

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 -

Mindy Kaur Sidhu

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/629

DATE OF HEARING: October 30, 1997

DATE OF DECISION: November 21, 1997

DECISION

APPEARANCES

| | |
|---------------------------------------|--|
| Mindy K. Sidhu | On her own behalf |
| Kathleen F. Chase) Sandra Broad) | On behalf of 446784 BC Ltd operating as We Care Home Health Services (“We Care”) |

OVERVIEW

This is an appeal by Mindy K. Sidhu under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination which was issued on July 24, 1997 by a delegate of the Director of Employment Standards.

The Determination advised Ms. Sidhu of the finding that her complaint was not made in good faith and that, by authority of Section 76(2)(c) of the *Act*, the Director’s delegate had stopped to investigate her complaint. A letter (also dated July 24, 1997) accompanied the Determination to describe in detail the reasons for the decision.

Ms. Sidhu’s appeal is based on her submission that: her complaint was made in good faith; her former employer owes her regular wages, overtime wages, vacation pay, severance pay, statutory holiday pay, minimum daily pay; and that she should be reimbursed for the cost of dry cleaning her uniform as well as cleaning the interior of her car. Finally, Ms. Sidhu seeks to be paid interest on any unpaid amounts to which she is found to be entitled.

A hearing was held at the Tribunal’s offices on October 30, 1997 at which time evidence was given under oath by Mindy K. Sidhu and Sandra Broad.

PRELIMINARY MATTERS

Style of cause

The Determination shows “We Care Home Health Care Agency” as Ms. Sidhu’s employer. Ms. Broad, one of the Employer’s principals, advised the Tribunal that the proper style of cause should be 446784 BC Ltd. operating as Fraser Valley We Care Home Health Services. By agreement, the style of cause was amended accordingly.

Complaint not made in good faith

The Director's delegate attached the following letter to the Determination to explain his decision to stop investigating Ms. Sidhu's complaint:

This letter will accompany my Determination in order to describe in detail the reasons for my decision.

In support of your claim for the costs of cleaning your uniform you submitted summary statements issued by Meadowfair Drycleaners showing you had paid a total of \$818.98 for dry cleaning for six months. I investigated these claims by checking the statements with Mr. Rupinder Azad, the proprietor of Meadowfair Drycleaners. The records he showed me were not those kept in the ordinary course of business but were separately recorded in a steno's ring binder. They matched the summary statements submitted. I asked Mr. Azad why the records showed entries twice for some days and again on the following day. He agreed they could only mean that more than one uniform was being cleaned.

Your former employers at We Care advised me that only one uniform was issued to you. How then do we have charges for more than one uniform? The answer came from another former employer, Valley Home Support Society, for whom you worked at the same time as We Care. The director of that agency, Ms. Lynn Tsumuraya, advised me that you wore a uniform in their service too.

My conclusion is that you have made a false claim against We Care for the cost of cleaning your uniforms.

The Employment Standards Branch requires that complainants come to us with "clean hands", i.e. to make their claims in good faith.

When you and I and your former employers at We Care were analysing your time cards with a view to determine if any overtime was owing we proceeded on the assumption you made your claims in good faith. In hindsight, considering your inflated claims for dry-cleaning costs, I can only presume you likely inflated these claims too.

As a result, I am dismissing your claims entirely.

Yours truly,

Despite being given an invitation and an opportunity to make a submission to the Tribunal, the Director's delegate did not do so and did not attend the hearing. Thus, the letter of July 24, 1997 is the Director's only submission on this point.

Ms. Sidhu denies the assertions made by the Director's delegate and submits that her complaint was made "in total honest good faith". It should be noted that Ms. Sidhu's lengthy and detailed complaint of February 24, 1997 did not include a claim for reimbursement of dry cleaning expenses.

We Care questions the validity and reliability of the dry cleaning expenses and auto detailing expenses for which Ms. Sidhu seeks reimbursement. However, it acknowledged candidly in writing to the Director's delegate during his investigation of Ms. Sidhu's complaint that it owed certain unpaid wages to Ms. Sidhu (overtime wages; minimum daily pay; statutory holiday pay).

The Director's delegate wrote to Ms. Sidhu on May 28, 1997 to inform her that, according to calculations made by We Care following discussions with the Director's delegate, she was owed \$807.85. Ms. Sidhu was not satisfied that that amount represented the full amount owed to her by We Care and rejected it as an offer to resolve her complaint. The Director's delegate continued his investigation of Ms. Sidhu's complaint which now included a claim for reimbursement of dry cleaning expenses.

I find the following sentence in the delegate's letter dated July 24 to contain a fatal flaw:

"In hindsight, considering your inflated claims for dry-cleaning costs, I can only presume you likely inflated these (overtime wages) claims too."

In my view, a presumption by the Director's delegate is not a sufficient ground on which to stop investigating a complaint. Rather, the Director (or her delegate) must make a finding that a complaint has not been "made in good faith" [Section 76(2)(c)] and that finding must be supported by reasons [Section 81(1)(a)]. In addition to those statutory requirements there is also a requirement that the Director's delegate act fairly and without bias in making a determination. As noted in *BWI Business World Incorporated* [BC EST #D050/96], "...the Director is acting in a quasi-judicial capacity when conducting investigations and making determinations under the *Act*" [cf. re: *Downing and Graydon* 21 o.r. (2d) 292 (Ont, C.A.)]. This, in essence, is a requirement to make determinations which are based on finding of fact rather than a "presumption" about a person's likely intent. The purpose of such a requirement is to ensure that the decision-making process is free from bias - that is, free from a predisposition or inclination to decide an issue in a certain way.

The Director's delegate did not purport to make any finding of fact on which to base his presumption that Ms. Sidhu's claim for unpaid wages was "inflated". On the contrary, he had a candid acknowledgment from We Care that it had not met the statutory requirements to pay overtime wages and minimum daily pay on certain occasions - an acknowledgement which is confirmed by We Care's "Assignment Sheets" for Ms. Sidhu.

I therefore find that the Director's delegate was not acting pursuant to the provisions of Section 76(2)(c) of the *Act* when he decided to stop investigating Ms. Sidhu's complaint.

Alleged mistreatment due to complaint

In her complaint dated February 24, 1997 Ms. Sidhu alleged that her employer was mistreating her and had "cut back hours to zero since they became aware of my intention to file a complaint." Ms. Sidhu did not make any submission nor give any evidence to the Tribunal to support this complaint. In the absence of any such evidence or submission, I reject this ground of appeal.

CLAIM FOR UNPAID WAGES AND REIMBURSEMENT OF EXPENSES

Ms. Sidhu was employed by We Care as a casual, on-call, home-support worker from July 11, 1996 to December 11, 1996. Her wage rate was \$9.00 per hour. Ms. Sidhu was also employed by Valley Home Support as a casual home support worker from July 24, 1996 to September 27, 1996. She filed a complaint with the Employment Standards Branch on February 24, 1997 in which she claimed that she had not been paid:

- regular wages;
- overtime wages;
- vacation pay;
- statutory holiday pay;
- compensation for length of service; and
- reimbursement of costs associated with cleaning the interior of her personal vehicle.

As noted earlier, Ms. Sidhu's appeal to the Tribunal includes a request that We Care be ordered to reimburse her in the amount of \$818.98 for uniform dry cleaning costs incurred by her during her period of employment.

Regular Wages and Overtime Wages

Ms. Sidhu submitted to the Tribunal a worksheet in which she compares her "hours worked" (including Minimum Daily Hours per Section 34 of the *Act*) with "hours paid". According to that worksheet she is owed \$698.17 for unpaid regular wages and overtime wages.

We Care responded by comparing Ms. Sidhu's "Assignment Sheets" and "Supplementary Assignments" (which are completed and signed by her and, subsequently, used for payroll purposes) with the worksheet which she had submitted to the Tribunal. When We Care's principles (K. Chase and S. Broad) met with Ms. Sidhu and the Director's delegate in June, 1997 it had agreed to pay wages based on overtime hours and minimum daily hours as recorded in the "Assignment Sheets" and "Supplementary Assignments". According to Ms. Broad, the amounts unpaid by We Care amount to \$358.92 (overtime wages), \$110.25 (minimum daily hours), and \$19.50 in miscellaneous adjustments for a total of \$488.67.

Ms. Sidhu testified that she prepared her worksheet after she had filed her complaint on February 24, 1997.

I find that the "Assignment Sheets" and "Supplementary Assignments" are the best evidence of the actual hours worked by Ms. Sidhu and should be relied on to determine her entitlement to wages under the *Act*. I make this finding because they were prepared contemporaneously and were signed by Ms. Sidhu and submitted by her to We Care as being a correct record of her hours of work.

Statutory Holiday Pay

Ms. Sidhu submits that she is entitled to be paid statutory holiday pay during 1996 and 1997 for British Columbia Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and New Year's Day (1997).

Section 44 of the *Act* places the following requirements on an employer:

44. *After 30 calendar days of employment, an employer must either*
- (a) *give an employee a day off with pay on each statutory holiday, or*
 - (b) *comply with section 46.*

Section 46 of the *Act* sets out the requirements placed on an employer when an employee is required to work on a statutory holiday.

Ms. Sidhu commenced her employment with We Care on July 11, 1996. Therefore, she is not entitled to statutory holiday pay for British Columbia Day (August 5, 1996) because she had not completed 30 calendar days of employment by that time. She is, however, entitled to be paid statutory holiday pay for Labour Day, Thanksgiving Day and Remembrance Day in accordance with Section 24 of the *Employment Standards Regulation* (B.C. Reg. 396/95) because she did not have a regular schedule of hours.

I find that Ms. Sidhu is not entitled to statutory holiday pay for Christmas Day (1996) nor New Year's Day (1997) because she terminated her employment on December 11, 1996. I find that Ms. Sidhu terminated her employment for the following reasons.

Ms. Sidhu was warned in writing on October 22, 1996 that on "...the next incident (sic) where you are unable to meet your prescheduled obligations, previously accepted and agreed to by you, without a medical certificate, you will be dismissed immediately." This warning was issued following the third occasion on which she was unable to work when assigned according to her "Statement of Availability". On this point, We Care's written submission dated September 8, 1997 was not challenged in any meaningful way by Ms. Sidhu. That is, Ms. Sidhu did not rebut the evidence that she called her employer on December 12, 1996 at 5:30 p.m.

"...to cancel all her shifts for the following three days (Friday, Saturday, and Sunday). She was advised that it would be too difficult to replace her for the entire weekend with such short notice. She stated her boyfriend's father died in Calgary and she was going with him. She was reminded of her obligation to her employer and clients and of the letter received in October about unreliable behaviour as cause for dismissal. She decided to go anyway. We heard no more from Ms. Sidhu and did not schedule her for any shifts."

Compensation for Length of Service

Section 63 of the *Act* places a liability on an employer to pay compensation for length of service to an employee who has completed 3 consecutive months of employment. The liability is deemed to be discharged if the employee is given written notice, a combination of notice and money or if the employee terminates the employment [cf. Section 63(3)(c)]. Having found earlier that Ms. Sidhu terminated her employment on December 12th (her last day of work was December 11, 1996), I now find that she is not entitled to compensation for length of service under Section 63 of the *Act*.

Vacation Pay

We Care's payroll records show that Ms. Sidhu was paid 4% vacation pay with each bi-weekly paycheque which she received during her employment. Ms. Sidhu does not challenge this in any of her submissions or evidence. Thus, the only vacation pay to which she is entitled is 4% of the gross amount of any wages to which she is found to be entitled by this Decision.

Personal Vehicle Interior Cleaning Expenses

Ms. Sidhu's complaint of February 24, 1997 sought reimbursement of expenses associated with cleaning the backseat of her personal vehicle because a client of We Care had urinated on it. We Care has stated its willingness to reimburse Ms. Sidhu a reasonable amount and paid her \$25.00 by cheque on February 5, 1997. Ms. Sidhu seeks reimbursement of \$96.90.

Section 1(1) of the *Act* defines "wages" as follows:

"wages" includes

- (a) *salaries, commissions or money, paid or payable by an employer to an employee for work,*
- (b) *money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,*
- (c) *money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,*
- (d) *money required to be paid in accordance with a determination or an order of the tribunal, and*
- (e) *in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,*
but does not include
- (f) *gratuities,*
- (g) *money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,*
- (h) *allowances or expenses, and*
- (i) *penalties;*

I note that sub-paragraph (h) above specifically excludes "allowances or expenses" from the definition of wages. Therefore, I have no jurisdiction to deal with this aspect of Ms. Sidhu's appeal.

Dry Cleaning Expenses

Ms. Sidhu seeks, as one part of the remedy in her appeal, that the Tribunal order We Care to pay \$818.98 as reimbursement for the cost of dry cleaning the uniform which she wore while employed by We Care.

Section 25 of the *Act* states:

25. (1) *An employer who requires an employee to wear special clothing must, without charge to the employee,*
 - (a) *provide the special clothing, and*
 - (b) *clean and maintain it in a good state of repair, unless the employee is bound by an agreement made under subsection (2).*

- (2) *If an employer and the majority of the affected employees at a workplace agree that the employees will clean their own special clothing and maintain it in a good state of repair,*
 - (a) *the agreement binds all employees at that workplace who are required to wear special clothing,*
 - (b) *the employer must reimburse, in accordance with the agreement, each employee bound by the agreement for the cost of cleaning and maintaining the special clothing, and*
 - (c) *the employer must retain for 7 years records of the agreement and the amounts reimbursed.*

- (3) *The following are deemed to be wages owing and this Act applies to their recovery:*
 - (a) *money received or deducted by an employer from an employee for providing, cleaning or maintaining special clothing;*
 - (b) *money an employer fails to reimburse under subsection (2).*

As I understand her appeal, Ms. Sidhu relies on subsection 25(3)(b) as the basis for the remedy which she seeks. However, subsection 25(3)(b) refers back to section 25(2) and

“...an agreement between an employer and the majority of affected employees.” I have no evidence that any agreement existed under which We Care was obligated to reimburse its employees for cleaning and maintaining their own special clothing. Thus, We Care is required, under sub-section 25(1) to provide, clean and maintain the special clothing.

There is no dispute that We Care provided Ms. Sidhu with special clothing which it required her to wear while she was at work. We Care’s written submission of September 8, 1997 includes the following statement:

The dry clean receipts suddenly presented by Ms. Sidhu were never submitted during the months Ms. Sidhu worked, never authorized and indeed never discussed. We do not feel any responsibility for this. We also question Ms. Sidh’s premise that clothing needed to be cleaned between clients. As professional nurses, we are well aware if infection control and hygiene standards. Even in a hospital setting with acutely ill patients, nurses do not change clothes between rooms or patients. As Well, Ms Sidhu rarely did nursing care-her main duties were to supervise and assist mentally handicapped clients in their home and on occasional outings, and to transport children between their biological and foster parents. Neither of these duties require more than following the dress code.

We Care also noted:

- Ms. Sidhu claims cleaning for July 11, which was her training date-she only received the clothing that day.
- Aug. 19 she was scheduled to work 7:30 am-7:30pm. She claims cleaning for that day-the drycleaner confirmed by phone that their hours are 8-6 weekdays. If Ms. Sidhu took cleaning that day, she would have had to do so in working hours. She certainly did not deduct any time from those worked hours, nor requested permission to leave for that purpose.
- On Sept. 23 Ms. Sidhu claims to have had clothing cleaned twice, however she only worked 4 hours with one client that day
- Oct. 28 she claims 2 cleanings, but did not work at all in the Oct. 29-31 period.
- Dec. 12, she claims 2 cleanings but she was off that day and phoned at 5:30 to say she was leaving for Calgary and cancelled all her hours for the 13, 14, and 15.

Ms. Sidhu testified that she did not retain the “little tickets” for each occasion that she had clothing dry cleaned. Rather, she testified that she paid cash at the end of each month. Under cross-examination, she could not recall the name of the person (or persons) with whom she had made those arrangements and payments. She also testified that she kept a record of the individual amounts owed in her calendar (“it was a big calendar” according to Ms. Sidhu), but she also testified that she no longer has that calendar.

Ms. Sidhu also challenged the statement made by the Director's delegate in his letter of July 24, 1997 that she was required to wear a uniform while employed by Valley Home Support Society. That statement was challenged directly by a letter dated August 15, 1997 in which Lynn Tsumuraya (Director of Care, Valley Home Support) explained that Valley Home Support "...does not supply uniforms but we have a dress code that we expect employees to follow....." As noted earlier, Ms. Sidhu was employed on a casual basis by Valley Home Support during the Summer of 1996.

At the hearing on October 30th., I asked Ms. Sidhu to submit to the Tribunal a copy of the Record of Employment ("ROE") which was given to her by Valley Home Support. The ROE was received in our offices by facsimile on November 14, 1997. However, Ms. Sidhu submitted several unrequested documents at the same time. I have not read nor considered those other documents in making this decision.

Where there is a conflict in evidence, the views of the late Mr. Justice O'Halloran of the Court of Appeal of British Columbia in *Faryna v. Chorny*, (1952) 2 DLR 354 (BCCA) have been widely accepted. He made the following comments at page 357, on how the issue of creditability ought to be assessed by a decision-maker:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test 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 preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.(pp.356-357)

When I review all of the evidence concerning this aspect of Ms. Sidhu's appeal I am unable to conclude that dry-cleaning charges totalling \$818.98 are "...in harmony with preponderance of the probabilities". Ms. Sidhu offered no explanation for not requesting reimbursement of any dry-cleaning expenses during her 6-month period of employment. Furthermore, the only documents which she tendered to the Tribunal were photocopies of monthly statements of account from Meadowfair Dry Cleaners. As noted by the Director's delegate, the records supporting the Statements of Account "...were not those kept in the ordinary course of business but were separately recorded in a steno's ring binder." The proprietor of Meadowfair Dry Cleaners also acknowledged that "more than one uniform was being cleaned" on certain days. Ms. Sidhu did not offer a satisfactory rebuttal to the observations made by We Care which raise a significant challenge to the validity and reliability of the documents on which this aspect of her appeal is based. For all of those reasons I am unable to conclude that We Care has contravened the requirements of Section 25 of the *Act* and accordingly dismiss that aspect of Ms. Sidhu's appeal.

ORDER

I order, under Section 115 of the *Act*, that the Determination be varied to show that Ms. Sidhu be entitled to regular wages and overtime wages in accordance with We Care's "Assignment Sheets" and "Supplementary Assignments" Records. I further order that Ms. Sidhu be entitled to statutory holiday pay for Labour Day, Thanksgiving Day and Remembrance Day in accordance with Section 24 of the *Regulation*. These amounts and related vacation pay will be calculated by the Director's delegate.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:bls