

An appeal

- by -

Sport Central Enterprises Ltd.
("Sport Central")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2002/459

DATE OF HEARING: November 28, 2002

DATE OF DECISION: December 17, 2002

DECISION

APPEARANCES:

Derrick Luu	For Sport Central
Akwi Tendo	On her own behalf

OVERVIEW

Sport Central Enterprises Ltd. operating as Sport Central (I will use “Sport Central” and “the Appellant” for ease of reference.) has appealed, pursuant to section 112 of the *Employment Standards Act* (“the Act”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 7, 2002. The Determination is that Sport Central owes Akwi Tendo \$1,350 in wages plus vacation pay and interest, a total of \$1,514.83.

Sport Central, on appeal, argues that the Determination should be cancelled. The Appellant notes that there are not records to confirm that the employee worked as set out in the Determination. It argues that it follows from the fact that the employee did not sell anything that the employee did not work. The Appellant also attacks the credibility of the employee and a witness.

I have decided to confirm the Determination. The delegate had to decide credibility, faced as he was with two competing versions of the truth. The delegate’s decision is that there is reason to believe the employee. And the employer has failed to show me that the delegate’s decision is wrong or unreasonable.

An oral hearing was held in this case.

ISSUES

I must decide what was the last day of work, March 31, 2001 or May 1, 2001. That issue goes to the credibility of witnesses. The employer argues that it is ludicrous to believe that the employee could have worked in April of 2001 given that the employee did not sell any memberships at all.

What I must ultimately decide is whether the Appellant does or does not show that the Determination ought to be varied or cancelled, or a matter or matters referred back to the Director, for reason of an error or errors in fact or law.

FACTS

Sport Central is a sports and fitness complex.

Akwi Tendo started working for Sport Central as a sales trainee on the 12th of March, 2001. On the 31st of March, she signed a sales contractor agreement and she was paid \$500. The agreement is an attempt to put the responsibility for remitting income tax and E.I., C.P.P. and W.C.B. premiums on the employee.

There are not records to confirm that Tendo worked for the employer after March 31, 2001. It is agreed that it was the employee's job to sell memberships in Sport Central and that she did not sell any memberships at all.

It is the employee's claim that she worked a regular workweek to May 1st, 2001 selling memberships for Sport Central and that it was her job to show people the facility, contact people by telephone, staff shopping mall kiosks and leaflet parking lots, the IKEA lot in Richmond in particular. The employer, on the other hand, claims that the employee's last day of work is the 31st of March. The employer claims that no one saw her at work after the 31st of March.

The delegate has decided to believe Tendo. He does that because the employee's claims were confirmed by Theresa De Castro, Sport Central's manager in the Spring of 2001. De Castro, said that Tendo worked a regular shift in April, that she assisted with the distribution of leaflets in an IKEA parking lot, and that Tendo worked at a shopping mall kiosk on several occasions.

The employer at the investigative stage argued that De Castro is not a credible witness in that she is not currently an employee and, in fact, has herself a wage complaint against the employer. The employer went on to point out that De Castro appears to have changed her story because, while manager, she said that Tendo did not "work" after the 31st of March. The delegate considered such facts and the employer's arguments, yet it is his decision that De Castro is credible. The delegate has put it this way:

"The employer contends that De Castro's credibility is in question, because she too is no longer employed by Sport Central and has brought a wage complaint against the employer. Since she left, De Castro and Tendo must have been in touch and have agreed to back each other up on their stories. However, Tendo's evidence was that she tried but could not find De Castro to talk to. My contact with De Castro resulted from receipt of De Castro's own complaint. I talked at length with De Castro about Tendo; her statements offered no obvious credibility gaps, and her testimony merely consisted of asserting that Tendo did continue to work for a while after her training period. De Castro had earlier been asked to talk to me when she was still the manager, and she had confirmed that Tendo had not "worked" after March 31, 2001, but that she had gone on sub-contract. De Castro stated on that occasion that Tendo had completed a few "promos". I encountered throughout this investigation an apparent systematic and ongoing confusion in people's minds between self-employment and an employment relationship, and over Tendo's complete non-success in commission sales as evidence of her not working. I attribute the non-success in resolving this file to this apparent confusion. Further, I cannot accept that De Castro's credibility was any less suspect when she was still employed and asked to give evidence for the employer, than when she was no longer employed and spoke a slightly different story. Ultimately, I don't believe her stories are in conflict. It is important to note that De Castro does not stand to gain in any way by verifying that Tendo worked, and there is no *quid pro quo* between the two, that is, there is no evidence of Tendo's that is related to or required for De Castro's claim."

The employee, on appeal, complains that it is not just De Castro who is able to confirm that she worked in April. I am shown that Tendo submitted a list of persons that are said to be able to confirm that she worked for Sport Central in April.

ANALYSIS

Given that De Castro alone was contacted by the delegate, even though the employee submitted a list of persons that are said to be in a position to confirm that she worked as claimed, it is a narrow question that

I must decide: Whether there is or is not reason to send this matter back to the Director for further investigation.

I am not shown that the delegate failed to consider an important fact or that the Determination is in any way contrary to the facts. It does not follow from the mere fact that the employee did not sell any memberships that the employee is not entitled to be paid as set out in the Determination because she did not work. It may be, as the employee claims, that she did work to sell memberships: It is just that she failed to sell any memberships on her own.

This case turns entirely on the credibility of witnesses. Deciding credibility is seldom an easy task. There are many factors to consider. The manner of a witness is of some interest (Is the witness clear, forthright and convincing or evasive and uncertain?) but of greater importance are factors like the ability of the witness to recall details; the consistency of what is said; reasonableness of story; the presence or absence of bias, interest or other motive; and capacity to know. As the Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 354, B.C.C.A., has said, the essential task is to decide what is most likely true given the circumstances.

“The credibility of interested witnesses, particularly in cases of 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 that a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

The decision of the delegate in this case is that both Tendo and De Castro are credible. While he uses other words, it is the delegate’s decision that Tendo’s story is likely to be true because it is in harmony with that of De Castro. The delegate looked for inconsistencies between statements by the witnesses and he decided that there were none. De Castro did appear to say that Tendo was not at work in April and then say something to the contrary. But the delegate went on to discover that what De Castro was trying to say, and she is clearly wrong on this, is that Tendo was an independent contractor in April and that she, as such, did not “work” for the employer but herself in that month.

It is not for me to second guess the delegate’s decisions with respect to credibility. What I must decide is whether the delegate’s conclusions are or are not reasonable given the evidence before him. I am satisfied that they are. The delegate had clear reason to believe the employee and not the employer.

I suppose that a witness, De Castro in this case, might paint the employer in a bad light in the hope that she might win her own case. It may also be, as the employer claims, that she might turn against the employer and/or see the employer as a “common enemy”. But that does not automatically disqualify the witness. It goes to the weight which is to be attached to statements by the witness.

My understanding of the Determination is that the delegate has attached considerable weight to what De Castro has had to say and I am satisfied that it is reasonable to do so. De Castro and the employee did not rehearse their stories, yet their stories were found to be consistent with one another, once it was realised what De Castro was actually trying to say when she said that Tendo did not work for the employer in April.

De Castro was clearly in a position to know whether the employee worked in April. The delegate having decided that she was a credible witness, and there being no one but the employer saying anything to the contrary, the delegate was led to believe the employee, Tendo. It is clear to me that that is a reasonable decision given the evidence.

The employer believes that it should not be made to pay Tendo but it has failed to show me that the Determination is wrong or unreasonable. There is nothing to send back to the Director. The Determination is confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated August 7, 2002 be confirmed in the amount of \$1,514.83 and to that I add further interest according to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal