Employment Standards TRIBUNAL

An appeal

- by -

Ashley Home Care Cleaning Centre Ltd.
(the “Employer” or “Ashley”)

- 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: Ib S. Petersen

FILE No.: 2002/394

DATE OF DECISION: September 16, 2002

DECISION

OVERVIEW

This decision arises out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director issued on July 19, 2001. The Determination concluded that Ms. Wendy Rondeau ("Rondeau") and Ms. Susan Perrault ("Perrault") were owed $4,652.07 by the Employer on account wages (Sections 18(2), 40(1) and 58(3)).

This matter originally came before me at a hearing held at the Tribunal's offices on October 15 and November 8, 2001. A Decision was issued on January 24, 2002 referring certain calculation issues back to the Director (BCEST #D044/02):

1. the calculation of amounts owed, if any, for time actually worked, including travel time; and

2. the calculation of the amount Ms. Perrault is entitled to on the basis that she is entitled to two hour's pay per week for the "extra" work done.

The Delegate issued his report on April 11, 2002, dealing with the second issue. The Delegate, if would appear, did not accept the first issue and, essentially, appeared to decline to deal with it. As a result, the matter came before me again, and I--again--directed the Director to calculate wages owed as required under the original decision (BCEST #D280/02).

The Director has now completed his calculations. In a report, the revised calculations shows that the amounts owed to Ms. Perrault and Ms. Rondeau were $2,011.47 and $194.85, respectively. In his report, the Delegate notes:

> "The calculations were performed as follows:
>
> ....All hours worked including up to maximum .5 hours paid between jobs. All hours were calculated using employer records and took into account any revisions set out in the schedules. For example some days the allotted time to finish the job was 2 hours and the actual time worked was 1.5 hours. If it was noted on the schedule, only the actual time worked was calculated. In addition, Susan Perrault was awarded 2 hours per week for cleaning and restocking.
>
> It must be noted that the records at time were very unclear and inconsistent. The delegate completed calculations on the balance of probabilities where the amount of hours worked was not obvious."

For the purposes of this decision, the report is the Determination.

ISSUE(S)

Did the Delegate err in his calculations?

ARGUMENTS

Ms. Church, for the Employer, says that the calculations do not make sense. She says that the Delegate has come up with different results in his calculations and that he erred. She argues that the Delegate came up with the amount of $622.87 initially, now the amount is $194.85. She asks "what has changed"? She asks the same question with respect to Ms. Perrault where the amount changed from $4,029.20 to now $2,011.47. Ms. Church's position is that she has been more than fair with her employees and wants the Determination cancelled. Ms. Church also disagrees with my earlier decision to award 2 hour's pay per week for "extra" work.

Ms. Perrault accepts the Delegate's revised calculations.

FACTS AND ANALYSIS

The Employer appeals the determination. The Employer, as the appellant, has the burden to persuade me that the Determination is wrong. For the reasons that follow, I am not persuaded that the Employer has succeeded in meeting that burden and I dismiss the appeal of the Determination.

Let me start by saying that I am not going to revisit my earlier conclusion with respect to the 2 hour's pay per week for Ms. Perrault. If the Employer disagrees, it may apply for reconsideration under the *Act*.

Turning now to the issues of wages owed, other than for the two hours per week to Ms. Perrault, I am not persuaded that the Delegate erred.

First, the records relied upon by the Employer are, to say the least, as noted by the Delegate, "very unclear and inconsistent." The records are far from transparent and explains, in large measure, the difficulties faced by the Delegate in his assessment of wages owed. For that, the Employer bears the responsibility. The *Act* recording requirements are quite clear. An Employer is required to keep records of "the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis" (Section 28(1)(d)). If the Employer had kept the records required, it is doubtful this matter would have taken the time it has.

Second, as noted in my initial decision, travel time, is work time. The problem, as I see it, is that the Employer continues to disagree with that concept. As mentioned above, I do not intend to revisit my earlier decision, that is a matter for reconsideration. It stated:

> "Third, and this is perhaps where the real difference is between the parties, I accept that where the time between jobs is of short duration, the Employees should be given credit for that time as if were "worked". Such time is likely to include travel time from one job to the next, getting ready for the next job, delays and other factors that invariably "sneak" into any schedule, etc. Church's own evidence was that she always scheduled .5 hours between jobs. In other words, this is at the Employer's discretion. As noted above, "[a]n employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence". The .5 hours between jobs is effectively time the Employees are "on call". Common sense indicates that there is little meaningful they can do apart from waiting for the next job to start, and I accept that they are not on their "own time". (Amounts already paid on account of the .5 travel time must be considered in this context.) I emphasize that there is, in my opinion, generally nothing magic about the .5 hour. On the facts of this case, this is the time designated by the

> Employer. The Employer could organize its affairs to minimize this time and, hence, reduce its labour costs.
>
> Fourth, in the circumstances of this case, where the time between jobs exceed the .5 hour, I am of the opinion that the Employees are not entitled to be paid for that time. In my view, the Employees are on their own, and not subject to the Employer's control, and can meaningfully do what they wish to do. There is nothing before me to indicate that the employees were required to be available, or on call at a location designated by the Employer...."

By way of example, the Employer points to April 12, 2000. She claims that the delegate awarded Ms. Perrault 9 hours (January 11, 2001 calculations). Ms. Church says she paid for 7.5 hours, including .5 travel time--*i.e.*, the employee worked cleaning houses for 7 hours. The calculations before me (in the Determination) indicates that the number of hours awarded by the Delegate was 8.50. On the day in question, the employee attended the houses of four customers, the first two, in the morning, for 1.5 hour each, the last two in the afternoon, for 2 hours each. In short, the employee did actual house cleaning work for 7 hours. According to the Employer's "master copy" of the weekly schedule (which forms the basis for the calculations), the work day started at 8:00 a.m. with the first client. Ms. Church explains that the day, or the first client, actually started at 9:00. According to the "master copy," the next client, where work started at 11:00 (for 1.5 hours), ending at 12:30 p.m. The next client started at 1:00 p.m. for two hours until 3:00 p.m., and the last client started at 3:30 p.m. for two hours until 5:30 p.m. It can readily be ascertained that the time between clients on that day amounts to 1.5 hours. Thus the work day, on the Delegate's calculations, is 8.5 hours (7 hours cleaning, plus .5 travel time as per agreement, plus 1.5 hours travel between jobs, less .5 hours for lunch). Overall, in my view, his calculation is consistent with my initial decision.

The Employer also refers to the following day, April 13, 2000. The Delegate awarded 6.5 hours to Ms. Perrault. According to the preliminary "employee schedule," on this day the first client started at 9:00 a.m. (for 1.5 hours), the next at 11:00 a.m. (1.5 hours), the third at 1:00 p.m. (1.5 hours), and the last at 3:00 p.m. (1.5 hours). The total number of hours cleaning, therefore, is 6. Based on her "master copy," Ms. Church appears to take issue with the second client's start time and says that the third client cancelled the appointment. According to her, the total hours cleaning was only 4.5 hours, plus .5 for travel as per agreement. The Delegate, on this particular day, it would appear, did not award any travel time over and above the .5 agreed. Again, while this, at first blush, would seem inconsistent with the principle set out in my initial decision, it likely reflects the difficulty in establishing the hours worked because of the inconsistency of the documentation available to the Delegate and, indeed, to the Tribunal.

The Appellant asks why the amounts are different (lower) in the Determination, i.e., compared with the initial calculations (which were referred back). The reason, it would appear, is that the Delegate has taken heed of my directions and reduced the award. For that, the Delegate is not to be criticized. In the circumstances, the Delegate had a difficult task before him.

I would also like to refer the parties to the following quote from the penultimate paragraph of the second decision (BCEST #D280/02):

> "....From the facts of this case, however, and despite the Employer's protestations, it is clear that the employees are owed wages .... They were only paid .5 hours travel time per day plus the time spent cleaning. I note that the Employer has the responsibility to keep proper records and much of the confusion in this case could have been avoided had that been done."

Against that backdrop, The Employer's continued protestations that it owes "nothing" (or next to nothing), are not particularly persuasive.

At the outset of this part of the decision, I referred to the burden on appeal. Despite having been through a two day hearing in October and November 2001, and the Delegate's investigation both before and after that, the arguments made by Ms. Church on behalf of the Employer are not readily transparent, the word "confusing" comes to mind. The documentation is "very unclear and inconsistent." It is not for me, as the Adjudicator, to attempt to make the case for either of the parties. That responsibility rests ultimately with the parties. It is for the Appellant to show on the balance of probabilities that the Determination is wrong and, in my opinion, she has not met that burden. In the result, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated July 19, 2001, be varied to show Ashley Home Care Cleaning Centre Ltd. owes Susan Perrault $2,011.47 and Wendy Rondeau $194.85.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal