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 -

Peter Chu
("Chu" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/528

DATE OF HEARING: October 1, 1998

DATE OF DECISION: November 23, 1998

DECISION

APPEARANCES/SUBMISSIONS

Mr. E. Ajit Saran on behalf of the Employer

Ms. Kim Allen on behalf of herself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on July 16, 1998 which determined that Chu was liable for unpaid overtime wages, statutory holiday pay and vacation pay to Ms. Kim Allen (the "Employee"). The Director's delegate found that Allen was owed $1,797.45.

Briefly, the delegate's findings and conclusions may be summarized as follows:

- Allen was an employee of Chu, employed as a dental assistant/receptionist between February 4, 1994 and May 25, 1997.
- Chu is a dentist who practices at two locations: at his Granville Street office and at the Burnaby Correctional Institute for Women.
- Allen's regular work days at Granville Street were Monday, Tuesday, Wednesday and Friday. Allen often worked on Thursdays (for less than four hours) doing administrative work.
- Allen worked at the correctional facility one or two days on many weekends.
- Allen was paid straight time for work at both locations.
- Taking week-end work into account, she worked in excess of 40 hours in a week.
- The delegate found that Chu owed Allen overtime wages in the amount of $1,059.50 (Sections 35 and 36) because there was only one employee, Allen, and one employer, Chu, and that there were not two separate jobs.

- The delegate found that Chu owed Allen on account of minimum daily pay in the amount of $563.50 (Section 34) because Chu paid Allen for the hours worked on Thursdays and did not tell her to stop working on those days.

- The delegate did not find that Chu owed Allen on account of vacation pay because she had received more vacation pay than she was entitled to. The delegate found that Allen had been paid $4,545.00 and that her entitlement was $3,427.88. He did not deduct the difference from the amounts owed by the Employer on account of wages.

- The delegate issued a penalty determination in the amount of $0.00 based on the contraventions.

The Employer disputes the Determination.

ISSUE TO BE DECIDED

The overall issue to be decided in this appeal is whether the Tribunal should vary, confirm or cancel the Determination. The key issue is whether, as argued by the Employer, Allen worked in two separate jobs for Chu, which should be considered separately.

FACTS

While the facts are in dispute, this decision largely turns on the characterization of the facts and the legal results that flow that.

Dr. Chu ("Chu") is a dentist. Ms. Allen ("Allen") was employed by Chu between February 4, 1994 and May 25, 1997. Since 1982, he has operated a general dental practice on Granville Street in Vancouver. The revenues from this practice is based on fee for service. Since 1995, the opening hours of this practice has been every second Monday and every Tuesday, Wednesday and Thursday. The practice employs two full-time employees, a dental receptionist/assistant and a bookkeeper. The latter position is occupied by his wife.

The duties of the dental receptionist/assistant include making appointments, patient scheduling, billing patients and insurance companies, general clean-up, setting up instruments, and assisting at the chair. Currently, the dental receptionist/assistant works when Chu is in the office. The daily hours of work are from 9:00 a.m. to 5:30 p.m., with one hour off between 12:00 and 1:00 p.m., or 7.5 hours per day. Allen worked the same daily hours, though she also worked every Monday. Chu testifies that she did administrative work on Mondays.

As well as working in his dental practice, Chu is on annual contract with the Corrections Branch of the provincial government to provide dental services at two corrections facilities. These facilities provide fully equipped clinics. Patients are "booked" by the facilities and there is generally no overlap in patients between his Granville office and the corrections facilities. He has been providing those services at the Youth Detention Centre since 1984 and at the Women's Correctional Centre since 1992. For those services he is compensated on a "sessional rate", which varies depending on whether he provides a dental assistant. He is paid the "sessional rate" whether he attends to one or 10 patients. When Allen worked for Chu, he worked two Saturdays per month at the Women's centre. From the beginning of the 1997/98 contract year, he added two more Saturdays per month. In September of 1995, he also started working there every second Monday. I understood Allen's testimony to be that she worked with him every second Monday from the beginning of her employment, *i.e.*, from February of 1994. She says that her predecessor also worked those Mondays. At the Youth Centre, he has worked Sundays as needed. He indicates that he worked 65-75% of Sundays. Between 1992 and 1996, he also had a contract with the Vancouver-Richmond Health Board to provide dental services to school age children.

Allen started working for Chu in 1994. At that time, Chu had a pool of dental assistants, including Ms. Rae, Allen's predecessor, who worked with him at the correctional facilities on "contract basis"--a fixed amount per session, paid by separate cheque. Apparently, Revenue Canada did not accept this arrangement and required Chu to take deductions of the combined earnings from work at the Granville clinic and the "contract work". Revenue Canada would not accept two T-4 slips for the same person. In the result, Allen was paid by one pay cheque. After Allen had worked with Chu for a period at the Granville clinic, she learned about the "contract work" and began expressing an interest in this work and Chu started using her increasingly. From 1996, she worked virtually every week-end with Chu. Allen says that she worked week-ends from the beginning of her employment. She also testifies that the week-end work at the correctional facilities was offered to her during her interview for the position of dental receptionist/assistant at the Granville clinic. The payroll records tend to support a finding that Allen started working week-ends early on in her employment. However, it appears that she, as Chu says, started working virtually every week-end in 1996.

Chu says that it was not a requirement that she be available for the work at the correctional facilities, either when her employment commenced or later. He also says that he discussed overtime with her because he was concerned that she worked too many hours. She was aware of the problem with Revenue Canada and he told her that the work at the Granville clinic and at the correctional facilities were two totally separate jobs. According to Chu, "she didn't say she didn't want to work". In fact, he made the work at the correctional facilities available to her "on her insistence". She wanted to do the work and she never said that she wanted to be paid overtime for that work. When Allen left Chu's employment in 1997, she did not claim for over time. She did, however, have a discussion with Chu concerning vacation pay. Allen was of the view that he owed her on account of vacation pay.

Chu also testifies that Allen generally was not in the office on Thursdays. It was supposed to a day off work for her. He agrees that she did come in to "catch up" once in awhile. This was done without his approval. He did no ask her to do this. However, he agrees that she marked down his hours and that he paid her. Allen says that Chu told her that she could come to the office on Thursdays and "catch up".

Chu explains that Allen had paid time off on account of vacation, corresponding in many instances to his own time off. Chu does not dispute the delegate's findings that Allen received more vacation pay than she was entitled to. As well, I do not understand Allen to question the delegate's findings in that regard.

ANALYSIS

a. Employee Status

This decision largely turns on questions of law. There is no dispute that Allen under the *Act* is entitled to payment of overtime wages (Section 35 and 36) and minimum daily pay (Section 34) if her hours of work are looked at from the standpoint that her labour and services for Chu, whether at the clinic or at the correctional facilities, are considered as one job. On the other hand, if, as argued by Chu, there are two separate jobs, she may not be entitled to over time and minimum daily pay.

In the circumstances, there is no basis for a conclusion that Allen worked two separate and distinct jobs which happened to be for the same Employer (see Section 1 "employee", "employer" and "work"). There is no dispute that Chu was Allen's employer at the Granville clinic and at the corrections facilities. I accept that these were two different business for Chu: at the clinic, he provided dental services to private patients and billed them (or their insurance carriers) for the work done. He was responsible the overhead for the clinic and staff. He provided the equipment needed to perform the dental services. At the corrections facilities, he was a contractor, paid on a per session basis. He did not supply any equipment nor was he responsible for the administrative aspect of the provision of dental services. His patients were scheduled through the corrections facilities. While I accept that Allen's duties were different in the sense that she did not do administrative work at the corrections facilities, she worked as a dental assistant an both the Granville Clinic and the corrections facilities. She was paid by the hour on one pay cheque. In reaching the conclusion, that all the work for Chu must be considered together, the remedial nature of the *Act* and the purposes of the *Act* are proper considerations. In that regard, it is important to keep in mind that the primary purpose of the act is to "ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment" (Section 2(a).

Even if I agree that Allen was not "forced" to work both at the clinic and at the corrections facilities, and that she voluntarily agreed to take on the work on the basis explained by Chu, such an agreement is void. Section 4 of the *Act* provides:

> The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

With respect to the work Allen did at the clinic on Thursdays, Chu says that he did not ask her to come to work. Even if I accept that, Chu is still liable, in my view, because he, at the very least, acquiesced in Allen doing the work. He knew that she was coming in. He paid her for the work. If he did not want her to do this work, it was within his powers to bring it to an end. He could simply have told her to stop. In the circumstances, Allen is entitled to minimum daily pay.

In the result, I uphold the findings and amounts awarded by the delegate except to deduct the amount paid by the Employer on account of vacation pay in excess of her entitlement. The delegate found that Allen had been paid $4,545.00 and that her entitlement was $3,427.88. The difference is $1,117.12. In my view, therefore, the amount owed by Chu is $1,692.32 less $1,117.12, for a total of $575.20 plus interest.

b. Penalty

With respect to the "$0.00" penalty, Section 98 of the *Act* provides:

> 98. (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.

As stated in *Narang Farms and Processors Ltd.*, BCEST #D482/98, at page 2:

> "In my view, penalty determinations involve a three-step process. First, the Director must be satisfied that a person has contravened the *Act* or the *Regulation.* Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the *Regulation.*"

Turning to the first element, in my view, the Employer contravened the *Act.* I accept that the Employer believed that its arrangement with Allen was proper and that Chu acted in good faith.

However, the Employer's knowledge of the statutory requirement is irrelevant: ignorance of the law does not constitute a defence (*Aujlas' Farm Ltd.*, BCEST #D428/98).

I now turn to the second element, the delegate's exercise of his discretion. In *Narang Farms*, above, the Tribunal stated, at pages 7-8:

> "The Director's authority under Section 79(3) of the *Act* is discretionary: the Director "may" impose a penalty. The use of the word "may"--as opposed to "shall"-- indicates discretion and a legislative intent that not all infractions or contraventions be subject to a penalty. It is well established that the Director acts in a variety of capacities or functions in carrying out her statutory mandate: administrative, executive, quasi-judicial or legislative. In the case of a penalty determination, the Director is not adjudicating a dispute between two parties, an employer and an employee, rather the Director is one of the parties. As such, the Director is exercising a power more akin to an administrative rather than an adjudicative function. The Tribunal has had occasion to deal with appropriate standard for the Director's exercise of discretionary power in the context of an administrative function in a number of cases. In *Takarabe et al.* (BCEST #D160/98), the Tribunal reviewed the case law and noted at page 14-15:
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> > ...
> > In *Boulis v. Minister of manpower and Immigration* (1972), 26 D.L.R. (3d) 216 (S.C.C.), the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant considerations."

Moreover, at page 8:

> "Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it (*Randy Chamberlin*, BCEST #D374/97). Given that the power to impose a penalty is discretionary and is not exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. It is not adequate to simply state that the person has

> contravened a specific provision of the *Act* or *Regulation*. This means that the Director must set out--however briefly--the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention."

In this case, the operative part of the penalty Determination simply states in generic terms:

> "In this instance, the Director thinks that a penalty will create a disincentive against repeat of a contravention of Sections 28, 34(2) and 36(1) and that such a disincentive is needed to promote compliance with the Act."

In my view, this is not sufficient. The Determination does not explain why a penalty in the circumstances will create a disincentive. In the result, I set aside the "$0.00" penalty.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated July 16,1998 be varied as follows:

1. the amount owed by Chu to Allen is $575.20 plus interest of 35.66, for a total of $610.86 at the time of the issuance of the Determination;

2. that this amount be paid out to Allen together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance;

3. that the penalty Determination be cancelled.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal