

**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 -

Dan Nott  
("Nott" or "the "Employer") and  
Ideal Villocillo  
("Villocillo" or "the Employee")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Michelle Alman

**FILE NOS.:** 2000/239 and 2000/487

**DATE OF HEARING:** September 11, 2000

**DATE OF DECISION:** September 25, 2000

## DECISION

### APPEARANCES

for Ideal Villocillo: Helene Walford, Articled Student

### OVERVIEW

This decision addresses two appeals filed pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”). The appeals are brought by Dan Nott (“Nott” or “the Employer”) and by Ideal Villocillo (“Villocillo” or “the Employee”) from a Determination issued March 10, 2000 by a delegate of the Director of Employment Standards (“the Director”). The Determination concluded that Nott had contravened sections 40(1), (2), and (4); 45; and 58(1) and (3) of the *Act* by failing to pay Villocillo overtime wages, statutory holiday pay and vacation pay; and section 18(2) of the *Act* by failing to pay Villocillo the amounts owed to her within the required period of time after the end of her employment.

Pursuant to section 79(3) of the *Act*, the Director ordered Nott to cease contravening the *Act* and pay a total of \$3,816.13 (\$3,590.73 in wages plus \$225.40 in interest owed to March 10, 2000) to Villocillo. As an attachment to the Determination, a second delegate of the Director, pursuant to section 98 of the *Act* and section 29 of the *Regulation*, also issued a \$0.00 penalty against Nott for his contraventions of the *Act*.

Nott appeals, with the assistance of his mother, Barbara Laferre (“Laferre”), from the Determination, alleging that Villocillo was paid all amounts owed to her or that no overtime was worked, and that Villocillo’s claim is vindictive. Villocillo appeals the amount of the Determination, alleging that the Director’s delegate erroneously counted as additions to regular wages two payments that were, in fact, only late-paid regular wage payments.

Despite delivery of the hearing notice to both Nott and Laferre, neither attended the hearing. As a consequence, I find that Nott has failed to prove the allegations in his appeal and, therefore, I dismiss his appeal. This decision hereafter addresses only the issue raised on appeal by Villocillo.

### ISSUE

The issue to be decided is whether the Director’s delegate erred in his calculation of the amount Villocillo is owed for overtime wages, statutory holiday pay and vacation pay.

### THE FACTS AND ANALYSIS

On or about March 21, 1998 Nott hired Villocillo through a domestics personnel services agency to work as a nanny in his home following his wife’s death in early March, 1998. Nott has three small children, then approximately 15 months, three, and six years of age. Nott apparently was then self-employed as a roofer and rented a large, four-bedroom home in Vancouver.

Villocillo had come to Canada in 1996 under Immigration Canada's nanny/live-in caregiver immigration program. Pursuant to that program, Villocillo was required to work for a certain length of time as a domestic before she could apply to become a landed immigrant. Her employment with Nott was part of the necessary period of live-in caregiver employment for her eventual qualification to apply for landing. Villocillo testified that she left her employment with Nott shortly before the end of her work authorization's validity because he had finally told her he was not going to renew his employment contract with her. Without a live-in caregiver position, Villocillo could not renew her work authorization and she would have been required to leave Canada.

On March 24, 1998 Nott and Villocillo signed an employment contract prepared by the domestic personnel services agency. In the contract Nott agreed to employ Villocillo for 24 months and to pay her \$1,000 net per month in two bi-weekly payments. Under the contract Villocillo was to work 40 hours per week during the five weekdays for eight hours per day. She was to receive the minimum wage, \$7.15 per hour, have the weekends off, and be paid for 9 statutory holidays. She was also to receive 4% of her annual wages for vacation pay and have her medical plan premiums paid by the Employer.

Villocillo gave evidence at the hearing to the effect that she was paid \$1,000 net only once a month, and that she often worked more than eight hours in a day and 40 hours in a week. She testified that she never received more than \$16.00 for all of the overtime hours she worked, and that she did not receive any breaks from her work during the day or night unless the Employer was home. She stated that she had never received any vacation pay at any time, despite an entry on her Record of Employment. Villocillo provided documentary evidence to show that she, herself, created the required wage records indicating her receipt of her contractually agreed upon gross wages at straight time pay, and statutory deductions. Some of her records the Employer signed. Villocillo's records also showed that during her approximate year of employment, the Employer delivered her pay to her around the 15<sup>th</sup> of each month, with variances of several days both prior to and after that monthly date.

Villocillo's appeal cites two calculation errors in the Determination. The first is an over-crediting for wages the Director's delegate presumed she received on October 15, 1998. Villocillo's records indicate that she received her contractual straight time hours' wages for the payperiod September 16, 1998 to October 15, 1998 by Nott's personal cheque delivered on October 19, 1998. Her records do not indicate receipt of an additional cheque for \$1,000 on that date for any other hours worked. Villocillo denied receipt of payment on October 15, 1998 for her contractual hours' wages for the September 16, 1998 to October 15, 1998 payperiod. Villocillo could not explain why the Director's delegate had assumed payment to her on October 15, 1998 of her contractual monthly wages and misattributed the \$1,000 October 19, 1998 payment as being received in addition to her contractual wages for the payperiod September 16, 1998 to October 15, 1998. She testified that she had provided all of her records to the Director's delegate, and that she had told him about her long hours worked in addition to her contractual hours. Villocillo also stated that her main concern after her departure from Nott's employment was with finding a new job so as to protect her immigration status. She testified that her preoccupation with her employment search and immigration worries kept her from examining closely her copy of the January 20, 2000 letter to the Employer reporting the preliminary wage claim findings of the Director's delegate. Once the Determination issued and the Employer filed his appeal, Villocillo sought legal representation and promptly appealed the

Determination's calculations when her representative discovered the above-noted problem with the wage payment schedule to the Determination.

Villocillo's appeal also cites as an error in the Determination the attribution to overtime wages of the \$1,000 she received on December 1, 1998. She testified that she received on December 1, 1998 payment of \$1,016, which represented \$1,000 net to cover again her contractual straight time wages for the period October 16, 1998 to November 15, 1998, and \$16 for extra evening work watching the children. At the hearing Villocillo provided a copy of the Employer's November 18, 1998 cheque for the October 16, 1998 to November 15, 1998 payperiod with a bank stamp notation that the account had insufficient funds to clear the cheque. She also provided a copy of her wage records indicating that the Employer provided her on December 1, 1998 with a cheque for \$1,016 to replace the "bounced" \$1,000 paycheque for October 16, 1998 to November 15, 1998 and \$16 additional babysitting payment. Again, Villocillo could not explain why the Director's delegate had misunderstood her explanation as to what amounts she had received in payment for her contractual straight time hours of work, and what amounts of overtime wages she had received. Her wage records were consistent, however, and she was able to provide documentary proof that the Employer's original pay cheque for the October 16, 1998 to November 15, 1998 payperiod had been rejected on deposit.

I find that where Villocillo has provided sworn evidence that was in contradiction to the unsworn assertions of Nott in his appeal submissions, I prefer Villocillo's sworn testimony and the documents entered into evidence at the hearing. This is properly within my discretion to do: *H.B. Kayson Ltd. (c.o.b. Guru Lucky Sweets)*, BC EST #D051/98. I also find that where that sworn testimony and documentary evidence supports Villocillo's claims that there were factual errors in the Determination, I accept that evidence as true. Villocillo's counsel provided a corrected wage receipt schedule and calculations for the wage amount properly owing to Villocillo. Those calculations indicate that the total amount of overtime wages, statutory holiday pay and vacation pay owing is \$4,567.38, once the total amount of gross wages received has been corrected and the vacation pay recalculated (lowered). Interest is owed on that amount pursuant to section 88 of the *Act*.

## **ORDER**

Pursuant to section 115 of the *Act*, I order that Nott's appeal is dismissed and that the Determination is varied to increase the amount of the wages owing to be \$4,567.38, plus interest calculated as per the provisions of section 88 of the *Act*.

***Michelle Alman***

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**Adjudicator  
Employment Standards Tribunal**