Citation: DC Process Servers Inc.(Re)
2023 BCEST 22

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

DC Process Servers Inc.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2022/205

DATE OF DECISION: April 20, 2023

DECISION

SUBMISSIONS

Daniele L. McDonald	legal counsel for DC Process Servers Inc.
Christopher Dow	on his own behalf
Shannon Corregan	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal filed by DC Process Servers Inc. (the "appellant") and it concerns a determination issued by Shannon Corregan, a delegate of the Director of Employment Standards (the "Adjudicating Delegate"), on October 28, 2022 (the "Determination"). This appeal is filed pursuant to subsections 112(1)(a) and (c) of the *Employment Standards Act* (the "*ESA*"). The appellant says that the Adjudicating Delegate erred in law in making the Determination (section 112(1)(a)), and also bases its appeal on evidence it says was not available when the Determination was being made (section 112(1)(c)).

2. In interim reasons for decision issued on February 16, 2023 (2023 BCEST 3), I dismissed the appellant's "new evidence" ground of appeal on the basis that it had no reasonable prospect of succeeding (see section 114(1)(f) of the *ESA*). I directed the respondent parties to file further submissions regarding the appellant's "error of law" ground of appeal (with the appellant having a right of reply). With these submissions now in hand, I am issuing my final reasons for decision in this appeal.

3. As will be seen, after considering the parties' submissions, I have decided to cancel the Determination and refer the original complaint back to the Director of Employment Standards so that a new investigation may be conducted.

FACTUAL BACKGROUND AND THE DETERMINATION

4. The Determination and Adjudicating Delegate's "Reasons for the Determination" (the "Reasons") were both issued on October 28, 2022, nearly three years after the complaint was filed (on December 17, 2019).

5. By way of the Determination, the appellant was ordered to pay its former employee, Christopher Dow (the "complainant"), a total sum of $10,241.12, including section 88 interest. The complainant worked for the appellant as a security guard, in the City of Kamloops, from May 15, 2019, to February 20, 2020. The appellant was also ordered to pay an additional $2,500 on account of five separate $500 monetary penalties (see section 98 of the *ESA*). The bulk of the monies payable to the complainant ($8,838.84) represents unpaid overtime pay, and the central thrust of the appellant's case on appeal is that a large portion, if not all, of this latter award reflects wages that were not payable since the complainant was not "on call" at a location designated by the appellant (see the section 1(1) definition of "work").

Investigation of the Complaint by the Employment Standards Branch

6. In June of 2021, the complaint was assigned to Joy Archer, a delegate of the Director of Employment Standards, who was tasked with undertaking an investigation into the complaint. On August 11, 2021, this delegate (the "First Investigating Delegate") e-mailed her "preliminary findings" to both the complainant and the appellant. In her "preliminary findings" report, the First Investigating Delegate noted the following with respect to the complainant's "on call" wage claim:

> …shifts were 12 hours in length, of the 12 hours, he would work doing static patrol/checks for approximately 4 hours, the remaining 8 hours he was on call for any alarms, and was required to be in uniform ready to respond. [The complainant] stated that alarm calls were few and far between, on average he maybe received 3 calls per month, [the complainant] did not keep a record of the dates/hours he was called out on alarms. [The complainant] was not required to be at a particular spot designated by the Employer, he could be anywhere he chose (home, restaurant etc) as long as he was no more that [*sic*] 20 – 30 minutes away from the city.

7. The central issue in this appeal is whether the complainant was "on call" at certain times, and thus not considered to be at "work". This latter term is defined in section 1(1) of the *ES*A as follows:

> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> (2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence. (my underlining)

8. With respect to the question of whether the complainant was "on call" other than at a location designated by the appellant (and thus not considered to be "working" for purposes of the *ESA*), the First Investigating Delegate initially concluded that the complainant was on call and thus not deemed to be working. However, on December 7, 2021, the First Investigating Delegate e-mailed her "reconsideration of my preliminary findings" to both the complainant and the appellant. In her "reconsideration" e-mail she noted that "[i]nformation also provided by both parties during the initial investigation was that [the complainant] was required to be in uniform and monitor his radio for the full 12 hour shift he was scheduled for as well." The First Investigating Delegate then concluded: "it is my updated preliminary finding that [the complainant] was required to be available and performed work for the employer for 11.5 hours of the 12 hours he was scheduled for on mobile alarm shifts, and for not being provided 32 hours free from work." The First Investigating Delegate made a provisional finding that the complainant was "owed wages in the amount of $4,817.29 (overtime pay $4,576.01 + $56.00 minimum daily pay + $185.28 4% annual vacation pay)."

9. On April 20, 2022, another delegate – Taylor McDowell (the "Second Investigating Delegate") – appears to have been assigned to complete the investigation of the complaint. Although the Second Investigating Delegate advised the parties that he would be issuing an "Investigation Report", he never did so.

10. On August 12, 2022, the Adjudicating Delegate issued an "Investigation Report" that was sent to both the complainant and the appellant. In her report, the Adjudicating Delegate indicated that having reviewed the information contained in the file, she was satisfied: i) that wage statements issued to the complainant showed that there were two occasions when the complainant did not receive the 2-hour minimum pay (section 34); ii) the appellant never produced a copy of the section 73 variance it claimed to have regarding

the payment of overtime; iii) and that the wage statements also showed the complainant was not paid statutory holiday pay in accordance with section 46. The Adjudicating Delegate asked the parties to provide their written responses to her report by no later than August 26, 2022, but neither party did so.

11. The record shows that the appellant's principal had various telephone conversations with the Adjudicating Delegate in late August 2022 following the issuance of her "Investigation Report". The appellant's principal pressed the point that the appellant's business was closed some time ago, and that the business had been sold. However, the appellant did not provide any additional evidence or argument beyond what had already been submitted.

The Determination and Reasons

12. On October 28, 2022, the Adjudicating Delegate issued the Determination and her Reasons.

13. Certain matters relating to the Determination are not being challenged in this appeal. First, the Adjudicating Delegate determined, correctly in my view, that the appellant did not hold a valid section 73 variance regarding the payment of overtime pay, and this finding has not been challenged on appeal. Second, the Adjudicating Delegate determined that the Employment Standards Branch never "closed" the investigation prior to issuing the Determination. That latter finding is similarly not challenged on appeal. Third, the Adjudicating Delegate determined that notwithstanding the sale of the business, the appellant remained liable for any wages owed to the complainant, and this finding is not challenged on appeal.

14. The Adjudicating Delegate's findings with respect to the central issue in this appeal, namely, whether the complainant was "on call" at certain times, and thus not considered to be at "work" are as follows (Reasons, pages R9-R10):

> The parties also agree that [the complainant] was not required to be at a designated location as long as he remained within 20 - 30 minutes of the city. If this were the only evidence before me, I would find that [the complainant] was not on call at a location designated by the employer, and therefore not entitled to wages for the time spent on call. However, this is not the only evidence before me…
>
> [The complainant] stated that he was required to be in uniform and monitor his radio while on call. [The appellant's principal] stated variously that [the complainant] 1) was required to be in uniform; 2) was not required to be in uniform when he was on call; 3) if he changed out of his uniform, would have to change back in order to answer a call; and 4) was permitted to wear his uniform to "save" his own clothing if he wished…On the evidence before me, I find it more likely than not that [the appellant] required [the complainant] to wear his uniform while he was on call.
>
> … [the complainant] was providing a service to [the appellant] by wearing his uniform: the service he provided was following the instructions he was given, and the ability to respond more rapidly to an alarm, rather than having to get dressed in his uniform first. While an employer may require an employee to be on-call without it being considered "work" under the Act, an employer cannot impose additional requirements on the employee or give them instructions about what to do during that time without running the risk of this time being considered "work." [The appellant] chose to exercise control and direction over [the

> complainant's] activities by requiring him to wear his uniform when he was on-call. This circumscribed [the complainant's] freedom (he was not free to wear his own clothing or represent himself as he wished in public) and provided a benefit to [the appellant], as discussed above. I find that the time [the complainant] spent on call was work, and he is owed wages for that work.

15. Having determined that the complainant worked several hours for which he was not paid (principally due to an "undercounting" of his actual time at work due to the "on call" finding), he was entitled to an unpaid wage award that reflected unpaid overtime pay, unpaid statutory holiday pay, minimum daily pay, hours worked contrary to section 36, and concomitant vacation pay. The total unpaid wage award, including section 88 interest, was fixed at $10,241.12. The Adjudicating Delegate also levied five separate $500 monetary penalties in light of the appellant's contraventions of sections 16 (failure to pay at least minimum wage), 34 (minimum daily pay), 36 (minimum hours free from work), 40 (overtime pay), and 46 (statutory holiday pay) of the *ESA*.

THE ALLEGED ERRORS OF LAW

16. The appellant asserts that the Adjudicating Delegate erred in finding that the complainant was required to wear his uniform while on call. The appellant maintains that the evidentiary record does not support such a finding. The appellant also says that even if the complainant had been directed to wear his uniform while on call, that fact does not, of itself, justify a finding that the complainant was "working" while on call.

17. Following its position regarding the on call issue, the appellant asserts that if it prevails on this point, the complainant's various unpaid wage claims (e.g., overtime and section 36 pay) cannot stand. The appellant says that the payroll records clearly show that the complainant was properly paid (perhaps even overpaid) for work undertaken on various statutory holidays.

18. Finally, the appellant says that since it did not contravene any provision of the *ESA*, all five monetary penalties should be cancelled.

THE COMPLAINANT'S AND ADJUDICATING DELEGATE'S SUBMISSIONS

19. The complainant's submission addresses some matters that are not before me in this appeal, such as whether the appellant held a valid section 73 variance and his wage rate. With respect to the "on call" issue, the complainant did not expressly assert that he was *directed* by the appellant to be in uniform at all times when he was "on call". The complainant stated: "In terms of *work*, I had to be in uniform in order to respond to any calls or security related work" (my *italics*). Of course, changing into a uniform before responding to a call is not quite the same thing as being required to wear a uniform *at all times* while on call.

20. In this case, there is no dispute about whether the complainant was required to wear his uniform while working (the employer concedes this point); the key factual issue in dispute is whether he was required to wear his uniform when he was at home or at some other location while on call. If so, a further legal issue arises regarding whether such a direction effectively converted the complainant's "on call" time to "working" time.

21. The complainant's submission outlined various arguments regarding why such a direction would be appropriate:

> Any reasonable employer would expect their employees to be in uniform while performing and exercising their duties and be in accordance with the laws.
>
> Additionally if an employee was to be out of uniform and in their civilian clothes, it would then take extra time to respond to alarms or any other duty laid out by their employer. The goal of alarm response is to get to the residence or business as quickly as possible and by not being in uniform including having the equipment ready to go would result in longer response times ans [*sic*] would be detrimental to the customers that are paying for a service and relying on us to provide it in a timely fashion.

However, demonstrating that such a direction might have been sensible from an administrative or efficiency point of view, is not the same thing as demonstrating that the complainant was *actually required* to wear his uniform while on call.

22. The complainant's submission also addresses the restrictions on his freedom of movement while on call:

> During the 12 hour shift and what [the appellant's principal] would consider downtime, I could not go seek other employment as per say a split shift, one may be able to pick up a few extra hours in between. Since I had to monitor the phone, do house checks, alarm response, check in from two companies and other duties as they arose I was not able to get other employment.

23. The Adjudicating Delegate did not personally gather any evidence from the parties but, rather, relied on the record that was principally compiled by the First Investigating Delegate. In her submission on appeal, the Adjudicating Delegate noted that "there was no indication from either party that there was any documentary evidence that would assist in deciding the issue of the uniform." Further, while observing that she only had the written record of the parties' evidence before her, she also cautioned that "the parties' testimonies were in direct conflict when it came to the issue of the alleged uniform requirement" and that "neither party's evidence was fulsome on this point." Finally, the Adjudicating Delegate noted that "neither [the complainant] nor [the appellant] provided any supporting details to lend strength to their respective positions, and [the First Investigating Delegate] did not take it upon herself to press the parties for further information."

24. With respect to her ultimate finding that the complainant was required to wear his uniform while on call, the Adjudicating Delegate submitted that she "arrived at this conclusion after conducting an analysis of the evidence before me" and although "this evidence was slender…I ultimately found it sufficient."

FINDINGS AND ANALYSIS

25. The complainant's work consisted of both "static shifts", which were described in the section 112(5) record as shifts where the complainant was "required to be at a location that [he] did not leave and [was] paid by the hour". Further, and also as recorded in the record, the complainant was assigned 12-hour "mobile shifts" where, for a portion of the shift (the actual portion is disputed as between the parties), he undertook "static" duties including some patrol checks and for the balance of the shift, "when there were no customers to attend to [the complainant] was free to engage in his own pursuits provided he was

within 20-30 minutes of town." The appellant "did not designate a location where [the complainant] had to be as long as it was within a 20-30 minute radius [and] there was no direction or expectation from [the appellant] that when [the complainant] was not responding to a customer call he would patrol the areas/or contracted sites looking for issues."

26. The appellant and the complainant agree that the complainant was "on call" for large portions of his 12-hour "mobile shifts". The complainant indicated that the "on call" portion was about 8 hours, while the appellant maintained that the "on call" time was closer to 10 hours. As detailed in the section 112(5) record, the complainant acknowledged "that alarm calls were few and far between, [and] on average he maybe received 3 calls per month". While he was on call, "he could be anywhere he chose (home, restaurant etc) as long as he was no more than 20-30 minutes away from the city" (i.e., Kamloops).

27. Apart from the dispute between the parties regarding the length of the "on call" portion of the complainant's "mobile shifts", the parties also disagreed about whether the complainant was required to be in uniform throughout the entire period of the "on call" portion of a 12-hour mobile shift. In light of the stark conflict in the parties' evidence, the Adjudicating Delegate was obliged to make a credibility determination. That being the case, and as directed by the B.C. Court of Appeal in *Faryna v. Chorney*, 1951 CanLII 252, [1952] 2 D.L.R. 354, the Adjudicating Delegate was obliged to assess the relative credibility of the parties in light of the following considerations (at page 357, D.L.R.):

> 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 which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

28. This case is doubly difficult inasmuch as the Adjudicating Delegate does not appear to have had any direct contact with the parties for the purposes of gathering additional evidence. Rather, her credibility findings were based on a review of a written evidentiary record that was largely, and seemingly entirely, compiled by the First Investigating Delegate. This evidentiary record, as the Adjudicating Delegate readily concedes, is far from satisfactory. The Adjudicating Delegate characterized the evidentiary record as being inadequate and incomplete – "neither party's evidence was fulsome"; "the parties' testimonies [were] brief"; neither party provided "supporting details to lend strength to their respective positions"; and the First Investigating Delegate "did not take it upon herself to press the parties for further information".

29. In light of the unchallenged finding of fact that the complainant was never required to remain at a location designated by the appellant while he was on call, in my view, it was his burden to prove – in accordance with the usual civil standard, namely, the balance of probabilities – that his "on call" time was actually "working" time.

30. Insofar as this latter question is concerned, the "on call" provision within the section 1(1) definition of "work" refers to "a location designated by the employer" (and there was no such designated location in this case), and then further provides that an employer may designate an employee's residence as the "on

call" location without triggering a deeming provision, which converts what would otherwise be "on call" time to "working" time.

31. In *Hills*, 2011 CanLII 152449, a 3-person reconsideration panel reviewed the "on call" provision and summarized the Tribunal's jurisprudence with respect to it. The Tribunal has recognized that even though an "on call" employee's freedom of movement is constrained, that fact alone does not convert "on call" time to "working" time. As in the *Hills* case, the complaint here was essentially free to be wherever he wished provided he could respond to a call within the requisite 20-30 minute time frame.

32. In *Ashley Home Care Cleaning Centre Ltd.*, 2002 CanLII 78343, the Tribunal suggested that when "on call" employees "are on their own, and not subject to the Employer's control [other than with respect to the obligation to be available for call outs], and can meaningfully do what they wish to do", they should not be considered to be "working". Similarly, in *MacAulay*, 2020 BCEST 31, even though the "on call" employee's liberty was restricted to a degree due to limits in cellular telephone coverage (which effectively restricted his freedom of movement), and a zero-tolerance policy regarding the consumption of alcohol, the Tribunal held that since there was no non-residential designation, the employee was not working while on call.

33. In *Hicks*, 2007 CanLII 91696, the Tribunal summarized the law and policy underlying the "on call" provision as follows (at para. 20):

> Since the deeming provision does not apply at the employee's residence, clearly the legislature intended that in such circumstances the employee must either be doing something more than merely being on call to perform work, or, perhaps, that the duties related to being on call were of a particular kind or nature. If merely being on call were sufficient for a finding that there was work, then the exclusion from the deeming provision would be unnecessary. Consideration of the deeming provision and the exclusion from it indicates, in my view, the true legislative intent, namely, that where a person is on call at their residence something more is required before there is compensable work as defined in the Act.

34. Accordingly, this appeal turns on two questions, the first being a factual matter, the second being a matter of statutory interpretation: first, did the appellant expressly direct the complainant to wear his uniform at all times while on call?; second, even if such a direction were made, does that direction sufficiently constitute "something more", such that what would otherwise be non-compensable "on call" time is converted to compensable working time? The Adjudicating Delegate answered each question in the affirmative.

Did the appellant require the complainant to wear his uniform while on call?

35. In my view, the Adjudicating Delegate's factual determination that the appellant directed the complainant to wear his uniform at all times while he was on call is not entitled to an elevated degree of deference given that she conducted no independent factual investigation, had no personal contact with the parties, and simply relied on the evidentiary record gathered by the First Investigating Delegate. I am in no better or worse position than the Adjudicating Delegate in terms of assessing the evidentiary record.

36. The section 112(5) record is contained in four parts and consists of 304 pages. Several documents are reproduced in several different locations within the record and, accordingly, I will only refer to any particular document using the first location where it appears.

37. In his original complaint, the complainant made no mention of having been required to wear a uniform at all times while on call. The *entire* record of complainant's evidence regarding the direction to wear a uniform while on call was as follows:

> • Part 1, p. 16 – a note of a telephone call (apparently between the First Investigating Delegate and the complainant, but this is not entirely clear) states: "would work – then have about 8 hours off in between potentially – but would be on-call for any alarms during the time you were off. – you had to be in uniform at all time [*sic*] even when off"
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> • Part 1, p. 17 – note of a telephone call: "alarms would vary sometimes you could get 3 in a day & sometimes go weeks w/o an alarm – regardless had to be available for the full 12 hours" (underlining in original text)
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> • Part 1, p. 18 – note of a telephone call: "was a mobile security guard – on call alarm response – expected to be in uniform"

38. The *entire* record of the appellant's evidence regarding whether the complainant was required to wear a uniform when on call was as follows:

> • Part 1, p. 10 – a note in an Employment Standards Branch "Workflow Sheet" appears to indicate that the appellant's principal had a telephone call with the First Investigating Delegate on July 19, 2021; the notation regarding this call states: "Response to questions about uniform. Not required to wear, could change into their own clothes when home. Had to change back to uniform when called out."
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> • Part 2, p. 23 – a note of a telephone call between the First Investigating Delegate and the appellant's principal states: "had a company vehicle – had to be able to respond to a call w/in a ½ hr had to be uniform" [*sic*]
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> • Part 2, p. 34 – an e-mail from the appellant's bookkeeper to the First Investigating Delegate: "2 Hrs for a couple of patrols; 7.5 Hrs on call to attend to alarms. (they were allowed to do what every they wanted as long as they attended any alarm as soon as they received it" [*sic*]; The remainder of the 12.5 hrs they were on call, and were allowed to be at home."
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> • Part 2, p. 37 – an e-mail from the appellant's principal to the First Investigating Delegate: "He was paid to stay at home, on call. I f [*sic*] he got a call. he [*sic*] would put on his uniform and attend. If he wished, he could wear our uniform during his shift and save his clothes. We gave them that choice. He could even use the company gas and vehicle for personal use during the shift if they [*sic*] wished."

39. The above evidence certainly can be fairly characterized, as the Adjudicating Delegate did in her submission, as "slender" and not "fulsome". The Adjudicating Delegate, referring to the evidence, noted that the First Investigating Delegate "did not take it upon herself to press the parties for further information". Regrettably, I am impelled to conclude that the "investigation" in this case fell well short of being an adequate investigation. The parties clearly had conflicting views about whether the complainant

was required to wear a uniform throughout the entire time he was on call. Additionally, the complainant's evidence is somewhat unclear inasmuch as at least one of his comments could be taken as meaning he only had to be in uniform when *attending* a call.

40. It strikes me as being highly doubtful that the complainant would be sitting around his home in uniform waiting for a call when, on his own evidence, such calls were quite rare (i.e., "sometimes go weeks w/o an alarm"). The security guard's uniform consists of not much more than a shirt, a pair of slacks and, depending on the weather, perhaps a jacket. I think it is reasonable to conclude that one could change into such a uniform in a matter of minutes. When not at home (and he was not required to remain in his residence at all times while on call), the complainant might well have worn his uniform since he was still obliged to respond to calls within a 20-30 minute time frame. However, a personal choice made in order to meet the requirement that he attend calls in uniform within a specified time frame, is not at all the same thing as saying he was required to wear a uniform when on call but not at home.

41. Given the stark conflict between the parties regarding whether the complainant was directed to wear a uniform at all times while on call, a careful assessment of their relative credibility – consistent with *Faryna v. Chorney*, *supra* – was called for. *Faryna* directs fact-finders to examine evidence taking into account the probability that a particular statement is reasonable and in "harmony with the preponderance of the probabilities".

42. The Adjudicating Delegate found, at page R10 of her Reasons, that the complainant stated he "was required to be in uniform and monitor his radio while on call." That is not quite accurate. While during one telephone call with the First Investigating Delegate he stated that he was required to wear a uniform even when on call, he also made a statement that could equally be read as indicating he only had to be in uniform when *responding* to a call.

43. The Adjudicating Delegate stated that the appellant's principal "stated variously that [the complainant] 1) was required to be in uniform; 2) was not required to be in uniform when he was on call; 3) if he changed out of his uniform, would have to change back in order to answer a call; and 4) was permitted to wear his uniform to "save" his own clothing if he wished.

44. The appellant's principal's evidence, as recorded in the First Investigating Delegate's handwritten notes (and as set out above), was as follows: i) "had to be able to respond to a call w/in a ½ hr had to be uniform"; and ii) "I f [*sic*] he got a call. he [*sic*] would put on his uniform and attend. If he wished, he could wear our uniform during his shift and save his clothes. We gave them that choice." The first item is a note of a telephone call between the First Investigating Delegate and the appellant's principal (and it should be acknowledged that *all* of the First Investigating Delegate's handwritten notes are potentially unreliable hearsay evidence). The second item reflects the appellant's principal's own words and, that being the case, is perhaps the more reliable of the two items. The appellant's principal never stated that the complainant had to be in uniform at all times while on call. As I read his evidence, the appellant's principal simply stated that the complainant had to be in uniform when *attending* a call and otherwise could *choose* whether or not to wear a uniform while on call. In addition, the July 19, 2021 telephone call between the appellant's principal and the First Investigating Delegate noted in the "Workflow Sheet", states that the appellant's principal specifically stated that the complainant was not required to wear a uniform while on call, but would have to change into his uniform when called out.

45. As previously discussed, the burden was on the complainant to demonstrate that he was required to wear a uniform while on call. The complainant's evidence on this point was ambiguous, and the appellant's principal never acknowledged that there was a work rule in place requiring the appellant's security guards to wear their uniforms while on call. Indeed, the only evidence in the appellant's principal's own hand (an e-mail to the First Investigating Delegate) was that there was no such rule. There is no written policy or other documentary record showing that such a rule was in place.

46. The First Investigating Delegate did not, so far as I can determine, make any inquiries of other security guards employed by the appellant in order to corroborate the complainant's position regarding the wearing of uniforms while on call. The complainant's apparent position that he constantly wore his uniform while sitting around his house waiting for a (very rare) call for service is, in my view, not credible, particularly given that it only takes a few minutes to change into uniform. The Adjudicating Delegate's conclusion that the complainant was "more likely than not" required to wear his uniform while on call (page R10) is simply not justified based on the evidentiary record.

The legal effect of a requirement to wear a uniform while on call

47. I am not satisfied that the evidentiary record in this case supports a determination that the appellant required the complainant to wear his uniform at all times while on call. However, if such a rule were in effect, I think it is at least arguable that it could constitute sufficient control over an employee's "on call" time so as to make that time compensable under the *ESA*.

48. On the other hand, the appellant makes a cogent argument that simply wearing a uniform in private or public, and while on call, without additional indicia of employer control and mandated work-related activity, falls short of meeting the definition of "work", namely, "the labour or services an employee performs for an employer". Many employees – such as truck and vehicle drivers, retail clerks, hotel staff, restaurant workers, medical and dental office workers, emergency services personnel, municipal maintenance staff, janitors, ferry captains and other on-vessel workers, and the list goes on – are required to wear uniforms while on duty. Some employers require their employees to report for duty in their uniforms (often because there are no adequate changing facilities at the workplace). In the latter instance, would an employee, in uniform and travelling to work in a private car or on public transit, be considered to be working while travelling to work simply because they were effectively obliged to be in uniform? This case potentially raises important public policy considerations. In light of the fact that this issue has not been comprehensively argued before me, and given the evidentiary deficiencies in this case, I do not think it appropriate to make a finding on this issue in this case.

Summary

49. I am not satisfied that the Adjudicating Delegate's determination that the complainant was required to wear a uniform at all times while on call is tenable in light of the very poor quality of the evidentiary record. The investigation conducted in this case was not comprehensive or even minimally adequate, but that failing should not prejudice either party.

50. In my view, the only fair result would be to cancel the Determination, and return this matter to the Director of Employment Standards so that an adequate investigation can be undertaken. This matter has not proceeded in what I would consider to be a timely manner. I thus express the hope that the Director

of Employment Standards will prioritize this matter so that it can proceed to an adjudicated result as quickly as possible.

51. I wish to make it clear that I am not requesting the Adjudicating Delegate to prepare a "referral back report" to be delivered to the Tribunal, following which a final decision would be rendered with respect to this appeal. These reasons represent my final decision regarding the Determination – I am cancelling the Determination and, having done so, my jurisdiction with respect to this appeal is now exhausted.

ORDERS

52. Pursuant to section 115(1)(a) of the *ESA*, the Determination is cancelled.

53. Pursuant to section 115(1)(b) of the *ESA*, the complainant's complaint is referred back to the Director of Employment Standards.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal