BC EST #D333/98

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 -

Patricia Cottingham
("Cottingham")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 97/857

DATE OF HEARING: May 22, 1998

DATE OF DECISION: July 29, 1998

DECISION

APPEARANCES

Patricia Cottingham	Appellant
Barbara Holm	Witness for Cottingham
Robert Cottingham	Witness for Cottingham

OVERVIEW

This appeal is by Patricia Cottingham pursuant to section 112 of the *Employment Standards Act* (the "*Act*") and it is against CDET and PDET Determinations of the Director of Employment Standards (the "Director"), both of which are dated October 14, 1997. In the first of the Determinations, Cottingham is found to owe Renata Steinova ("Steinova") wages, vacation pay, overtime pay and interest. In the PDET Determination, a penalty of $0.00 is imposed.

The appeal has proceeded in stages. Initially considered was the matter of whether or not Cottingham should be granted an extension of time to appeal as section 109 (1)(b) of the *Act* allows. The decision, *Patricia Cottingham*, BC EST #D030/98, allows the extension of time.

A hearing was set for May 22, 1998. That hearing proceeded in the absence of Steinova. On the morning of the hearing, the Tribunal received notice from Steinova, a fax, that she had in the previous evening left British Columbia for an indefinite period. She gave no reason other than to say she had an "unexpected personal emergency". She did say that, on the advice of legal counsel, she was not asking for postponement of the hearing but for it to proceed without her.

On hearing the appeal, it was clear that I would require both a copy of the Complaint and the employee's record of hours worked if I was to decide matters raised by Cottingham. The production of those documents was sought through the office of the Tribunal's Registrar. Steinova forwarded her record on the 28th of May. I obtained the documents in June.

ISSUES TO BE DECIDED

According to the Determination, Steinova worked for Cottingham until the 6th of June, 1997, but calculations which accompany the Determination show the last day of work as the 4th. Cottingham claims to have terminated Steinova on the 31st of March and allowed her to remain in the home as a friend. I must decide the date on which Steinova's employment was terminated.

The quantity of work is in dispute. Whether there was work after March 31, 1997 is only part of this issue: The extent of work prior to that date is also disputed. Underlying that is a question of whether or not the employee's record of hours worked is credible. The Determination relies on it completely while Cottingham complains that it is a fabrication which grossly exaggerates the amount of work. She claims that work was roughly as payroll records show.

At issue is the finding that vacation pay is owed Steinova. Cottingham claims to have provided Steinova with paid vacations which are far in excess of what is required. Steinova's Complaint is that she took no vacations and is owed 4 percent vacation pay as provided by the *Act*. The Determination is that Steinova received three weeks' paid vacation, in exchange for work while Cottingham vacationed in Fiji, but the calculations which accompany the Determination do not reflect that.

At issue is the matter of whether or not the penalty determination is in order.

A number of long distance telephone calls were made by Steinova, on the account of Cottingham, and they are a source of dispute between the women. I explained to Cottingham, at the outset of the May 22nd hearing, why the matter of what Steinova might or might not owe for use of her telephone is not something for the Tribunal to decide. She indicated that she both understood and accepted my explanation and, as such, I see no reason to address that matter further in this decision.

FACTS

Steinova started work as a nanny for Cottingham on October 2, 1996. She was hired through World Class Nannies (1991) for an 8 hour day, 22 days a month, $7 an hour or $1,232 a month, less room and board of $250.

While Steinova was employed by Cottingham, their relationship was not strictly one of employment. The two women are of similar age, share interests, and quickly developed a friendship. That led Cottingham to include Steinova in much of what she did.

It was in November, only seven weeks after beginning work, that Steinova took her three week vacation. She was paid for each of those weeks. Cottingham won a week's vacation in Fiji and took that vacation in December. The children were in Steinova's care for the length of the Fiji vacation. According to Cottingham, and her former boyfriend, C. McCoy, Cottingham only took the vacation because Steinova volunteered to take complete care of the children, as a way of encouraging her to take what was then a much needed vacation after a somewhat bitter divorce. Steinova told the delegate that her work in this period was in exchange for allowing the November vacation.

Beyond the above vacations, Steinova took short trips to Whistler and Campbell River.

There are payroll statements signed by both women, to the end of February, 1997. They set out pay, an 8 hour day and 22 days of work per month, and show the amount paid, which is in all cases $1,232 a month less room and board and the usual deductions. Cottingham accepts that work was not strictly as outlined in the pay statements, that some days were longer than others but she says that, on average, work was as set out in the payroll statements.

Cottingham would periodically require a baby sitter. Steinova could earn extra income by volunteering for the baby-sitting and she did that on occasion. Like other baby sitters, she was paid cash for that work. McCoy paid Steinova cash for baby-sitting.

In awarding pay, the Determination relies completely on the employee's record of hours worked. The record consists of two diaries, one for 1996, the other for 1997. The diaries contain a record of work, start and finish times and the total hours of work, and a record of each day's events. The two records are, however, separate from one another in that the record of work is not part of the daily record of events. And different inks are used. The record of work is in red ink, but for a few days where it is in pink, and days in May where entries in red are overwritten in black. The daily record of events is in various blue and black inks, except for four weeks beginning January, when all entries are in red. Moreover, there is almost no overlapping of the records. And where that does occur, and I can tell which overlaps the other, 13 places in all, it is the record of work that is the later entry.

Cottingham was sent a photocopy of the April, May and June sections of the 1997 diary, on being asked to respond to the Complaint. That copy of the diary is not the same as the diary as it exists today. The latter gives start and quit times, and total hours worked, for the days May 1, 2, 8, 9, 16, 17, 18, 19, 20, 22, 23, 28, 29 and 30. The photocopy has none of that. The information was added at a later date. It could not have been before the 8th of June, the photocopy contains diary entries to that point. The photocopy was taken after that. As far as I can see, the new record of work surfaces after the June Complaint.

Diary entries are sometimes in English but many are in Steinova's native Slovakian. Cottingham has had sections of the 1997 diary translated and has much to say on that basis. All of that which depends on the translation is disregarded as Cottingham does not establish the accuracy of the translation. She does show, however, that much of what she has to say on the basis of her translation was raised with the delegate. And without relying on her translation, Cottingham is able to show what appear to be a several inconsistencies in the diaries. She shows that work is claimed on days when the children were in school, and when the children were in the care of her mother. She points out that 14 hours of work are claimed on April 15 with the hours of work being 8:00 a.m. to 10 p.m. but, in English, Steinova has written "meeting, 2:00, new job" and "movie in the evening". She shows that 13 hours of work is claimed for May 7th, 9 a.m. to 10 p.m., even though Steinova writes that she attended *Phantom of the Opera* with friend, Doug Wright. And work for Cottingham is claimed when the entry is Caroline. Later diary entries make it clear that Caroline is actually Carol Ann McKinley, a subsequent employer.

Of course, Cottingham's appeal is not that the diaries overstate work in April, May and June: She claims to have terminated Steinova on the 31st of March. According to Cottingham, from that point on, Steinova was merely staying in the house as a friend who had no job to go to. I am shown a letter dated March 1, 1997. It clearly sets the 31st of March as Steinova's last day of work. However, as the Determination makes clear, Steinova denies receiving the letter, and the delegate found no evidence to the contrary.

I find evidence pointing to termination on the 31st of March. The Record of Employment ("ROE") does not prove the point of termination but it gives March 31 as the day of termination. C. McCoy, Cottingham's boyfriend in the relevant period, and a frequent visitor to the house, swears that "whatever facts are still in question, one is very clear: Ms. Steinova was informed, in writing, that her services would not be required after March 31st, 1997". He admits that he did not actually see Cottingham hand Steinova the letter, but he reports that it was often the subject of conversation. E. Green of World Class Nannies (1991) states that in late March or early April, Steinova contacted her and asked to be placed in a new job. She also says that she asked Steinova if everything was okay and was told that there was no problem, it was just that Cottingham no longer needed a full time nanny. P. Gagne, a nanny who Steinova would visit on occasion, writes to say that Steinova told her in March of 1997 that she was looking for work as she had lost her job with Cottingham. B. Cottingham, ex-husband and father of Cottingham's children, testifies that she had little work after February, no money for a nanny, and that both Cottingham and his children let it be known that Steinova was not the kids' nanny after March. I am shown a record of Cottingham's movie work. It shows almost no work after March. A neighbour, C. Collins, with a child on the same baseball team as Cottingham's boy, writes to say that Cottingham was at home and looking after the children from mid-March on, assisted by her mother. She also states that the children told her that Steinova was not their nanny anymore. B. Holm, Cottingham's mother testifies that she regularly took care of the children on Mondays, and many other days from March on.

I also find evidence pointing to termination at some later date than the 31st of March. There is the Complaint and related correspondence from Steinova. There is her application to Opti**MUM** childcare and nannies inc. showing that Steinova gave May 31 as her last day of work. D. Wright, close friend of Steinova, writes to say that Cottingham, in the course of an argument with him on the 20th of May, which led to the calling of police, by Cottingham, stated that she would not give Steinova a certain day off and that later Steinova "is my employee". Beyond that he says that as far as he knew, Steinova was employed to the end of May. The delegate reports that Carol Ann McKinley has had something to say in regard to work and termination but I have no submission from her. But L. Darling, who later became Steinova's employer, and was in May looking to interview her for the job, writes to say that Cottingham told her that Steinova was unavailable for interviews; on May 6, because "she needed (Steinova) to look after her children while she was out at a meeting"; on May 7, because Cottingham was on call for a movie shoot; and on May 8, because Steinova "had to work for her".

Cottingham's record of movie work shows 5.5 hours of work on the 7th of May but no work on the 6th or the 8th. She complains that Darling has forgotten or misunderstood what was

said. She says it was Steinova that had a meeting on the 6th. That is why she could not see Darling. And she says Steinova was not working for her on 8th but Carol Ann McKinley. Steinova has written "Caroline" in her diary on the 8th. Later entries indicate that Caroline is actually Carol Ann.

In filing her Complaint, Steinova claimed vacation pay to June 6, 1997 but wages only from March 15, 1997 to the end of April, 1997. She attached a letter to the complaint that states "I did not take any paid vacations". On being questioned by the delegate, why she was claiming wages to May but vacation pay into June, Steinova then expanded her claim for wages, to June 6, 1997, claiming an oversight "due to the emotion surrounding the situation". That is in a letter dated July 31, 1997. In the letter, Steinova states that she only worked 74 hours for Cottingham in May but "did continue to be in her sole employment". The delegate determined that Steinova in May worked a number of days for Carol Ann McKinley, and her work on the 5th and 6th of June was not for Cottingham, but McKinley.

Cottingham paid Steinova $1,232 a month to March. In March she paid a $375 as a mid-month advance. I understand that she has paid Revenue Canada what it requires. She claims that net pay on the 31st consisted of $200 in cash and $177.67 which was applied against Steinova's telephone charges. There is of course no record of the pay on the 31st.

The Penalty

The Determination is as follows:

> As Patricia Cottingham has contravened a specified provision of a Part of the *Employment Standards Act* or of a Part of the *Employment Standards Regulation*, this is a penalty in the amount of $0.00 for these contraventions.

The Determination explains that a further contravention will result in a penalty of $150.00 per employee as provided by section 29 of the *Regulation* but there is no further explanation for the decision to impose the penalty.

ANALYSIS

Cottingham was granted an extension of time to appeal, under section 109 (1)(b) of the *Act*. That was through the decision, *Patricia Cottingham*, BCEST No. D030/98. I have read that decision and concur.

A nanny is a "domestic" under the *Act*. Section 1 defines a domestic as a person who

> (a) *is employed at an employer's private residence to provide cooking, cleaning, child care or other prescribed services, and*
> (b) *resides at the employer's private residence.*

Section 14 of the *Act* is as follows:

> 14 (1) *On employing a domestic, the employer must provide the domestic with a copy of the employment contract.*
>
> (2) *The copy of the employment contract provided to the domestic must clearly state the conditions of employment, including*
> (a) *the duties the domestic is to perform,*
> (b) *the hours of work,*
> (c) *the wages, and*
> (d) *the charges for room and board.*
>
> (3) *If an employer requires a domestic to work during any pay period any hours other than those stated in the employment contract, the employer must add those hours to the hours worked during that pay period under the employment contact.*

Cottingham contravened section 14 of the *Act* in failing to provide Steinova with a copy of the required employment contract. But from what I can see, that reflects nothing more than an ignorance of the *Act*. Moreover, I am satisfied that the employee, at the point of hire, was told what hours she was expected to work, pay and the charge for room and board. Those terms were then confirmed with payroll statements.

Cottingham has not complied with section 13 of the *Employment Standards Regulation*. Again, I am satisfied, that reflects merely an ignorance of the law.

Cottingham mistakenly believed that she could freely alter the hours of work, adding hours of work here and subtracting hours of work there. That is incorrect, after 8 hours a day, overtime pay rates apply. I find that overtime hours were worked and that Cottingham failed to pay for that work at overtime rates. It is clear to me that Steinova is owed something for that work.

The Determination awards wages and overtime pay on the basis of the diaries. The delegate found no evidence that Steinova was terminated before that. She found no evidence that Steinova was served with written notice of termination and she concluded that the employee's record of hours worked is credible. The stated reasons for deciding that termination was not at the end of March, but in June, are that Steinova denied receiving the notice; that Cottingham stated that records had been taken, yet produced the notice; and that the ROE on its own proved nothing, it being executed in June. That does not explain to me, why Steinova's version of events is accepted over that of Cottingham. The delegate sets up a straw man and knocks it down, the ROE. And the delegate seizes on an apparent inconsistency on the part of the employer when it is the employee who is unexplainably inconsistent.

Steinova's account of matters is fraught with inconsistencies. The wage claim is first to the end of April, then it is to the 6th of June. Steinova at the outset was claiming to have taken no vacation. She claimed that Cottingham was her sole employer in May. Yet the delegate established that Steinova was working for McKinley in May. She found that Steinova was paid for a 3 week vacation taken in November, 1996. And the evidence before her was that Steinova could not have worked for Cottingham on the 5th and 6th of June, she was working for McKinley on those days. Moreover, diary entries are inconsistent with one another, and Cottingham, on the basis of her translation, was suggesting that there were many more serious inconsistencies in the diaries. It all pointed to an employee who has no clear idea of what was performed in the way of work.

Steinova explains that her initial claim, for wages to the end of April, was an oversight, a mistake due to emotional upset. My experience leads me to view that as highly unlikely.

As matters are presented to me, it is clear that Steinova modified her record of work for the purposes of her Complaint. Work in May suddenly appears. That part of the diary is clearly not a contemporaneous record of work in May. Nothing else establishes that other sections of the diary are of a contemporaneous nature. What evidence there is on that is to the contrary, even though not conclusive. But it all casts doubt on the accuracy of the record as a whole. When I consider that and the above noted inconsistencies, I find myself unable to accept the diary record as being a reasonably accurate account of work.

When I consider the evidence concerning termination that is before me, I am led to the conclusion that Steinova was terminated on the 31st of March. The evidence before me is that Cottingham had almost no work at that time and that she could not afford a nanny. The conditions demanded that she terminated the nanny and statements by McCoy, Gagne, Green, and the ex-husband lead me to conclude that she carried out the termination. They give first hand accounts and all are now at what is at least arm's length from the appellant. The Wright and Darling letters are to the contrary but there is clearly an unpleasantness between Cottingham and Wright, and a relationship between Steinova and Wright. That leads me to give his statements far less weight. Darling is removed from the protagonists and gives a first hand account of matters but I find that she is incorrect in respect to the facts.

The best record of work is the wage statements so far as I can see. The employee signed the statements. There is no evidence that the employee was at all unhappy with her work and her pay prior to March. On filling out the Complaint, Steinova claimed wages only after the 15th of March.

Steinova was paid $1,232 a month to March, and received a mid-month advance of $375 in March leaving net pay of $377.67 for that month. Cottingham says that Steinova accepted $200 in cash with the rest going towards her telephone bills. But there is simply no proof that the moneys were paid. In the absence of that proof, I find that Steinova has not been paid the moneys and is still owed net wages for the month of March of $377.67.

I have found that on some days work was beyond 8 hours. In the absence of a record of those overtime hours, yet considering the practice of adding and subtracting hours of work, I find that overtime was worked on at least a third of the days worked, and that, on average, 2 hours of overtime was worked on those days. A total of 132 days were worked according to the payroll statements. The overtime premium is $3.50 an hour. I find that $308 in overtime pay has yet to be paid [(44 days x 2) x $3.50 = $308.00].

On the matter of vacation, I accept the delegate's finding, namely, that Steinova received 3 weeks' paid vacation in return for services provided while Cottingham vacationed in Fiji. Steinova performed extensive work in that week. Pay for that, as set out by the *Act*, would far surpass the vacation moneys paid to Steinova over her 3 week trip but, then, she would not have received her three week vacation. The arrangement was mutually beneficial. Yet as one was in exchange for the other, it follows that vacation pay remains to be paid. I find that Steinova is owed 4 percent of earnings of $7,700 ($7,392 plus overtime of $308). That is another $308.00. In reaching this conclusion, I should say that I recognise that Steinova had days off, for travel to Whistler and Campbell River, but find that that was just part of swapping hours of work here and there.

In summary, I find that Steinova is owed net pay of $377.67 for the month of March. I also find that she is owed overtime pay and vacation pay of $616.00. To that must be added interest. I leave the interest calculation to the Director.

The Penalty

Under sections 98 (1) and (2) of the *Act*, the Director may impose a penalty where the Director is satisfied that a person or corporation has contravened a requirement of the *Act* or the regulations. Section 98 is as follows:

> 98 (1) *If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director* ***may*** *impose a penalty on the person in accordance with the prescribed schedule of penalties.*
>
> (2) *If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation*

> *who authorizes, permits or acquiesces in the contravention is also liable to the penalty.* (my emphasis)

Section 29 of the *Employment Standards Regulation* provides for a penalty for contravening a 'specified provision' of the *Act* or *Regulation*. The penalties may be from $0.00 to $500 multiplied by the number of employees affected by the contravention. The exact amount depends on the number of employees and previous contraventions.

Section 81(1)(a) of the *Act* requires that a person receive a Determination that includes the reasons for the determination. That section of the *Act* is as follows:

> 81 (1) *On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:*
>
> *(a) the reasons for the determination;*

The *Act* clearly requires statement of the reason(s) for a Determination which imposes a penalty. Moreover, as is found in *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BCEST No. D374/97, the need for fairness also demands a clear statement of reasons for the penalty given that the power to impose penalties is discretionary. In the absence of that, the person or corporation, against which the penalty is imposed, simply has no way of knowing the case against it [*Williams Security Services Ltd.*, BCEST No. D467/97].

Even though the Determination against Cottingham imposes a penalty of $0.00, it is a Determination which may prove to have consequences. As it fails to explain why the penalty is imposed, it is cancelled. It is simply not adequate to state that a person has contravened a specific provision of the *Act* or *Regulation* [*Fairfax Enterprises Limited*, BCEST No. D048/98]. There must be an explanation of why the discretion to impose a penalty is being exercised in the particular case.

ORDER

I order, pursuant to section 115 of the *Act*, that the CDET Determination dated October 14, 1997 be varied. Steinova is owed $377.67 in net wages and interest on that. And she is owed $616.00 gross wages in the form of overtime and vacation pay, plus interest as provided by Section 88 of the *Act.*

I order, pursuant to section 115 of the *Act*, that the PDET Determination, dated October 14, 1997, be cancelled.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal