Citation: Westcor Thermal Inc. (Re)
2020 BCEST 129

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Westcor Thermal Inc.
("Westcor")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2020/094

DATE OF DECISION: November 13, 2020

DECISION

SUBMISSIONS

Cameron R. Wardell	legal counsel for Westcor Thermal Inc.
Anthony R. Moffatt	legal counsel for Jung Changkeun
Clodagh O'Connell	delegate of the Director of Employment Standards

INTRODUCTION

1. Westcor Thermal Inc. ("Westcor") appeals a Determination issued on May 19, 2020, by Clodagh O'Connell, a delegate of the Director of Employment Standards (the "delegate"), pursuant to section 79 of the *Employment Standards Act* (the "*ESA*").

2. By way of the Determination, the delegate ordered Westcor to pay its former employee, Jung Changkeun (the "complainant"), the total sum of $16,523.48 representing $14,939.25 in unpaid overtime pay (see section 40 of the *ESA*), $340.96 for unpaid vacation pay (section 58), and $1,243.27 for section 88 interest. In addition, and also by way of the Determination, the delegate levied two separate $500 monetary penalties (see section 98) based on Westcor's contraventions of sections 40 and 28 (failure to keep payroll records) of the *ESA*. Thus, Westcor's total liability under the Determination is $17,523.48.

3. Westcor says that the Determination should be cancelled outright, or at least varied, because the delegate erred in law and otherwise failed to observe the principles of natural justice in making the Determination (see sections 112(1)(a) and (b) of the *ESA*).

BACKGROUND FACTS

4. Westcor operates a spray foam insulation business and its business offices are in Surrey. BC Registry Services records indicate that Westcor's sole directors are Willi Hamm and Marcus Peter Hamm. These two individuals are also identified as Westcor's sole officers being, respectively, President and "CEO".

5. The complainant was employed as an estimator with Westcor from June 26, 2017, until March 1, 2019. The complainant filed his complaint, seeking approximately $1,500 in unpaid vacation pay, on March 12, 2019. The complainant provided further details in Section F of his complaint form regarding his unpaid vacation pay claim. He did not advance any claim for unpaid overtime pay.

6. The complaint was the subject of an oral complaint hearing originally scheduled for September 4, 2019, and this hearing was to be conducted by teleconference. The delegate issued her "Reasons for the Determination" (the "delegate's reasons") concurrently with the Determination. The delegate's reasons, at pages R2 – R3, set out the following details regarding the complaint hearing process:

> The Notice of Complaint Hearing dated July 16, 2019 (the "Notice") specified the scheduled hearing date and dial-in information. The Notice advised the parties that the hearing may proceed

> in the absence of a party and a decision on the complaint will be made based on the information available.
>
> The Employer did not attend the hearing at 9:00 a.m. September 4, 2019. At 9:10 a.m. a delegate phoned Marcus Hamm ("Mr. Hamm"). His phone was answered by a party who did not identify herself but advised the delegate Mr. Hamm was aware of the hearing but would not be attending or sending anyone on his behalf.
>
> As the Employer clearly had notice of the complaint hearing and knew the particulars of the complaint, I proceeded with the hearing in the Employer's absence…
>
> In the course of providing evidence [the complainant] made a claim for overtime wages which was not on his initial complaint form. At 10:34 a.m. I adjourned the hearing so Mr. Hamm could be made aware of the overtime claim and [the complainant] could provide documentation relating to the claim. At 12:34 p.m. I received emailed documents from [the complainant] regarding his overtime claim. At 12:55 p.m. a delegate forwarded those documents to Mr. Hamm via email. At 1:00 p.m. the hearing resumed with Mr. Hamm present. After hearing evidence from the Employer I adjourned the hearing at 2:34 p.m and asked both parties to submit any additional documentary evidence on the issue of overtime by 1:00 p.m. on September 11, 2019. Both parties submitted additional evidence which was cross-disclosed. The hearing resumed September 24, 2019 at 9:00 a.m. On that date counsel appeared on behalf of Mr. Hamm who was not present.

