

Docket: 2003-1205(EI)

BETWEEN:

KIM CASE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ANGELA SADZAK,

Intervenor.

Appeal heard on November 19, 2003, at Prince George, British Columbia,
By: The Honourable Justice C.H. McArthur

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Raj Grewal
For the Intervenor:	Angela Sadzak

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision of the Minister, on the appeal made to him under section 91 of that *Act*, is confirmed.

Signed at Ottawa, Canada, this 1st day of December, 2003.

"C.H. McArthur"

McArthur J.

Citation: 2003TCC868

Date: 20031201

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BETWEEN:

KIM CASE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ANGELA SADZAK,

Intervenor.

REASONS FOR JUDGMENT

McArthur J.

[1] The issue before me is simple. Did the Appellant, Kim Case (Kim) work 124 hours or 416 hours or somewhere in between for 428994 B.C. Ltd. o/a Plaza One Hour Drycleaning (Plaza) owned by Angela Sadzak (Angela) the Intervenor. Both Kim and Angela testified. Angela was the Respondent's witness rather than giving evidence independently as the Intervenor. The question boils down to one of credibility. Their version of events are almost diametrically opposed.

[2] First, very briefly, I will relate Kim's side of the story. In May 2002, she boarded a horse with Angela's horse-boarding business (Sadzaks Quarter Horses). Angela also operated Plaza, a dry cleaning business. She hired Kim to work for Plaza. Kim stated that she was hired at \$8 per hour, from 9:00 a.m. to 3:30 p.m., five days a week and that she worked from May 22 to August 22, 2002, for a total of 416 hours. She recorded this by crossing out complete days on a calendar. She received, as payment, two cheques in June: one for \$56.96 and the other for \$97.64. She kept asking Angela for her pay but was told to wait until the horses were sold or her accountant (Angela's brother) got caught up with the books. She worked from May 22 to August 22, 2002 in a "sweat shop" without being paid other than the \$154 referred to above.

[3] On December 1, 2002, Kim filed a complaint with the Employment Standards Branch. She claimed a total of 416 hours worked from May 22 to August 22, 2002 at \$8 per hour for a claim of \$3,328. The Director of Employment Standards (Standards) ruled against her, finding that she worked only 124 hours as stated by Angela.

[4] Shelly Burchnall, a delegate of Standards interviewed the five or six witnesses that Kim recommended in support of her position. While they were aware that she worked at Plaza, they were of no assistance with regard to her hours worked.

[5] Now we turn to Angela's story, in brief. Angela stated that Kim did work full-time at the drycleaners from May 22 to August 22, 2002 but only part-time and for a total of 124 hours. Kim was paid only 19 hours because she insisted that any wages earned be applied to monies owed for feed and board of her horse¹ at Angela's stable/arena; except for the 19 hours, her wages never exceeded the board owed.

[6] Angela added that Kim imposed herself on her and very reluctantly she gave Kim a part-time job at the drycleaners. Kim had no regular schedule and would show up at her will. She kept track of Kim's hours. By August, Kim owed her a significant amount for the board of her horse. She stated that Kim initiated the arrangement at the Plaza in lieu of the board of her horse and if Kim's hours claimed were correct, she would be "making more money than me".

Analysis

[7] Shelly Burchnall of Standards prepared an impressive report dated May 6, 2003. While it is hearsay, neither Kim or Angela disputed its authenticity. Her investigation was made upon the complaint of Kim under section 74 of the British Columbia *Employment Standards Act*.

[8] Kim directed Ms. Burchnall to six witnesses. She interviewed four of them and two could not be reached. The first witness was Cathy Soulliere and Ms. Burchnall recorded the following:

¹ I believe Kim had three horses and boarded one horse at the facility and the other two horses were put out to pasture.

Cathy Soulliere ("Soulliere")

Case stated Soulliere is a very honest person and would tell the truth concerning the actual number of hours Case worked, regardless of whether she was still an employee of Sadzak's. Case was insistent that any information Soulliere gave would be credible and to be taken verbatim.

Soulliere stated she could not confirm any days Case worked, but knew she did not work full-time. Soulliere worked Tuesdays and Thursdays and some days when she arrived at work Case would be there, and some days not. Soulliere stated "Kim was a friend of Angela's and would be at the drycleaners visiting, but now always working". "She came and went as she pleased and didn't write her hours down like the other staff." "Angela would mark 'K's' on the payroll calendar days when Kim worked." Soulliere stated it was her understanding that Case was "working at the drycleaners in lieu of the board for her horses".

Soulliere said she was a long-term employee at the drycleaners and had always wanted full-time work. She worked as many hours as Sadzak could possibly give her and denied ever wanting to "simply work part-time".

The evidence of the other witnesses was much the same. None of the witnesses verified that Kim worked full-time at Plaza. Generally they were under the impression that Kim was working part-time to pay for the board of her horse. At page 12 of her report, Ms. Burchnell stated:

...I prefer the evidence and explanation of the employment relationship given by Sadzak. Her record of the hours and dates worked by Case were consistent with hours worked at the drycleaners during the months of May to August 2001 and 2002, by her other employees. In my opinion, the witnesses, including Case's, gave credibility and weight to Sadzak's version of the facts, specifically with their recurring account Case was "working part-time at the drycleaner for the board of her horse".

[9] The Respondent's counsel referred to *Faryna v. Chorny*² at page 357 where O'Halloran J.A. stated:

... 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. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-

² [1952] 2 D.L.R. 354.

lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

Obviously, Angela's version is more in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and those conditions".

[10] Reviewing what we have: (i) Kim's witnesses interviewed by Ms. Burchnall did not assist her position. She had no witnesses to corroborate her position at trial; (ii) the persons to whom Kim had directed Ms. Burchnall, supported Angela's position rather than Kim's, particularly with respect to Kim working part-time.

[11] Angela's version of work in lieu of board payment is more consistent with common sense. Originally Angela put Kim on the payroll, paying 19 hours in June 2002 and issuing wage statements. From then on, Kim's drycleaning earnings went toward board for her horse. It stretches credibility to accept Kim's version which would have her making more than Angela and receiving preferential treatment over other employees who had 10 years of service. I accept Angela's evidence over Kim's.

[12] I dismiss the appeal with an uncomfortable suspicion that the hours presented by Angela are too low and Kim's hours are far too high. But it is no more than a strong suspicion. It is not enough to justify my overturning the reasoned assessment, probably based on the Shelly Burchnall's decision, which was concluded with great care and was not successfully rebutted. I am not satisfied that Angela was rigorously honest. She was an Intervenor yet the Respondent appears to have paid her air fare to the hearing and called her as its witness. Further her brother is her accountant. There were no witnesses to support her evidence. I believe that the default judgment in Small Claims Court was for the gross boarding fee without crediting Kim for her work although this is not an issue I can deal with.

[13] The appeal is dismissed and the decision of the Minister, on the appeal made to him under section 91 of that *Act*, is confirmed.

Signed at Ottawa, Canada, this 1st day of December, 2003.

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"C.H. McArthur"

McArthur J.

CITATION: 2003TCC868

COURT FILE NO.: 2003-1205(EI)

STYLE OF CAUSE: Kim Case and
The Minister of National Revenue and
Angela Sadzak

PLACE OF HEARING: Prince George, British Columbia

DATE OF HEARING: November 19, 2003

REASONS FOR JUDGMENT BY: The Honourable Justice C.H. McArthur

DATE OF JUDGMENT: December 1, 2003

APPEARANCES:

For the Appellant: The Appellant herself

Counsel for the Respondent: Raj Grewal

For the Intervenor: Angela Sadzak

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm: N/A

For the Respondent: Morris Rosenberg
Deputy Attorney General of Canada
Ottawa, Canada