

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 -

PEERS

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April D. Katz

FILE No.: 2000/613

DATE OF HEARING: November 23, 2000

DATE OF DECISION: December 6, 2000

DECISION

APPEARANCES:

Gwen Smith, Barbara Taylor, Ally Reid

on behalf of PEERS

Mariee Williams, Harry Delorme, Rose Henry

on behalf of Mariee-Sylvie Williams

OVERVIEW

The Employer, PEERS, appealed the findings of fact in the Director of Employment Standards' Determination issued on August 8, 2000 based on a complaint from Mariee-Sylvie Williams, the Employee, ("Williams"). The Determination stated that PEERS had terminated William's employment without paying compensation for length of service and all of her hours worked. PEERS' appeal is based on its assertion that the evidence relied on for the hours worked was not consistent from one document to the other and was not supported in the documents PEERS had received on which to make comments.

The Determination also found that PEERS had contravened the *Employment Standards Act* ("Act") in failing to pay vacation time on the additional hours worked. PEERS's appeal argues that Williams had been paid for all the hours documented on the office calendar as worked plus one weeks length of service payment. The Determination found that \$874.86 was owed to Williams.

ISSUE

There are two issues arising in this appeal.

1. Did the Director err in finding that PEERS had failed to pay Williams for hours worked?
2. Did the Director err in finding that PEERS owed Williams more wages and vacation pay?

ARGUMENT

PEERS position is that they paid Williams for all the hours she was at work as noted on the office calendar. They argue that the evidence relied on by the Director's delegate in the investigation was not consistent or credible. PEERS submits that after calculating the hours noted on the calendar and the amount paid to Williams no money is owing except for a small adjustment for vacation pay.

Williams's position was that the Determination properly reflects her claim for additional hours worked.

THE FACTS

PEERS is a not for profit service organization which operates on grants. On January 17, 2000 Williams commenced a 6 month contract with PEERS as a peer counselor 2 hours a day for 5 days a week in the RISE project. On January 24, 2000 Marie started as a drug and alcohol counselor for 2 hours a day 5 days a week in the same project. Williams was paid at a rate of \$25 per hour for 4 hours a day commencing February 7, 2000. Williams had a written contract, which specified the hours and the rate of pay. No mention was made in the contract of what to do if additional hours were worked to accommodate colleagues or clients.

The administrator of PEERS thought Williams was aware that she was expected to take time off in lieu of any additional hours worked.

There was no evidence from anyone that Williams was told to take time in lieu for any additional hours required to meet the needs of a client or to cover in the absence of a colleague. Everyone had to work longer hours than planned on some days due to the circumstances in the office. Staff were expected to arrange their own time off in compensation and no one monitored the hours. No records were kept of specific hours worked. Everyone operated on an honor system.

Williams was told to keep track of extra hours worked in the event there was enough money to pay her at the end of the contract. She kept track of the additional hours in the first 10 weeks and claimed them after her employment ended on May 2, 2000.

Williams felt her co-workers in the project expected her to be at work every day without fail. She was called into work early on occasion and asked to stay late if one of her colleagues was out of the office.

There was a large calendar in the office and the employees were expected to note their hours. PEERS had as many as 27 people on the payroll during this period and everyone was expected to keep track of their own hours. Williams noted her regular hours on the calendar until April when she was too busy.

The office calendar showed that Williams had not been at work for 7 regular work days in April. The administrator's evidence was those absent days were understood to be Williams's time in lieu of previously worked hours. She was paid for all her documented hours on the calendar plus one week's salary in lieu of notice.

Williams's evidence was that she worked every day in April except one sick day. She did not put her hours on the calendar because she was too busy.

Williams kept three journals. One of journals noted her hours at PEERS. She also kept a narrative log explaining when and why she worked additional hours from January 24, 2000. From January 24, 2000 to the end of March Williams accumulated 32.5 hours of additional time. She did not tell anyone about the specific hours but she did mention that she had spent extra time on one matter or another.

Marie acted as a volunteer advocate in March and April because there were no funds to pay someone to do the needed advocacy work. She found that she was acting as an advocate at night and after work and that she had very little time to rest. There were concerns about Williams's

work performance and attendance in April. In a special meeting about her work Williams told her colleagues that the demands of the advocacy were interfering with her life and she felt she had to cut back. She did not claim any additional hours worked in April although the hours posted were more than 4 hours per day and it was her evidence that she worked all but one day. .

PEERS' administrator paid Williams on the basis of her contract throughout the contract period i.e. 4 hours per day at \$25 per hour. Marie was paid \$7450 for counseling and \$562.50 for transcribing. There is no dispute on the amount paid for transcribing.

Williams's journal shows that she worked for 12.5 more hours than she was paid. The Delegate calculated the unpaid hours of work to be \$312.50. The compensation owed for length of service was \$500. The Delegate calculated that Williams was owed \$48 in vacation pay.

PEERS did not believe Williams was entitled to be paid for 28 hours in April on the 7 days when nothing was noted on the calendar. The Delegate found Williams's record keeping to be more reliable.

ANALYSIS

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the evidence from the appellant must demonstrate some error in the Determination, either in the facts accepted, the factual conclusions reached or in the Director's analysis of the applicable law.

The greatest difficulty with this appeal is that the appellant did not keep any records. No record of hours worked was maintained by PEERS. The payroll records are based on the contracts of employment not on the actual hours worked. The contracts were not for salaries but were for hourly wages. The employees were expected to post the hours they were in the office on a calendar. Not all the employees regularly posted their hours. Some of the employees' work was performed outside the office. No one co-related the hours noted on the calendar with the actual hours worked. The evidence of the receptionist which I found very credible was that with so many people coming and going she could not be sure who she had seen on any given day.

Williams worked under 3 separate contracts for PEERS. She was hired at \$25 per hour in two as a counselor and she was a transcriber at \$15 per hour in the third. There is no dispute about the 37.5 hours worked transcribing for which she was paid \$562.50.

Williams was able to explain her notations on her journal that she used for PEERS. Her narrative had a great deal of detail related to the days she claimed more than 4 hours of work. PEERS was not able to show any particular evidence to dispute the evidence provided.

CONCLUSION

Based on the evidence presented I find no basis on which the Director's Determination was in error. PEERS has not discharged the onus of proof required to set aside the Determination. I confirm the Determination and deny the appeal.

ORDER

Pursuant to section 114 (1)(a) the appeal is dismissed. Pursuant to section 115 of the Act, Determination ER: 100-953 dated August 8, 2000 is confirmed plus interest pursuant to Section 88 of the *Act*.

April D. Katz

April D. Katz
Adjudicator
Employment Standards Tribunal