The Evidence Before the Delegate

7. The complainant testified that although his work schedule was based on an 8-hour day with a 1-hour lunch break, he regularly "ate his lunch at his desk" and worked through most of his lunch hour "checking documents, sending emails and checking schedules" (delegate's reasons, page R4). The complainant testified that he often stayed at work past his 4:00 PM official end time (typically, until 5:00 PM), and also worked at home in the evenings after dinner and on weekends. The complainant testified that although he worked many overtime hours, he was only paid for a 40-hour work week with no payment for any overtime hours worked. As recorded in the delegate's reasons (at pages R4 – R5):

> [The complainant] did not keep records of his overtime, but at the hearing, in response to a request to provide further details of hours worked, he provided the following information in writing:
>
> - worked at the office 7 a.m. to 5 p.m. every day. Sometimes staying later than 5 p.m.
> - worked 3.5 hours of overtime 20 weekdays each month for 11 months March 2018 to February 2019 for a total of 770 hours of weekday overtime.
> - worked a total of 6 hours of overtime on weekends each month for 11 months March 2018 to February 2019 for a total of 132 hours of weekend overtime.
>
> In response to a request for clarification of these written totals, [the complainant] stated he "sometimes" worked evenings after he got home and ate his dinner. He stated he worked two to three hours in the evening 20 days a month on average throughout 2018. He stated this is his best recollection as he did not keep a contemporaneous log of overtime hours as he was advised by Mr. Hamm salaried employers did not get paid overtime.

8. The complainant testified that his workload was such that he could not accomplish all of his assigned tasks in an 8-hour day/40-hour week. He also testified that Mr. Hamm was aware that he was working evening hours at his residence. The complainant never submitted an overtime claim *per se*, but did receive some payment on a couple of occasions, and hockey tickets on another as some sort of compensation for his overtime hours. Shortly after the complainant quit his employment, and in response to an e-mail he sent to Mr. Hamm in which he indicated his long work hours precipitated his resignation, Mr. Hamm replied (by e-mail) that "Salary sometimes means you work longer hours, however you had a gas card, bonuses, raises and a good wage…like I said, salary office jobs do not get overtime or vacation pay added. This is the law for Canada…".

9. Let me digress at this point – there is no law in Canada (certainly not in British Columbia) to the effect that employees are not entitled to overtime pay or vacation pay merely because they are paid by way of a salary. Managerial employees, provided they meet the regulatory definition of "manager", are not entitled to overtime pay under the *ESA*, but this is due to their status as managers, not because of their form of compensation. "Managers" are entitled to be paid vacation pay under the *ESA*.

10. Following his resignation, the complainant claimed unpaid vacation pay but Mr. Hamm's position was that no vacation pay was owing.

11. The complainant called Westcor's former office administrator, responsible for payroll and office personnel matters, as a witness. She testified that while hourly employees were paid overtime pay, salaried employees were not. She confirmed that Mr. Hamm often called employees at home and that the complainant worked through his lunch hour at his desk.

12. Westcor called two witnesses – Marcus Hamm and Willi Hamm, as well as the other estimator employed during the complainant's tenure – and, in addition, provided written statements from a spray foam insulation truck operator and a site superintendent. The delegate, rightly so in my view, gave little, if any, weight to these latter two witness statements. The Employer did not provide an explanation as to why these witnesses were not available to testify in person and, of course, had they done so, their evidence could have been tested through cross-examination.

13. Marcus Hamm confirmed that all salaried employees work a 40-hour week and are not paid overtime. Mr. Hamm stated that on the few occasions the complainant raised concerns about his long hours, he provided some dispensations such as hockey tickets, a bonus, or an afternoon off, and that the complainant never stated he was working at home on evenings or weekends. Willi Hamm, Marcus Hamm's father, testified that the complainant consistently left the office at 4:00 PM each day, and that if there were any evening telephone calls to employees at home, such calls would be brief.

14. The other estimator testified that the complainant was not replaced after he resigned and that, as the sole estimator now employed at the firm, he has no trouble managing his workload. He stated that while he occasionally works weekends, he is paid overtime for those hours, and that the complainant did not stay in the office after 4:00 PM, at least until the fall of 2017.

The Delegate's Findings

15. The delegate commenced her analysis of the conflicting evidence before her by noting that overtime pay is owed if the employer "directly or indirectly allows" an employee to work overtime hours. The delegate also noted that since Westcor failed to keep a daily payroll record of the complainant's working hours, "therefore, I must apply the best evidence rule by evaluating all the available evidence of the number of hours [the complainant] worked, including the wage statements provided by the Complainant" (page R12).

16. The delegate accepted that the complainant, in fact, worked overtime hours. In making this finding, the delegate relied on the fact that Westcor provided a laptop computer for the complainant's use (allowing him to work outside of the office and at home); evidence demonstrating that Mr. Marcus Hamm called the complainant at his home (a point confirmed by Mr. Hamm); the fact the complainant frequently complained to Mr. Hamm about excessive working hours; and the evidence that Mr. Hamm occasionally provided some benefits to the complainant for having worked overtime hours.

17. As for the evidence regarding the actual number of overtime hours worked, the delegate acknowledged that "there were inconsistencies in the evidence provided by both the Complainant and the Employer" (page R13). The delegate gave the greatest weight to the office administrator's evidence, finding it be both consistent and reliable given that "she was in a position to be aware of both payroll and employee issues."

18. The delegate considered the complainant's evidence as to his actual overtime hours to be unreliable, but nonetheless was satisfied he worked some overtime. The delegate held (at page R14): "I find that [the complainant] worked three hours of overtime outside the office during each regular work week March 2, 2018 to March 1, 2019." This aspect of the complainant's overtime claim (weekly overtime payable under section 40(2) of the *ESA*) was calculated at $5,751.

19. The delegate accepted the complainant's evidence – corroborated as it was, at least in part, by other witnesses – regarding working through his lunch hour and, applying section 32 of the *ESA*, awarded him $9,188.25 on this account. Accordingly, the total amount of unpaid overtime pay awarded to the complainant was $14,939.25.

20. Finally, and relying on the complainant's wage statements, the delegate determined that the complainant was entitled to receive $4,048.96 in vacation pay during the wage recovery period, but was actually paid $3,708.00, leaving a $340.96 shortfall due to the complaint.

WESTCOR'S REASONS FOR APPEAL

21. Westcor's first ground of appeal is as follows:

> The Delegate erred in law by allowing the Complainant to make a complaint of unpaid overtime outside of the six-month period prescribed by the *Employment Standards Act*, [citation omitted], s. 74(3)…

22. Section 74(2) of the *ESA* states that "[a] complaint must be in writing and must be delivered to an office of the Employment Standards Branch". Section 74(3) states that "[a] complaint must be in writing and

must be delivered to an office of the Employment Standards Branch". In essence, Westcor says that since the complainant never claimed overtime pay in his original complaint filed on March 12, 2019, and only first advanced an overtime at the September 4, 2019 hearing, the overtime claim is statute-barred.

23. Westcor's second ground of appeal principally concerns "natural justice". In this regard, Westcor says:

> The Delegate made an error of law and natural justice by disregarding reliable evidence in conflict with the Complainant's claim of overtime encompassing each and every lunch hour for an entire year.

FINDINGS AND ANALYSIS

24. Westcor advances two separate grounds of appeal, namely, whether the delegate failed to observe the principles of natural justice or erred in law. Both grounds of appeal, at least in part, concern whether the delegate should have proceeded to hear and decide the overtime pay issue. Apart from that question, Westcor also says that the overtime pay award should be set aside as it was not based on a proper evidentiary foundation.

25. I will address each separate ground of appeal in turn.

Natural Justice/Error of Law – The Overtime pay Award

26. In my view, this ground of appeal is not meritorious. The complainant testified that he worked through his lunch hours. Westcor's office administrator's testimony was that the two estimators were almost always working under deadlines and she "would often see them working during lunches" (delegate's reasons, page R7), although she also conceded that she was not always in the office during luncheon hours. Marcus Hamm confirmed that he provided some benefits to the complainant referable to overtime hours worked. The other estimator confirmed that overtime was sometimes worked in response to constant deadlines; he did not testify that the complainant did not work through his lunch hour. Willi Hamm testified that he saw the complainant on his computer during lunch hours but simply "believed" the complainant was "surfing the internet or emailing" (page R11). This testimony falls well short of an affirmative statement to the effect that the complainant did not regularly work through his lunch hour. Willi Hamm also confirmed that Westcor did not have "a company policy manual on overtime".

27. It cannot be ignored that Westcor failed to keep proper records regarding the complainant's working hours (despite its legal obligation to do so). This failure no doubt complicated the delegate's task. I accept Westcor's submission that the evidence supporting the complainant's overtime claim was not unequivocal and pristine. Nevertheless, the delegate reviewed the conflicting evidence before her and reached a conclusion that, in my view, cannot be assailed as reflecting a "palpable and overriding error", which is the standard for setting aside a finding of fact (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

28. I should also point out that, at least to a degree, Westcor's attack on the delegate's findings regarding the complainant's overtime hours is factually misconceived. For example, in its appeal submission, Westcor asserts that "the Complainant was seen by other employees using his computer to play video games". In fact, the evidence on this point was as follows (at page R8): "Mr. [Marcus] Hamm purchased [the computer] for him. He heard from another employee that [the complainant] was playing video games on it." This pure hearsay statement falls well short of proof that the complainant was not working during his

lunch hour but, rather, was engaged in video gaming. Another example: Westcor says that the complainant was specifically directed not to work through his lunch hour, and it referred to the testimony of the office administrator for substantiation. However, the office administrator was not the complainant's supervisor, and neither Marcus Hamm nor Willi Hamm testified that they told the complainant to stop working through his lunch. The office administrator's testimony about working through the lunch hour appears, in my view, to largely corroborate rather than undermine the complainant's position regarding working through lunch: "[the office administrator] would often see them [i.e., the estimators] working during lunches [and] she would tell them to stop working and enjoy their lunches" (page R7). There is no evidence that the complainant took this entreaty as a specific and authoritative direction to cease working through his lunch hour.

29. As is detailed in the delegate's reasons (at page R3, reproduced above), the overtime claim was raised at the hearing for the first time, and without any advance notice to either Westcor or the Employment Standards Branch. That being the case, the delegate adjourned the hearing, allowed the parties to file further evidence regarding the overtime issue, and reconvened the hearing about three weeks later (on September 24th). Westcor seemingly accepts that the delegate's approach (i.e., to adjourn the hearing, receive submissions, and then reconvene) was consistent with the principles of natural justice, but only insofar as the delegate's conduct *after* the complainant raised the overtime issue is concerned. If Westcor's position is that the procedure followed by the delegate as and from September 4th was not consistent with the principles of natural justice (and this is not entirely clear to me based on my reading of Westcor's submission), I am nonetheless of the view that the delegate's decision to adjourn and reconvene was entirely appropriate.

30. However, Westcor also says that the delegate failed to properly account for the prejudice it suffered as a result of the overtime issue not being raised until the day of the hearing. More particularly, Westcor says that it was disadvantaged "by the passage of time with respect to its response to the [overtime claim]", and that had it been given more timely notice, it could have provided evidence – in the form of video footage – that would have undermined the complainant's assertion that he regularly worked after the office's usual 4:30 PM closing time. Westcor additionally says "there was no opportunity to deal with the matter of overtime using pre-hearing procedures".

31. In my view, this latter submission as it relates to the matter of natural justice is also misconceived. Although Westcor says that video footage would have demonstrated that the complainant "was not in the office beyond a regular workday", it also says that "the footage is no longer available". Westcor says that if it had been notified about the complainant's overtime claim "in a more timely manner" it could have assembled the video evidence. However, Westcor has not indicated when the footage was destroyed (I presume it may have been simply recorded over after some period of time). The complainant's employment ended on March 1, 2019, and his unpaid wage complaint was filed on March 12, 2019. Under section 74(3) of the *ESA*, the complaint could have been properly filed within 6 months after March 1, 2019. The overtime issue was first raised on September 4, 2019, only a few days after the section 74(3) complaint filing period expired. Thus, and depending on when the video footage was destroyed, it may well not have been available in any event if the overtime claim had been raised shortly before the expiration of the 6-month complaint period. In the absence of any clear evidence that Westcor was actually prejudiced by the fact that the overtime claim was first raised only a few days after the 6-month complaint period expired – and given that Westcor has not provided any evidence about the nature

of the video evidence or when it was destroyed – I consider this aspect of Westcor's "natural justice" argument to be largely speculative and unpersuasive. Finally, I also note that this argument regarding video footage was never raised before the delegate; it appears to have been advanced for the first time in this appeal and, on that basis, this argument may not even be properly before the Tribunal.

32. To summarize, whether one challenges the delegate's overtime pay finding as an error of law (flowing from her assessment of the evidence before her), or as a breach of the principles of natural justice, I am not persuaded that the overtime pay finding should be cancelled or varied. There was conflicting evidence before the delegate regarding the number of overtime hours actually worked and, in my view, the delegate carefully weighed the evidence before her and came to a reasonable decision. At the very least, I am not satisfied that the delegate made a palpable and overriding error with respect to the calculation of the complainant's overtime pay entitlement. This aspect of Westcor's appeal fails.

Is the Overtime Claim Statute-Barred?

33. The complainant's last day of work, as detailed in his complaint, was March 1, 2019. His unpaid wage complaint was filed on March 12, 2019 – well within the section 74(3) 6-month complaint filing period. Although the complaint identified a claim for unpaid vacation pay (of about $1,500), there was no claim for overtime pay, or for any other relief. Indeed, in his complaint (Section D: Details About Your Employment), the complainant indicated that he worked 8 hours per day, 5 days per week, and 40 "total hours worked per week". I have reviewed the section 112(5) record in this matter and, having done so, it seems clear that during the period from March 12, 2019, until the first day of the complaint hearing – September 4, 2019 – the complainant never advanced any claim regarding unpaid overtime pay.

34. The 6-month complaint period expired on Monday, September 2, 2019 and the overtime issue was not raised until the day of the scheduled complaint hearing, September 4, 2019. At the September 4th hearing, the complainant submitted a written summary of his overtime hours in which he claimed 902 overtime hours from March 2018 to February 2019. As noted above, the September 4th hearing was adjourned and later reconvened that same day (with Mr. Marcus Hamm in attendance)

35. Westcor maintains that the delegate erred in law by hearing and deciding the complainant's overtime claim notwithstanding section 74(3). Westcor says that: "Section 74 of the *ESA* limits the window in which a complaint may be brought to six months from the date of termination of employment for individuals no longer employed by the employer against whom they wish to complain." Westcor says that the unpaid overtime complaint "was made outside the statutory time limit [and accordingly] the Delegate was barred from hearing it by a proper application of the *ESA*".

36. Although section 74(3) seemingly creates a firm limitation period – and unlike, say, section 22(3) of the *Human Rights Code*, there is no specific statutory provision in the *ESA* that would allow for the adjudication of late complaints – the B.C. Court of Appeal in *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553, held that the Director of Employment Standards has a statutory discretion under section 76 to accept and review an otherwise late complaint and, in an appropriate case and as an exercise of statutory discretion, may adjudicate a late complaint.

37. In this instance, the delegate proceeded to hear and decide the complainant's overtime claim without specifically addressing whether it was time-barred and, if so, whether the complaint should nonetheless

be adjudicated as a matter of discretion. I should also note that although Westcor's written submissions to the delegate do not contain the specific allegation that the complainant's overtime claim was statute-barred, the section 112(5) record contains several references to the fact that the overtime claim was filed late, or that the original complaint contained no reference to an overtime claim (see, for example, telephone record notes included at pages 22, 23, 25 and 47). The record also contains a September 11, 2019 e-mail from the Employment Standards Branch to Westcor's legal counsel which states: "In regards to overtime not being claimed by the complainant, please be advised that adjudicators assess complaints filed under the Act in their entirety, even if complainants have failed to include all claims under the Act in their original complaint form." Thus, although the delegate's reasons do not contain any express reference to the exercise of a statutory discretion, the delegate nevertheless seemingly considered that it was appropriate to hear and decide the overtime claim.

38. In her submission on this point, the delegate referred to the Tribunal's decisions in *660 Management Services Ltd. et al.*, BC EST # D147/05, and *Cownden*, BC EST # D069/01, in support of the following proposition: "It has been well-established by the Employment Standards Tribunal that the Act does not require a complainant to specifically identify the contravention they are alleging or the amount of wages claimed in their complaint."

39. The complainant's legal counsel notes that although section 74(3) requires the filing of a written complaint, there is no statutory requirement to deliver a *particularized* complaint. In addition to the decisions referred to by the delegate, the complainant's legal counsel also relies on *Urban Sawing & Grooving Company Ltd.*, BC EST # D112/05, and *Moore*, BC EST # D150/16. Counsel also says that if one examines the Section F "Details of Your Complaint", one finds "some disclosure that the Complaint included an overtime aspect". Finally, the complainant's counsel observes that the September 4th hearing was adjourned and reconvened on September 24th "for the express purpose of providing Westcor with an adequate amount of time to respond to the overtime aspect of the complaint."

40. While there is no doubt that the original complaint was timely, it is equally clear that the complaint was *solely* in regard to unpaid vacation pay. Although the complainant was awarded some vacation pay ($340.96), of the total amount of unpaid wages awarded by way of the Determination, nearly 98% represents unpaid overtime pay ($14,939.25).

41. In *Cownden*, *supra*, the Tribunal observed that although section 74(2) requires a "written" complaint, there is nothing in the *ESA*, or in any of the accompanying regulations, specifying the particular form that must be used. Nevertheless, the Employment Standards Branch has created a complaint form that may be used and, in fact, that form was used in this case. In *Cownden*, the employer argued that the complainant failed to properly specify an unpaid overtime pay claim, but this argument was rejected since "in section B of the complaint form, the employee identifies that the complaint relates to hours of work and overtime, by checking the appropriate box" (page 6). The Tribunal then made the following observations that are particularly relevant here:

> In order to present a claim for filing with the Director, all the claimant need do is identify, in writing, that the complaint is a complaint under the *Act*. There is no requirement for the employee to particularize the details of the claim made. It is not essential that the complainant set forth the complaint with precision. The information must be sufficient to disclose an alleged violation of the *Act*. If those minimum requirements are set out, the Delegate will investigate the

> complaint. If, during the course of an investigation of a compensation for length of service complaint, the Delegate discovers an overtime complaint, I see no restrictions in the *Act* on the jurisdiction of the Delegate to investigate the complaint provided there is some disclosure that the "complaint is an hours of work or overtime complaint"…
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> The lack of particulars, may in certain circumstances, cause a time barrier to a complaint if a new complaint surfaces, the six month time period has expired, and the particulars of the complaint cannot be linked to the claim form filed. In this case, however, there is no difficult as the employee's claim for overtime is clearly disclosed in the claim filed with the Director.
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> (my underlining)

42. *Cownden* was referenced and applied in *Urban Sawing*, *supra*, where the complainant initially sought overtime pay and recovery of an alleged unlawful wage deduction. The complaint proceeded to an oral hearing where the complainant advised that the unlawful wage deduction issue had been resolved, "but that he wanted a claim for length of service compensation [see section 63 of the *ESA*] to be added to his complaint" (page 3). The employer maintained that it had been previously unaware of this potential claim, but when offered an adjournment, it decided that an adjournment was unnecessary and it "chose to deal with that part of the claim in the complaint hearing" (page 9).

43. The Tribunal's reasons for decision in *Urban Sawing* indicate that the complainant's employment ended on August 16, 2004 and that the section 63 claim was not advanced until the date of the complaint hearing, but does not disclose the date of that hearing. However, the reconsideration decision (BC EST # RD188/05) indicates that the complaint was filed on August 16, 2004 and that the complaint hearing was held on February 15, 2005 (in which case, the section 63 claim was advanced, albeit perhaps not in writing, within the 6-month complaint period). At this complaint hearing, the employer did *not* argue that the section 63 claim was statute-barred. Rather, the employer asserted that the delegate breached the principles of natural justice by hearing and deciding the section 63 claim without giving it "a reasonable opportunity to respond to the claim" in light of the absence of "particulars of or written claim [*sic*] for length of service compensation when the complaint hearing commenced" (page 9). The Tribunal rejected that argument finding (at page 10):

> In this case, there was a complaint in writing that was filed within the time required under the *Act*. Urban was put on notice of the claim for length of service compensation and was given an opportunity to respond to it. While the amount of notice of the claim was short, it was apparently sufficient notice, as Mr. and Mrs. Velecky passed on an opportunity for an adjournment of the complaint hearing in order to consider their position and indicated to the Director they would address it at the complaint hearing. This part of the appeal is really about Urban seeking to have Mr. and Mrs. Velecky relieved of that decision and provided with another opportunity to address the length of service compensation claim. There is no reason that should be allowed.

