to find the Respondent set the salary at \$750 per month, but the Respondent asked the Appellant for \$100 more per month. The Appellant and the Respondent signed an agreement saying the Appellant would pay the Respondent \$425 every other week. The Appellant also says that the agency did not tell her she would have to pay overtime.

The Respondent disputes the Appellant's version and denies that the Appellant told her there would not be any overtime pay.

The conflicting versions on this issue are not relevant. Parties cannot contract out of the *Act's* requirement to pay overtime wages. The Director found that the Respondent worked overtime and was not paid for it. The Director based this conclusion on the Respondent's records of hours worked which the Appellant did not dispute. The Appellant did not supply any records of hours worked to the Director. For this part of the appeal to succeed, the Appellant must show the Determination is incorrect and she has failed to do so.

Application of the *Act* to the Respondent

The Appellant says a lawyer told her that a sitter can not apply for overtime pay and she submits that the Respondent was a sitter and thus not eligible for overtime. The Appellant supplied no evidence to show the Respondent was a sitter. In fact, her notes, supplied by the Respondent, indicate that the Respondent was not a sitter because she had to do housework, as well as look after the children. The Director found that the Respondent was a domestic, covered by the *Act*. The Appellant has provided no evidence to show this is not the case.

Deductions from Wages

The Appellant explains that she made deductions from the Respondent's wages because the Respondent ruined or damaged some clothes. The Director correctly concluded that those deductions were prohibited by section 21 of the *Act*. The Appellant has provided no evidence to show the Determination is incorrect on this issue.

Amount Already Paid to the Respondent

The Appellant says she paid the Respondent \$1807.74, not \$1333 that the Director calculated, and she submitted a T4 form showing the amount of \$1807.74.

On this issue, the T4 slip the Appellant submitted is new evidence. However, the Tribunal does not accept new evidence that could have been given to the Director during the investigation. The Appellant does not explain why she did not give the T4 to the Director. Even if the T4 were accepted now, the Appellant does not explain the basis of the figure used in the T4, so there would be no reason to use it to replace the amount the Director calculated. The Appellant had a chance to submit records and explanations on this point to the Director, but she did not do so. She has not shown that the Determination is incorrect here.

CONCLUSION

The party who appeals must show the Determination is incorrect, for an appeal to succeed. The Appellant has failed to show any aspect of the Determination is incorrect and therefore the appeal fails.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination dated May 19, 2000 be confirmed.

Norma Edelman
Vice Chair
Employment Standards Tribunal