

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 -

Amalia G. Toroy
("Toroy")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/502

DATE OF HEARING: September 17, 1998

DATE OF DECISION: October 5, 1998

DECISION

APPEARANCES

for the appellant

in person

for Ely's Boutique & Gift Shop Ltd.

P.J. Santos
Eleanor Santos

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Amalia G. Toroy ("Toroy") of a Determination which was issued on July 17, 1998 by a delegate of the Director of Employment Standards (the "Director"). In that Determination the Director concluded that Toroy was owed no further wages from her former employer, Ely's Boutique & Gift Shop Ltd. ("Ely's"). The Director reached that conclusion primarily on the basis that no credible record of daily hours worked was produced during the investigation to support the claim by Toroy that she had worked for Ely's Monday through Saturday, 9:30 am to 5:30 pm, during most of the period of her employment, which commenced March 22, 1996 and ended January 7, 1998.

ISSUE TO BE DECIDED

The issue is a factual one: whether Toroy has established a sufficiently credible evidentiary basis supporting her claim about the number of hours she worked.

FACTS

The basic facts of this case are not remarkable. Toroy was employed by Ely's for a period commencing late March, 1996 and ending January 7, 1998. On termination she filed a complaint that she had not been paid minimum wage for all hours worked. Ely's responded to the claim by asserting Toroy was never their employee, but acknowledged she frequently came to the shop because she was lonely and needed someone to talk to and while she was there sometimes assisted with the cleaning and with fitting customer's dresses.

Toroy summarized her working hours as follows:

April 1996 to June 1997
July to September 19, 1997
September 22 to January 5, 1998

Monday to Saturday, 9:30 to 5:30
Monday to Friday, 9:30 to 5:30
Monday, 12:00 to 5:00

Tuesday to Friday, 10:00 to 4:00

There was, however, no daily record of hours kept by either Toroy or Ely's, apart from a partial record of days worked, which occasionally set out the hours of work, for March, April, May and June, 1996 that was found in a diary kept by Toroy. The Director gave effect to the diary, stating in the Determination:

On days which the complainant did not note the time she began work and the time she completed work, but simply noted her attendance at work, she has been credited with the daily minimum of four hours.

T4 and T4A forms prepared and submitted to Revenue Canada by Ely's for 1996 and 1997 for Toroy showed an income of \$8500.00 during those two years.

ANALYSIS

I heard evidence from a number of witnesses, including the principal protagonists in this appeal, Toroy and Eleanor Santos ("Santos"), the owner of Ely's. I was also asked to receive a number of letters from persons claiming to have some knowledge of the circumstances of this matter. I accepted some of the letters, at the same time noting, first, that some of the assertions of fact did not appear to be based on the personal knowledge of the individual (a view that was confirmed by Santos), and second, that they did not add to the evidence given under oath by other witnesses. Also, in respect to one letter, it goes to the question of whether there was an employment relationship between Toroy and Ely's, a question which was addressed in the Determination but has not been appealed. As a result, I have attached little weight attached to the letters.

Nor did I find the witnesses presented by the parties to be particularly helpful on the issue. It should be noted that the issue in the appeal is not whether Toroy worked at Ely's, but whether there was a sufficiently credible record of hours from which the amount of wages paid or payable could be determined. In the Determination, it states:

Since no credible record exists outside of the diary, no estimate of hours worked has been made and credit has only been given to those hours for which the complainant maintained a record which she indicates she made on a daily basis. The calculation indicates the complainant was overpaid by \$4,808.86. While it is unlikely that the employer overpaid the complainant by this amount, particularly while the employer denies ever owing the complainant in the first place, it is nonetheless impossible to ascribe a specific dollar amount which may or may not remain owing to the complainant, for to do so would subject the result to a scrutiny which it could not withstand. Clearly, the letters attached provide anecdotal evidence which seems to indicate the complainant spent significant

periods of time at the employer's store, but in the absence of credible daily hour records made concurrently with the hours worked no specific finding can be made.

The evidence provided by the witnesses can best be described as oral confirmation of the "anecdotal" evidence referred to in the Determination which seemed to indicate that Toroy spent significant periods of time at the store.

A resolution of this dispute essentially lies in the credibility of the evidence of Toroy and Santos.

Toroy says she worked regularly at Ely's from late March, 1996 to January 7, 1998 as set out in the schedule reproduced above. Santos says she scheduled Toroy to work only three days a week, Monday, Wednesday and Friday, for three hours each day. She acknowledges Toroy was present in the shop almost every day it was open during the relevant period, but says she came to the shop to escape an unhappy domestic situation, not to work.

I do not find the evidence of either Toroy or Santos particularly compelling on the issue. Bearing in mind that the burden in this case is on Toroy to show the conclusion of the Director on the days and hours of work matter was wrong, were I to address that burden solely in the context of her evidence, I would dismiss the appeal. There were, however, several areas in the evidence of Santos and Mr. Santos that assist Toroy in meeting her burden. The first is the acknowledgment by Santos that Toroy was "at the shop every day" and although Santos "never asked her to work, she just did it". That is a very different position than the one given by the employer during the investigation, which is summarized in the following way in the Determination:

The employer contends the complainant was never an employee of the employer. The employer states the complainant did attend at the store frequently and *sometimes* assisted in the cleaning and with fitting customer's dresses. . . . The employer further indicates it paid the complainant a further \$5700 in 1997 for helping in the store on a casual basis "*no more than eight hours per week*".
[emphasis added]

These admissions against interest by the employer and their inconsistency with their previous position are cogent evidence that Toroy performed some work for the employer on a regular basis. On balance, I conclude that Toroy performed work on all those days she claims to have been at the shop. Work is defined in the *Act*:

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

To be performing “work” for an employer, it is not necessary that the employee be instructed by the employer. It is the act of performing labour or services for the employer with the direct or implicit approval of that employer that constitutes work, not that the employee has been told to work. That approval is present in this case.

I do not, however, accept that she worked the hours she claimed. In the circumstances of this case, I find it more probable Toroy did not work the *number* of hours she claims. Even accepting she was at the store for the number of hours she claims, she has not demonstrated that she was performing work during all of those hours. The facts show the business of the shop did not justify having Santos and a full time employee working at the same time and while Santos has shown bad judgement in this case, I do not accept she is so completely foolish concerning the financial running of her business to employ a full time helper when clearly that could not be afforded by the business. There is also no reason offered by Toroy to indicate why Santos needed any additional help in the shop at all on the days that she was at the shop. Except for occasional help provided by her daughter, Santos had never, in seventeen years of business, needed someone with her in the store.

Accordingly, I will do nothing more than apply the minimum daily requirements, found in Section 34 of the *Act*, to those days where I have concluded work was performed. That provision requires an employer to pay an employee a minimum of 4 hours at the regular wage, except where the circumstances described in subsection 34(2)(b) and 34(3) are present, for each day an employee starts work. The regular wage for the purpose of the calculation is \$7.00 and hour. This conclusion will not apply to those weeks for which the Director has already made a finding relating to the hours of work as that finding has not been appealed by either party.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 17, 1998 be referred back to the Director to be varied in accordance with this decision.

David Stevenson
Adjudicator
Employment Standards Tribunal