44. The *Urban Sawing* reconsideration panel confirmed the appeal decision, but whether the employer was denied natural justice in relation to the timeliness of the section 63 claim was not an issue raised in the reconsideration application.

45. *Cownden* was also referred to in the *Moore* appeal decision, *supra*. In *Moore*, the complainant sought to expand the scope of his complaint which, on its face, was solely concerned with the loss of a so-called "accommodation benefit". The delegate, at the outset of the complaint hearing, indicated that he

intended to limit the scope of evidence and argument to this latter issue. On appeal, the complainant asserted, relying on *Cownden*, that he ought to have been allowed to advance other claims not particularized in his complaint. The Tribunal referred to the Director's discretionary authority to hear and decide a matter that might otherwise be statute-barred and made the following comments regarding the permissible "scope of the hearing" (at para. 31):

> In my view, *Cownden* confirms the Director's discretion to expand the scope of a complaint where evidence uncovered by the Director or during an adjudication warrant expansion, provided that there is disclosure, and provided further that the affected parties have an opportunity to respond (see *Urban Sawing & Grooving Company Ltd.*, BC EST # D112/05). There is nothing in the Tribunal's reasons that would, however, force the Director to exercise that discretion or otherwise entitle a complainant to wield the Director's discretionary authority like some sort of sword.

46. Accordingly, the Tribunal refused to interfere with the delegate's discretionary decision to limit the scope the complaint hearing, and this decision was confirmed on reconsideration (see *Moore*, BC EST # RD008/17, especially paras. 25 – 26). In my view, the combined effect of *Cownden* and *Moore* is that while the Director has a statutory discretion to review claims that are advanced after the section 74(3) 6-month complaint period has expired, the Director is not obliged to hear and consider such claims. However, in exercising this statutory discretion, the Director must act reasonably and in good faith.

47. It should be noted that the *Moore* decision did not specifically address the argument advanced by *Westcor* in this appeal, namely, the interpretation and application of the section 74(3) 6-month complaint period. However, and as noted above, in light of the B.C. Court of Appeal's decision in *Karbalaeiali*, *supra*, it would appear that a "late" complaint is *never* absolutely barred (i.e., without having to consider the underlying reasons why the complaint was not filed within the statutory complaint period and the other section 76(3) factors).

48. The *660 Management Services Ltd.*, *supra* decision, sets out what I would consider to be the governing considerations for a case such as that presented in this appeal. In *660 Management*, the complainant was away on maternity leave but before her agreed return to work date, her employer offered her a reduced work schedule, from 3 days to 2 days per week. The complainant refused that return to work offer, and shortly thereafter filed a complaint seeking only section 63 compensation for length of service. Prior to filing her complaint, the complainant using the now-abandoned Employment Standards Branch's "Self Help Kit", claimed compensation in the amount of $1,426.93, and this latter amount was the sum claimed in the complaint filed approximately two weeks later. About two months after the complaint was filed, the employer provided a cheque for this latter sum (less statutory deductions), "in full and final settlement" of her complaint to the Employment Standards Branch – the funds were deposited into the Director of Employment Standard's trust account. As detailed in the appeal decision (at para. 8), the delegate advised the employer "that the offer in the Self Help Kit has been rejected by [the employer], had since been withdrawn by [the complainant] and [the complainant] had filed a complaint"; the delegate advised the employer's legal counsel "that the amount was paid into the ESB Trust [account] and would be applied to amounts, if any, found owing."

49. The delegate ultimately issued a section 95 "associated employers" declaration involving the complainant's direct employer and two other corporations, and determined that all three firms

contravened section 54 of the *ESA* (changing conditions of employment of employee on leave) and section 46 of the *Employment Standards Regulation* (failure to produce employment records). The delegate issued a wage payment order in the amount of $1,020.82, being an amount in addition to the funds held on deposit in the Director's trust account. The delegate also levied a $500 monetary penalty. On appeal, the employer argued that the delegate erred in finding that the employer contravened section 54 of the *ESA* inasmuch as this provision had not be specifically identified in the original complaint. The Tribunal held (at paras. 26 – 28):

> Subsection 74(2) says the complaint must be in writing and must be delivered to an office of the Branch. There is no issue that [the complainant] complied with those statutory requirements. There is nothing in Section 74, or in any other provision of the *Act*, that either requires a complainant to specifically identify the particular contraventions which have taken place or to indicate what is owed. Providing this information at an early stage undoubtedly assists the Director in administering the complaint process, but to suggest it delineates the scope of the Director's jurisdiction is unsupported by any provision and, as the Director has argued, is inconsistent with the general authority of the Director to ensure compliance with the *Act*.
>
> Subsection 76(1) of the *Act* requires that the Director, subject to subsection 76(3), accept and review a complaint made under Section 74. Reading subsection 76(1) together with subsection 76(2) and Section 2, which sets out the purposes of the *Act*, the Director is entitled, and quite probably required, to take a liberal view of the scope of the complaint. That conclusion is, of course, consistent with the statutory purpose of ensuring employees receive at least basic standards of compensation and conditions of employment and with the principles expressed in *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th) 336 (B.C.C.A.), *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Health Labour Relations Association of B.C. v. Prins*, (1982) 40 B.C.L.R. 313, 82 C.L.L.C. 14,215, 140 D.L.R. (3rd) 744.
>
> Although concerns about the procedural fairness of the complaint process can arise if the Director does not allow the party under investigation a reasonable opportunity to respond to the Director's appreciation of the complaint following the required review, there is no such concern in this case…

The *660 Management Services* appeal decision was confirmed on reconsideration (see BC EST # RD044/06).

50. Although the original complaint in this case was unquestionably filed within the 6-month complaint period, that complaint did not in any way refer to the claim that, ultimately, represented almost the entire amount of the Determination, namely, the overtime pay claim. The complaint itself was timely, but the overtime claim was not advanced until after the section 74(3) 6-month time limit had expired (but only by a couple of days).

51. Unlike some of the other Tribunal decisions discussed above, there is nothing in the complaint that suggested the complainant intended to pursue an unpaid overtime claim. I reject the complainant's legal counsel's position that this complaint contained "an overtime aspect". The only tangential references in the complaint to "overtime" were contained in communications from Westcor to the complainant that the complainant included in his complaint. In my view, it simply cannot be reasonably concluded that the complaint included – either directly or indirectly – a claim for unpaid overtime pay in his original complaint.

52. I accept that Westcor had no prior notice of an overtime claim until the delegate contacted Marcus Hamm on September 4, 2019, after the complainant advanced an overtime claim during the course of his testimony before the delegate. In my view, the delegate was not obliged to hear and decide the overtime claim (consistent with *Cownde*n, *supra* and *Moore*, supra), but nonetheless had the statutory discretion to do so. However, if the delegate intended to hear and decide the overtime claim, as a matter of statutory discretion, she was obliged to ensure that fundamental principles of administrative fairness were respected. In this instance, the delegate did not allow the complainant to press on with his overtime claim at a hearing where Westcor had apparently deliberately chosen not to appear. However, Westcor's decision in this latter regard may well have been influenced by its understanding that the only issue at the hearing would be in relation to the complainant's vacation pay claim.

53. Once it became clear that an overtime claim was being advanced, the delegate notified Westcor, and later reconvened the hearing with Westcor's representative in attendance. The delegate subsequently adjourned the September 4th hearing, established a process for both parties to file further evidence relating to the overtime claim, and later scheduled a hearing continuation date (for September 24th). In my view, Westcor was given sufficient notice of, and a fair opportunity to respond to, the overtime claim after it was first advanced on September 4th. I am not satisfied that in deciding to hear and decide the overtime pay claim, the delegate acted in bad faith, abused her statutory authority, or otherwise acted unreasonably or proceeded on a wholly erroneous premise. Indeed, Westcor does not assert that the delegate acted in bad faith or abused her discretionary authority in deciding to adjudicate the overtime claim.

ORDER

54. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the amount of $17,523.48 together with whatever additional interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal