

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 -

Len Achter,
operating as L.A. Consulting,
Management and Accounting
("Achter")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Michelle Alman

FILE No.: 2000/558

DATE OF HEARING: November 6, 2000

DATE OF DECISION: December 8, 2000

DECISION

APPEARANCES

Len Achter, for himself

Lorna Turbuck, for herself

OVERVIEW

This decision addresses an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Len Achter (“Achter”), operating as L.A. Consulting, Management and Accounting, from a Determination issued July 24, 2000 by a delegate of the Director of Employment Standards (“the Director”). The Determination concluded that Achter owed his former employee, Lorna Turbuck (“Turbuck”), wages and compensation for length of service, plus interest on those amounts. In addition, a \$0.00 penalty was assessed against Achter and he was ordered to cease contravening sections 18(1) and 63(1) of the *Act*.

PRELIMINARY ISSUE

A preliminary issue arises in this case as to the admissibility of new evidence on appeal. Prior to issuing the Determination, the Director’s delegate by letter dated January 4, 2000 sought to obtain payroll records from Achter to confirm the dates and hours of Turbuck’s work, and what wages she had been paid. Achter provided on January 19, 2000 a payroll summary and a payroll journal indicating amounts paid to Turbuck from the April 1, 1999 start of her employment through the end of August, 1999. According to the initial version of a Record of Employment for Turbuck dated August 1, 1999, Turbuck’s last day of work for Achter was July 31, 1999. Achter and Turbuck agree that the amounts Achter paid to Turbuck in August, 1999 were related to wages owed to her from July, 1999. They disagree on the pay period in July, 1999 to which those amounts should have been attributed. On May 4, 2000, Achter also supplied five receipts for cash he paid to Turbuck as net wages after her second payroll cheque and a third partial payroll cheque “bounced.” Achter asserts that Turbuck signed all of the receipts, that they are accurate, and that they were signed on the dates stated on the receipts. Turbuck denies that she signed any receipts but the first two, and says there are inaccuracies in the dates of both and the amount on one of the two receipts that she acknowledges signing. Achter subsequently provided to the Director’s delegate on May 10, 2000 modified versions of the payroll summary and payroll journal to show payments to Turbuck only through July, 1999. He explained the changes as being related to an accounting error, stating that monies paid to Turbuck in August, 1999 should have been entered under his business’s “accounts payable” category instead of the “payroll” category.

With his appeal submissions of August 14, 2000 Achter supplied for the first time copies of two pages from a calendar for the months of June and July, 1999. He alleged in his submissions and in his oral evidence that the calendar proves that Turbuck did not work for him during the last two weeks of July, 1999. Achter stated in his submissions and his evidence that this document

was his “file calendar” in which he regularly recorded all of Turbuck’s hours. Achter also testified that the calendar had been kept on the kitchen wall, not in the office space in his home where Turbuck worked. Turbuck denied she had ever seen or heard about the calendar during the time she worked for Achter. Achter asserted in his evidence that the calendar was being produced for the first time during the appeal because it had been misplaced in his house. He said he had found it in a drawer in the house, not in the office area, after the Determination issued. Achter admitted that he had never told the Director’s delegate about the calendar, but claimed that he had not done so because he had believed it was destroyed before the Determination issued. Achter further testified that he used the calendar to reconstruct the payroll summary and payroll journal supplied to the Director’s delegate in January, 2000 following a “crash” of his computer. In his appeal submissions and in his testimony, Achter asserted that he had not been able to supply original computer payroll records because Turbuck’s back-up of the computer files had been performed incorrectly and all original records had been lost with the “crash.” According to the reconstructed payroll journal from January, 2000, Turbuck worked fewer than 80 hours per pay period on numerous occasions, including her second pay period. This was in contrast to the second payroll cheque’s wage statement, which indicated Turbuck was to be paid for 80 hours for that pay period.

My review of the original “file calendar” showed that it appeared to record that Turbuck regularly worked eight-hour days, five days per week, from the beginning of April, 1999 through mid-July, 1999, except for the later part of June and early part of July, 1999. I also noted that the calendar clearly showed signs that “8” had been written on the weekdays from July 16-30, 1999, but that those entries had been erased. The erasures did not show on the photocopies submitted by Achter with his appeal. Achter had no explanation for why those entries and erasures had been made.

In his appeal submissions Achter stated that Turbuck did not work after July 16, 1999, and that he did not, therefore, owe her wages for that period. In his evidence, Achter stated that Turbuck had taken only one week of unpaid vacation time during the last part of June, 1999. He also testified that he had been absent himself from the business in the first week of July so he was without knowledge as to her hours worked. He further admitted in his evidence that Turbuck had come in to work throughout the remainder of July, 1999, but that there had been no work for her to do.

Achter also sought to provide for the first time with his appeal submissions of August 14, 2000 additional evidence of his payments to Turbuck. The evidence consisted of a copy of his September, 1999 bank statement, a copy of his cheque payable to Lorna Turbuck for \$250.00 dated August 30, 1999 with the notation, “Advance, L. Turbuck,” and several “reconciliation reports” which he had generated on his computer. Achter sought to introduce these documents in support of his contention that Turbuck was denying receipt of cash he had paid to her in August, 1999 for wages owing for July, 1999. He had no explanation for why he had not supplied these documents to the Director’s delegate during the delegate’s investigation.

The Tribunal has previously ruled that new evidence is not to be admitted at a hearing of an appeal from a Determination if that evidence “should have and could have been given to the delegate in the investigative process.” *Tri-West Tractor Ltd.*, BCEST #3268/96; see also *Kaiser Stables Ltd.*, BCEST #D058/97. That principle must, however, “be balanced against the right of

the parties to have their rights determined in an administratively fair manner.” *Specialty Motor Cars (1970) Ltd.*, BCEST #D570/98. The Tribunal also said in *Specialty Motor Cars, supra*,

There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and...an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such nondisclosure.

At the hearing Achter failed to give credible or any reasons why the calendar, bank statement, cancelled cheque, and reconciliation reports were not produced to the Director’s delegate prior to the issuance of the Determination. Moreover, the calendar shows efforts made by someone to alter the original state of the document, rendering it unreliable in any event. Accordingly, none of the new evidence was admitted into evidence at the hearing of Achter’s appeal.

ISSUES

The issues to be decided are whether Turbuck is owed any wages for her employment with Achter in July, 1999, and whether Turbuck is owed one week’s wages as compensation for length of service.

THE FACTS AND ANALYSIS

Achter operates an accounting business from his home. He hired Turbuck to work for \$10 per hour, 40 hours per week, as his secretary starting April 1, 1999. Turbuck’s first paycheque wage statement shows that, in keeping with this agreement, she worked 80 hours in the first two weeks of April. Her net pay for that pay period was \$607.75. Turbuck’s second payroll cheque failed to clear, leaving Achter in arrears to her for \$607.75. A third cheque in the amount of \$250 also failed to clear, so in mid-May Achter paid Turbuck \$1,200 in cash to cover her second and third pay periods. Achter testified that he did not obtain signed receipts from Turbuck for this lump sum payment, while Turbuck in her evidence asserted that Achter did make her sign two receipts for that single payment. Turbuck also testified that the two receipts, which were still joined, were for dates in June after her receipt of the \$1,200 in mid-May. She also asserted that she only received \$1,200, and not \$1,210 as the two receipts for \$600 and \$610 would indicate. The original receipts were in Turbuck’s possession and were still joined together. Turbuck also testified that she received an additional \$1,200 from Achter in mid-June to cover her two pay periods from the end of May and the beginning of June, 1999. She said she did not sign any receipt for that amount.

By late June, 1999 Achter’s business was not doing well, and he allegedly gave Turbuck oral notice at the end of June, 1999 that he was going to have to lay her off from work until matters improved. He then drove Turbuck to Calgary for her to take an unpaid week’s vacation, while he continued on for a two-week trip to Manitoba from late June through early July, 1999. Achter conceded that he never gave Turbuck written notice of layoff, but acknowledged that he gave her a Record of Employment dated August 1, 1999 indicating her employment ended on July 31, 1999. Achter also admitted that he never separately paid Turbuck a week’s wages as compensation for length of service.

Turbuck testified that she received cash payments from Achter as noted in the Determination on an irregular basis after the middle of June until mid-July, 1999. She denied strongly that she ever saw or signed any receipts other than the two she asserted she signed in mid-May, 1999. Turbuck also testified that she received an additional cheque for \$250 from Achter in late August, 1999 which did not clear until she tried again to cash it in early September, 1999. Turbuck said that she never received full payment for the wages owing to her for the first pay period in July, 1999 and nothing for her work for the last pay period in July, 1999. She asserted that she had worked full 40-hour weeks for the entire time she was employed, with the exception of the week of unpaid vacation time she took in late June, 1999. Turbuck asserts she is owed the amount noted in the Determination.

Achter testified that he paid Turbuck in full for all net wages owed to her, and that her employment actually ended in mid-July, 1999. He asserted that any amounts he paid to Turbuck over and above wages owing to her for work up to July 15, 1999 should have been attributed by the Director's delegate to any compensation owed Turbuck for length of service. Achter stated that after he paid Turbuck \$1,200 cash in mid-May, 1999, he always obtained signed receipts from her for cash wage payments. He denied he had ever made two payments of \$1,200 to Turbuck. Achter said that Turbuck had signed one of the two joined receipts on June 1, 1999 for \$600 received on that date, and the second of the joined receipts on June 15, 1999 for \$610 received that day. He conceded that he did owe Turbuck an additional amount of \$15.50 for the two pay periods covered by the \$1,200 payment he made in mid-May, 1999. He denied he owed her an additional \$15.50 for the last pay period in May and first pay period in June, 1999 because he stated he had paid her an additional \$10 on June 15, 1999.

Achter also said that he had Turbuck sign the three other receipts produced to the Director's delegate on the dates indicated on the receipts: July 5, August 4, and August 10, 1999. Achter testified that there was only one receipt book, and that Turbuck signed the receipts in front of him. He said Turbuck knew where the receipt book was, but offered no reason why Turbuck never had possession of the originals of the three noted July and August, 1999 receipts. Achter testified that he sent the originals of those three receipts to the Director's delegate during the investigation. He produced at the hearing the carbons for all five receipts. Achter had altered the carbon for the receipt dated July 5, 1999 by whitening out and over-writing the dates for which it represented payment. The carbon for the receipt dated August 4, 1999 showed that, though written out for \$300, it recorded a further amount of \$20 paid in August, for a total of \$320 allegedly paid to Turbuck for "payrol [sic] July 15-31/99." \$100 of the amount of \$300 noted on the August 4 receipt was attributed to an alleged payment made by Achter for a dress for Turbuck purchased from one of his clients' businesses. Achter admitted that he must have added the \$20 payment notation after the date he alleged it was signed by Turbuck. The carbon for the third receipt dated August 10, 1999 for \$250 also indicates that it was for "payrol [sic] July 15-31/99."

Turbuck agreed in her evidence on cross-examination that she had gotten a dress from one of Achter's clients' businesses, but denied that Achter had paid for it. She also denied that she had ever agreed to accept the dress instead of wages or that she had received any money from Achter in August. Turbuck did agree she had received \$200 in cash from him in July, but insisted she had never signed any receipts except for the two in May, 1999 with June, 1999 dates. Turbuck also said she had discussed being laid off with Achter in July, 1999 when Achter's falling behind in his payroll was causing serious financial hardship for her. Turbuck testified that she had never received any vacation pay during her employment, but stated that she did not wish to delay

further the outcome of the instant appeal and wished to waive any claim to vacation pay owed to her from April through July, 1999.

Section 18(1) of the *Act* states:

If employment is terminated

18 (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.

And section 63(1) of the *Act* states:

Liability resulting from length of service

63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

The Director's delegate found that the evidence presented by Achter was neither consistent nor credible, and preferred the evidence given to him by Turbuck. In assessing the conflicting evidence given by Achter and Turbuck at the hearing of Achter's appeal, I must determine independently which person's evidence I prefer. The test to be applied is set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356-357 (B.C.C.A.):

The credibility of interested witnesses, particularly in cases on conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Here, Achter's evidence was that he, a person running an accounting service, kept his payroll records on a kitchen wall calendar, which he then misplaced. As to the accuracy of his payroll records supplied in January, 2000, Achter's evidence was first that he had reconstructed his payroll records in reliance on his calendar. Achter then contradicted this by saying he must have relied on his memory to reconstruct the payroll records, since the first and second paycheque wage statements differed from the reconstructed payroll journal. Achter's tampering with the carbons of the receipts he alleges Turbuck signed is also an irresponsible act, at best, for someone in the business of maintaining others' business records. It is also impossible to accept that Achter would have given Turbuck the originals of the first two of the receipts she allegedly signed, but not the remaining three. In short, I prefer Turbuck's evidence to Achter's in all respects.

ORDER

Pursuant to section 115 of the *Act*, I hereby confirm the Determination issued July 24, 2000, plus additional interest owed further to section 88 of the *Act*.

Michelle Alman

Michelle Alman

Adjudicator

Employment Standards Tribunal

MA/bls