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-

David and Nelita Vandt and Adanac Food Importers Ltd.
("Vandt and Adanac")

-of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Paul E. Love
FILE No:	98/496
DATE OF HEARING:	October 6, 1998
DATE OF DECISION:	October 22, 1998

DECISION

APPEARANCES

Maria Sousa, David Vandt, Nelly Vandt in person and for Adanac

OVERVIEW

This is an appeal by Dr. & Mrs. Vandt and Adanac (the "employers") of a Director's Determination, dated July 9, 1998, finding that the employers owed to the employee, Maria Sosa the sum of $22,477.85 plus interest in the amount of $1,041.83 in accordance with the *Act.* The employers did not participate in any meaningful way in the investigation of the Director's delegate although invited to do so. There was no cogent evidence advanced at the hearing which illustrated any error in the Determination. The Determination is confirmed.

ISSUES TO BE DECIDED

Was the employee dismissed for just cause, or without notice of termination?

Was the employee entitled to overtime and statutory holiday pay from each employer?

Was the employee entitled to reimbursement for vehicle and cell phone expenses?

FACTS

The case for the employers was conducted primarily by Mrs. Vandt. Dr. Vandt gave some brief evidence. The other witnesses for the employer were Mrs. Vandt, Veronica Sindian, Lea Ganadin, Gemma Ganadin, Edwin Cruz, Rudolf Pajro, Ruyeldo Domingo and Lorna Cruz. The witnesses testifying on behalf of the employee were Ms. Sosa and Maria Breden.

Ms. Maria Sosa was employed by Dr. & Mrs. Vandt as a domestic or nanny for the period November 15, 1995 to December 31, 1996. After this time she was employed by Adanac, which is a food wholesale and distribution company apparently controlled by Dr. Vandt or Dr. and Mrs. Vandt. During the entire time period that she was employed by the employers, Ms. Sosa did not receive a statement other pay. She was terminated by Adanac on September 15, 1997. Ms. Sosa had difficulty obtaining employment insurance benefits because of the failure of the employers to issue pay statements, and because of certain representations made by Mrs. Vandt to the

employment insurance officer, which were not consistent with the written documents that related to the termination of Ms. Sosa' s employment.

It is clear from the evidence before me that Dr. and Mrs. Vandt did not keep records of the hours worked by Ms. Sosa during her employment as a domestic or while in the employment of the company. Both Dr. and Mrs. Vandt indicated that records were kept and were in the possession of an accountant.

The Director's delegate made a demand for production of records on February 17, 1998 demand was received by the employers. No issue was taken on this point before me.

In response to the demand the employers provided records which indicated the amount of the employee's monthly salary, but did not indicate the number of hours worked. The Director's delegate who was investigating Ms. Sosa's complaint wrote to the employers on March 9, 1995.
The letter reads in part as follows:

> Thank you for the wage summaries for Ms. Sosa, submitted to us on March 3, 1998.
>
> Regrettably there are no daily hours of work as required by Section 28 of the Act, herein appended. Additionally, the employer did not provide any wage statements or copies of same as previously mentioned in my February 17th letter. Section 27 requires that the hours worked by the employee be stated.
>
> As a domestic, Ms. Sosa asserts that she worked 6 days per week and between 82 and 85 hours per we~J<. She claims to have asked you for overtime which was apparently denied. I am asking you to respond to these specific allegations within 15 days of the date of this letter. ...
>
> If the daily and weekly work hours are not produced as required, the employer will be filled $500.00 for contravening each record requirement as stated in section 28 of the regulations herein appended. Failure to respond will result in the same action.
>
> ...Again your input is requested within 15 days or a decision will be rendered in your absence.

The only further information provided upon demand was a handwritten note signed by Ms. on the letterhead of Adanac Food Importers Ltd. which reads as follows:

> As a live-in domestic, she received room and board and eight hundred dollars per month net. She worked eight hours per day, five days per week.

 If you have any questions, please phone my cellular phone 551-8774 or home phone 684-1030.

The employers neglected or refused to respond to the requests and demand of the Director's delegate for payroll information.

As a result the Director's delegate relied on the information provided by the employee and made the following findings of fact:

> Given the nature of her duties and the times she performed them, it is more likely than not that she was at work six days per week from 8 am to 9 pm. This is a conservative estimate by her own admission. Two one-half hour unpaid meal periods are deducted leaving 12 hour work days.
>
> No daily and weekly work hours were again kept by the employer at Adanac. Ms. Sosa' s evidence with respect to overtime worked is not as compelling or as supportable as her domestic duties. There is not enough evidence to conclude that one or two hours of overtime were worked on 5 days of the week. Therefore, I find no overtime owing from January I, 1997 to September 15,1997.

The Director's delegate found further that the employer did not provide a written employment contract as required by Section 14 of the Act, nor did the employer register Ms. Sosa with the Employment Standards Branch as required by Section 15 of the Act and Section 13 of the Regulations.

The Director's delegate found that Ms. Sosa was terminated without cause or payment or compensation for length of service. Ms. Sosa was laid off on September 15 by Dr. Vandt due to a re-organization of the company. She received a written recommendation, and was not recalled for work.

The position taken by the employer in written submissions and in the evidence called before this Tribunal was that Ms. Sosa was terminated for "immoral conduct" in conducting an affair with Edwin Cruz. Mr. Cruz was the husband of one of Mrs. Vandt's friends. There was evidence before me of an affair. There was no cogent evidence before me that the affair was conducted on the employer's premises or during company hours. The witnesses called by Mrs. Vandt in particular Edwin Cruz, Ruyeldo Domingo and Rudolf Pajro did not prove that an affair was conducted
during company hours. Mr. Cruz's evidence was that "they didn't make love at the warehouse". Mr. Pajro testified to a date when the warehouse door was locked "and that was it". Mr. Domingo
stated that on one occassion Ms. Sosa and Mr .Cruz went in Ms. Soza' s car to pickup or cash a cheque for the employer. There was no effective cross-examination of Ms. Sosa which demonstrated an affair on company time.

The employers' main argument repeated throughout the hearing was that Ms. Soza was upset about her discharge by Adanac and that she fabricated her entire claim. The employer argued that Ms. Sosa lied about her affair with Edwin Cruz in material filed with the Tribunal. The employers further argued that because she lied I cannot believe any evidence that she has filed or given under oath concerning her wage and other entitlements.

There was no lie before me in the oral evidence tendered. Ms. Soza candidly admitted to an affair with Mr. Cruz. The affair was conducted during off work hours. She stated that in the Phillipino community while it was acceptable for men to have affairs it was not acceptable for women. She stated that "it takes two to tango". From that I infer that the relationship was a consensual one.

In a written submission, the Director's delegate noted that the employers did not advance "immoral conduct" as a reason for terminating Ms. Soza at the time of the hearing. Mrs. Vandt admitted that she altered the record of employment from laid off to terminated after she became aware Ms. Soza was stating that she was wrongfully dismissed. I I:tote that Mr .Cruz remains in his employment at the warehouse, and was apparently not disciplined. I further note that Ms. Sosa was terminated or laid off for lack of work according to written documentation. There is also an admission by Mrs. Vandt that she altered the record of employment after she became aware Ms. Sosa claimed to be wrongfully dismissed. None of the employers have any personal knowledge that these employees were engaged in an affair on company time. I have noted earlier that, if Ms. Sosa was terminated she was treated in a discriminatory manner, because Mr. Cruz was not terminated.

I have no hesitation in preferring the evidence of Ms. Sosa over the evidence of Mrs. Vandt on almost all issues. Ms. Sosa gave her evidence in a straightforward and credible manner. Mrs. Vandt on the other hand was ~yasive in questions that I put to her regarding the pay statements and written contract. She conducted her questioning of the witnesses largely by way of silolloquay attempting to correct the witness with her own correction or explanation when the witness did not give evidence in the manner expected.

I have appended as annexure " A " to this decision, the calculations of the Director's delegate with regard to Ms. Sosa's employment as a domestic and as an employee with Adanac. There was no challenge presented with respect to the arithmetic in written submissions, evidence or closing argument. The employer challenged the underlying assumption of 12 hours per day as a lie. The total amount calculated to be due and owing was as follows:

Overtime	$18,886.66
Minimum Wage calculation	$ 794.88
Compensation for Length of Service (2 weeks)	
Vacation Pay	$ 560.00
Business Expense Reimbursement	$
Interest from September 16, 1997 to the Date of	1,359.46
Determination	$ 876.85
Total Unpaid Wages	$ 1.041.81
	$23,519.68

ANAL YSIS

In this appeal, the burden rests on the employers to establish an error in the Determination such that I ought to vary or cancel the Determination. I was persuaded by the whole of the evidence, including the written information filed with the Tribunal and oral evidence, not only that there was no error made, but that the Director's delegate made the correct determination.

Issue #1: Termination

I find that the employer has not established that the Director's delegate erred in his finding that the employee was terminated without cause. I note that the evidence called by the employer did not prove any allegation that an affair was conducted on the company premises and on company time.
I place no weight on this grounds for termination alleged by the employer. In my view this is not a proper case in which the Tribunal ought to consider "immorality" as a grounds for termination, as there is no sufficient factual basis to determine whether this could be a grounds for termination.

It is apparent from the submission of the Director's delegate, which I accept, that the employers had ample opportunity to participate in the investigation. An explanation of cause was not advanced at the time of the investigation. It is well established that this Tribunal will not permit an employer to sit in the weeds, fail to participate in an investigation and then advance a story at the Tribunal hearing or submissions before the Tribunal: *Tri-west Tractor Ltd.* , (BC EST *#D286/96).*

Issue #2: Overtime

The employer kept no records of the hours worked by the employee. The employee worked long hours as a domestic. Her evidence was confIrmed by her cousin, Maria Breden, who testified that on several occassions Ms. Sosa was not available to attend family functions because she was at work at the employers premises. The employer argued that there was no corroborative evidence to prove that the employee worked 12 to 16 hours per day as alleged. The Director's delegate indicated that he believed that Ms. Sosa's evidence ofhours worked was conservative.

The burden in this proceeding clearly rests with the employers. In my view the employer did not tender any cogent evidence that pointed out an error in the Determination. Ms. Vandt called a number of her friends in the Fillipino community, in particular, Veroncia Sindian, Lea Ganadin in support of the proposition that they would assist Ms. Vandt from time to time as she requested for child care. These witnesses were unable to specify when and for how long they offered babysitting. Ms. Vandt testified that she had other friends that would assist her. These other friends were not called as witnesses, although I reviewed some written statements contained in the employers written submission.

Ms. Gemma Ganadin, a domestic, still in the employment of Mrs. Vandt testified that during a three month period she worked from 4:00 pm to 10:00 pm while Ms. Sosa worked 8:00 am to 4:00 pm. This is some support for the proposition that the services of a domestic were required for more than eight hours per day. I note that she starts at 8:00 or 8:30 am and puts the children to bed at 7:30 pm. She is clearly required to be present until Mr. and Mrs. Vandt return home in the evening.

I note that Ms. Gamadin looked uncomfortable when Ms. Sosa directed her attention to a conversation at a funeral when Ms. Sosa claims that Ms. Gamadin complained to Ms. Sosa of working long hours. I note that Ms. Gamadin is in a particularly vulnerable situation presently.

She remains in the employment of Mrs. Vandt. Her immigration status has expired. She is awaiting issuance of a new visa. I prefer Ms. Sosa's version of the conversation. I note Ms. Gamadin while subpoened by Ms. Sosa, testified in chief for Mrs. Vandt. I think it would be unlikely that Ms. Sosa would have obtained a subpoena for Ms. Gamadin if Ms. Gamadin was a willing witness.

I note that Ms. Vandt made an admission during th.e course of her questioning to the effect that Ms. Sosa did not complain about overtime, and if she had complained she would have worked it out by getting a nanny who would not complain about overtime. The evidence of Mrs. Vandt's witnesses did not demonstrate any error in the Director's determination.

It is clear that Mrs. Vandt had substantial needs for child care. She had a large number of businesses which included:

Adanac Food Importers Ltd.
Aling Ping Grocery Store -Vancouver
Aling Ping. Grocery Store -S~ey
Video Store
Manila Tax & Accounting Services
Gardenia Home for Hair & Beauty Luzviminda -
Money Remittance
Aling Pining (Tayho) Restaurant -Vancouver NV
Production
Aling Pining Restaurant -Surrey

She came home late in the evening. I reject her evidence that she provided child care in any material manner, which raises the issue of an error made in the delegate's finding. Mrs. Vandt had a large range of business activities. There was the evidence of her friends who assisted her in child care and the evidence of the complainant of long hours. In any event I put little weight on this evidence as it was not advanced to the Director's delegate in any meaningful way during the investigation process. The evidence tendered by friends of Mrs. Vandt was so vague and indescript that it could not be said that there was any contradiction between Ms. Sosa' s evidence, let alone proof of an error in the I)!Iector's findings. of fact.

Issue #3: Employment Expenses

I find that the employer has not satisfied me that the Director's delegate erred in his finding that Ms. Sosa's gasoline expenses were $444.09 and cell phone costs to be $432.76. These expenses were apparently paid to a manager who was terminated by Dr. Vandt. Ms. Sosa took over some of these management duties. She apparently used a cell phone and vehicle during the course of her duties.

In my view the Director's delegate was correct in deciding that a vehicle loan is a private matter between the parties. In any event no cogent evidence or argument was addressed to me on this point.

In my view, the case of the employers was entirely devoid of merit, and was conducted in a manner by Mrs. Vandt that was calculated to be humiliating to the complainant. The written material filed by the employers was largely irreleyant to the issues of termination, entitlement to pay and employment expenses. The oral evidence was of such a general nature that it did not contradict the evidence of the employee or prove an error was made in the Determination.

ORDER

Pursuant to Section 115 of the *Act,* I order that the Detemlination in this matter, dated be confimled. I further order interest accruing on the total unpaid wages from the date of the Detemlination in accordance with Section 88 of the *Act.*

Paul E. Love, Adjudicator
Employment Standards Tribunal