Employment Standards TRIBUNAL

An appeal

- by -

Atheneon Travel Service Ltd.
("Atheneon")

- 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: Lorne D. Collingwood

FILE No.: 2002/191

DATE OF HEARING: June 19, 2002

DATE OF DECISION: August 7, 2002

DECISION

APPEARANCES:

B. J. Promislow	Counsel for Atheneon
Andryana Sofocleous	Owner of the business
Iryna Sochynska	On her own behalf

OVERVIEW

Atheneon Travel Service Ltd. (I will use "Atheneon" and "the Appellant" for ease of reference.) has appealed, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on March 20, 2002. The Determination is that Iryna Sochynska was Atheneon's employee, not an independent contractor, and that she is, as such, covered by the Act. The Determination goes on to order Atheneon to pay Sochynska the minimum wage, and other wages, a total of $6,851.68, vacation pay and interest included.

The delegate's calculations primarily rest on three decisions. The first of the decisions is that the employment ran from March 13, 2000 to June 26, 2001. The second is that it is agreed that Sochynska worked 8 hours a day, Monday through Friday, and 6 hours on Saturdays. The third is that the Saturday work continued until December 23, 2000.

Atheneon has decided to accept the decision that Sochynska is an employee under the *Act*. The appeal is that the delegate is wrong on both days worked and hours worked. According to the Appellant, it is not until the 3rd of April that the employee started work and she stopped working Saturdays in September, 2000, not December, 2000. Atheneon is also claiming that the delegate should have deducted, each day, one hour for lunch and at least another two hours for reason of the many personal telephone calls that were made by the employee. Finally, Atheneon claims that the employee should not be awarded pay for holidays that are not statutory holidays, or time spent with a realtor or time spent training.

An oral hearing was conducted in this case. Ms. Sochynska required an interpreter and one was provided.

I refused to hear from two of the employee's witnesses. I had gone to great lengths to explain that it is the policy of the tribunal to exclude witnesses and I specifically warned everyone that persons in the hearing were not to speak to any of the excluded witnesses until such time as I was finished with the witness. Despite that warning, comprised of two separate warnings, I found the employee's husband deep in conversation with the witnesses at a point where he was in a position to inform the witnesses of testimony by the employer's witnesses.

I have found that there is no agreement on hours worked, only the hours of work. I have found that there is not reason to believe that there was any Saturday work after September but that there is not reason to change the Determination except in that one respect. Neither the employer, nor the employee has kept a record of work in this case. There is not evidence to support a conclusion that there should be a deduction for lunch. The employee is entitled to be paid for training. The Determination is based on the hours of work information and I am satisfied that it is reasonable to do so, there being no better record on which to

rely. It is shown that the employee took a certain amount of time off work but it does not follow that the Determination should be changed for that reason. The employee worked late on occasion and the delegate has not taken any of that overtime work into account.

PRELIMINARY ISSUE

It is the policy of the Tribunal to exclude witnesses. The parties and the witnesses were clearly warned, at the outset of the hearing, that persons in the hearing were not to speak to any of the witnesses that had been excluded until I had finished hearing from them. But on taking a break, the very first break, both Sofocleous and Sochynska were caught speaking to their witnesses, all of which were at that point excluded. On reconvening the hearing, I again took time to explain, this time rather sternly, that the witnesses were off limits to persons sitting in on the hearing.

On taking a subsequent break, I caught Volodymyr Zolotarov, Sochynska's husband, conversing with Larissa Makhotkina and Irina Pavlenko. As Zolotarov was present for all of my warnings about speaking to excluded witnesses and he had just overheard testimony by the employer's witnesses, I decided that I should not hear from either Makhotkina or Pavlenko.

THE ISSUES

The appeal is that Sochynska did not work as set out in the Determination. It is said that she started work on the 3rd of April, 2000, not March 13, 2000. It is said that she took a one hour lunch break each day. It is said that she did not work Saturdays after September 23, 2000. It is said that she is not entitled to be paid for taking a course (what I will call the "Galileo training"), time spent viewing apartments, holidays except for statutory holidays, and time spent on personal telephone calls.

What I must ultimately decide is whether it is or is not shown by the Appellant that the Determination ought to be cancelled or varied or a matter(s) referred back to the Director for reason of an error or errors in fact or law.

FACTS

The employer operates as a travel agency and tour operator. It is also a travel wholesaler in that it sells to travel agents. The employer specialises in the promotion of selling travel to Greece and Russia and, as such, it requires a person(s) that can speak Russian as well as English.

Sochynska speaks Russian and she has basic conversational English skills. On the 11th of March, the employer offered Sochynska a job as a travel agent. It was understood that she would act as its Russian translator.

The delegate has decided that the first day of regular work is as the employee claims, namely, the 13th of March, 2000. That is appealed. The appeal is that it was not until Monday, the 3rd of April, that the employee started work. I find that there is not evidence to show, clearly, that the delegate has erred in deciding that there was work from the 13th of March to and including the 3rd of April. Indeed, as matters are presented to me, I am led to believe that Sochynska may have at least received a kind of on-the-job training and that there was an orientation period. Andryana Sofocleous does agree that Sochynska was

allowed to practise her computer skills in the employer's office in this period. As the employee describes what she did in March, it was probation without pay.

I find that it was April 1st, not April 3rd, when Sochynska became a full-fledged employee. That is the date used in Mrs. Sofocleous' written submission. The initial agreement on terms and conditions also refers to the 1st.

The Determination is that both "parties agree that Sochynska worked a total of 8 hours per day, Monday through Friday, and 6 hours on Saturday." I can find no evidence of any such agreement. There is merely agreement on the hours of work and other terms and conditions of the employment.

The employer claims that the employee did not work as set out in the Determination and that she was free to come and go as she pleased. I find that it was in fact a condition of employment that the employee be at work from 10:00 a.m. to 6:00 p.m., Mondays through Fridays, and that she be at work from 10:00 a.m. to 4:00 p.m. on Saturdays. It is a condition of the employment that the employer was in fact to come in early on each day of work and that, in the event she was late, she was to make up for being late at the end of her shift. It is also a condition of employment that the employee finish serving clients before leaving work for the day. And, I find that Sochynska did in fact stay late on occasion for the purpose of attending to the needs of customers. The parties agree on this point. It is just that there is not any record of this extra work and, from what I can see, no way to establish the extent of it.

There is no provision for any lunch break in the written terms and conditions of the employment. It is the employer's claim that the employee took a one hour lunch break each and every day. It is the employee's claim that she ate her lunch at her desk as time permitted. I find that there are not records to show, nor clear reason to believe, that the employee was free to leave work at lunch, for an hour or even half an hour.

It was common for Sochynska to make personal telephone calls during office hours. The employer claims that Sochynska spent at least two hours a day making personal phone calls each and every workday and that, on some days, she spent as much as three hours on the telephone talking to family and friends. As Mrs. Sofocleous describes the employee's personal use of the telephone, it was real problem because the employee's phone calls took her away from her work. I am not prepared to accept that the phone calls were any great problem for the employer. Sochynska was given a pay raise on the 1st of September, 2000 and there is no record of her having been warned or disciplined about her use of the telephone.

No one has kept a record of hours worked in this case, not the employer, nor the employee.

It is claimed by the employer that the office is closed on Easter Monday and Boxing Day. While there are not records to show that these days were not worked, I am inclined to believe that Atheneon is consistently closed on these two days and that it is something that the employer would remember. The employee claims only, but does not show me, that she was at a course on one Easter Monday.

The employer claims that Sochynska took 10 hours off of work so that she could view real estate. It is the testimony of the realtor that Sochynska went to see apartments with him on three different occasions, all in July, 2000, and that, altogether, she spent about 10 hours viewing apartments. The realtor is a friend of Mr. and Mrs. Sofocleous. The employee argues that the realtor is wrong on his dates and she claims that she went to see the apartments early in the morning, before work.

Sochynska was expected to take Galileo training. The Galileo training was training in the use of computer software used by the employer and it was in Richmond.

The employee has claimed all along that she worked every Saturday to and including December 23, 2000. The employer claimed, at the investigative stage, that the employee did not work any Saturdays after September 23, 2000. The delegate has decided that Sochynska worked Saturdays to and including December 23, 2000 but I find that there is not evidence to support such a conclusion. The underlying reasoning for the delegate's decision is that it follows from the fact that the employer does not produce a record of work that the employee must have worked Saturdays to December 23. It does not. As matters are presented to me, I find that the employee did not work any Saturdays after October 1, 2000.

The employee has produced two letters. One is an April 21, 2002 letter from Vladimir Boulankov. He appears to indicate that he picked Sochynska up at Atheneon as she left work at about 4 p.m. on Saturday, the 6th of October, and that he also met with her on Saturday, December 16, 2000, in Atheneon's office. The second letter is from Eve Mcgrath. She appears to indicate that she took Sochynska's daughter to Karate tournaments on Saturday, November 18 and, Saturday, November 25 and that Sochynska had told her that she could not attend the tournaments because she had to work at Atheneon. I have not heard from these people directly and under oath.

The employer produces Kleanthis Korkodilos. Korkodilos is a piano tuner. He is obviously a friend of Mr. and Mrs Sofocleous. They allow him to use their office free of charge. It is his testimony, however, that he is at the office about 3 out of every 4 Saturdays in the fall as that is the busiest time of the year for him. It is Mr. Korkodilos' memory that Mr. and Mrs. Sofocleous were in September of the year 2000 fretting that Sochynska was refusing to work any more Saturdays after September. He tells me, moreover, that the employee was not in Atheneon's office on any Saturday in October or thereafter.

ANALYSIS

The term "employee" includes

> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
>
> (c) a person being trained by an employer for the employer's business, … .

An employee is entitled to be paid at least the minimum wage for his or her work. The Act defines the term "work" as follows:

> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

As matters have been presented to me, it is clear that the employer expected Sochynska to take the Galileo training and that she is entitled to be paid for that training. It is unimportant that the training was in Richmond.

As noted above, I have found that there is not evidence to show, clearly, that the delegate has erred in deciding that there was work from the 13th of March to and including the 3rd of April. Indeed, as matters are presented to me, I am led to believe that Sochynska received a form of on-the-job training and job orientation. I cannot rule out the possibility that there was other work. I will not vary the delegate's decision on work in March.

The employee was advised that she was not going to paid for whatever it was that she did in March. An employee may not, however, accept less that what he or she is entitled to under the *Act*. Any attempt to contract out of the *Act* is null and void.

> 4 The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.
>
> Sections 43, 49, 61 and 69 have no application in this case.

Employers are expected to keep a record of hours worked.

> 28 (1) For each employee, an employer must keep records of the following information:
>
> (a) the employee's name, date of birth, occupation, telephone number and residential address;
>
> (b) the date employment began;
>
> (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
>
> (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
>
> (e) the benefits paid to the employee by the employer;
>
> (f) the employee's gross and net wages for each pay period;
>
> (g) each deduction made from the employee's wages and the reason for it;
>
> (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
>
> (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
>
> (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.
>
> (2) Payroll records must
>
> (a) be in English,
>
> (b) be kept at the employer's principal place of business in British Columbia, and
>
> (c) be retained by the employer for 7 years after the employment terminates.

The employer did not realise that Sochynska was its employee in this case and so it did not keep proper records. The employee is entitled to be paid as the *Act* requires, however.

The Tribunal has said that where an employer fails to keep proper records, the Director may rely on records kept by the employee, so long as there is reason to believe that the records are reliable, or any other record that appears to indicate the extent of work.

In this case, the employee did not keep a record of her work. The best evidence of work is the agreement(s) on terms and conditions. As noted above, it is a condition of Sochynska's employment that she work from 10:00 a.m. to 6:00 p.m., Mondays through Fridays, and 10:00 a.m. to 4:00 p.m. on Saturdays. It is also a condition of the employment that the employee came in early and that she not leave until finishing with the last of her customers.

The Determination is consistent with the agreement on terms and conditions and I can see no reason to vary the Determination except in one respect, the Saturday work. The delegate's decision on Saturday work is not supported by evidence. And it cannot be logically concluded from an absence of records that the employee did work every Saturday to December 23.

Aside from the evidence of the two protagonists, I have in regard to the matter of Saturday work only two letters which appear to support the employee's position on the one hand, and testimony by Mr. Korkodilos on the other. Applying *Farnya v. Chorny* (a decision of the courts, *Farnya v. Chorny (1952) 2 D.L.R. 354, B.C.C.A.*), I have decided that I should believe Mr. Korkodilos. I have had the benefit of hearing from him under oath. And while he obviously has a close relationship with the owners of the employer, I find that he is both clear and forthright, he was in a position to know of what he has to say, and he does not parrot the employer's position. It is not the 23rd of September, the employer's position, of which he speaks but only the months in which he does and does not remember seeing the employee in the office on Saturdays. Specifically, he tells me that he did not see the employee at work on any Saturday in October or thereafter. His story is in harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions.

I am, for reason of the above, ordering that the Determination be varied so that it reflects Saturday work to October 1, 2000, not December 23, 2000.

I have found that there is not evidence to show that the employee was given a proper lunch break.

The appeal is that the employee is not at work while she was on the phone. I am not prepared to accept that her phone calls were at the expense of work as there is not evidence to support such a conclusion. Sochynska's job is such that she was required to wait for customers. She is at work even when she has really nothing to do other than to wait for customers. And in my view, the employee can be waiting for customers even though she is on the telephone.

I have found that the employee did view apartments during work hours and that the employer's office is closed on Easter Monday and Boxing Day. I does not follow from that, however, that I should change the Determination so that it reflects that. As another of the Tribunal's Adjudicators has noted, in the decision *Mykonos Taverna operating as the Achillion Restaurant*, BC EST # D576/98:

After the Director has determined that a person has lost wages because of a contravention of the Act, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving "efficient" resolution of

disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged on its facts, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the Act (see *Shelley Fitzpatrick operating as Dockers's Pub and Grill*, BC EST # D511/980. (pages 6-7)

In this case, I am inclined to believe that the employee took at least some time off work for the purpose of viewing real estate and that it is unlikely that she was at work at Atheneon each and every Boxing Day and Easter Monday. But I have, on the other hand, found that the employee was required to report for work early and that she did in fact stay late on occasion and work a certain amount of overtime which has not been considered by the delegate. As there is no way to calculate what should have been paid for that overtime work, it follows that if I were take into account time spent viewing apartments and deduct for Boxing Day and Easter Monday that I might then award less than the amount that Sochynska would be paid if I had perfect knowledge, a complete, accurate record of all hours worked. I cannot rule out, moreover, that the employee did take training on an Easter Monday. It is for these reasons that I find that I should only vary the Determination in respect to the Saturday work and that I should not deduct for time spent viewing apartments or take into consideration what is awarded in the way of holiday pay.

In summary, I have found that there is not evidence to support a conclusion that the employee worked any Saturdays after October 1, 2000 but that there is not reason to vary the Determination in any other respect. The matter of recalculating wages and interest is referred back to the Director.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination which is against Atheneon Travel Service Ltd., in favour of Iryna Sochynska, and dated March 20, 2002, be varied as set out above.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal