

An appeal

- by -

Canadian Truck & Trailer Repair Kelowna Inc.
("CTTR")

- 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 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2006A/139

DATE OF DECISION: February 8, 2007

DECISION

SUBMISSIONS

Ken Thompson	on behalf of CTTR
Graham Jickling	on behalf of the Director of Employment Standards
David P. Dustan	on his own behalf

OVERVIEW

1. This is an appeal by Canadian Truck and Trailer Repair Kelowna Inc. (“CTTR”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued November 10, 2006.
2. David Dustan worked as a “service writer/advisor” for CTTR, a truck and trailer repair business, from January 24, 2005 until January 3, 2006. Mr. Dustan filed a complaint alleging that he was owed overtime wages.
3. The Director’s delegate held a hearing into Mr. Dustan’s complaint on September 6, 2006. The employer was represented by the operations manager, Darcy Knapp, while Mr. Dustan represented himself.
4. The delegate determined that CTTR had contravened Sections 40 and 58 of the *Act* in failing to pay Mr. Dustan overtime wages and vacation pay. He concluded that Mr. Dustan was entitled to vacation pay, wages and interest in the total amount of \$7,588.51. The delegate also imposed a \$1,000 penalty on CTTR for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. CTTR noted a typographical error in Mr. Dustan’s name as it appears in the Determination, which was acknowledged by the delegate. CTTR contends that the delegate erred in law in calculating Mr. Dustan’s entitlement, which it says is a period of seven months rather than the six provided by the *Act*. CTTR also contends that the delegate erred in determining that Mr. Dustan was entitled to overtime, and in calculating his overtime wages.
6. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal’s Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I conclude that this appeal can be adjudicated on the written submissions of the parties. This appeal is whether the delegate erred in law, an issue which does not turn on the credibility of the parties or whether additional evidence needs to be considered. This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination

ISSUE

7. Did the delegate err in law in determining that Mr. Dustan was entitled to overtime wages, and in calculating his wage entitlement?

FACTS AND ARGUMENT

8. The relevant facts for the purposes of the appeal are as follows.
9. Mr. Dustan's evidence at the hearing was that he was required to begin work early, work through lunch and put in extra hours after work and on weekends in order to get all the necessary work completed. He said that he had an agreement with the employer to take time off in lieu of the overtime, but did not have the chance to do so. He also testified that his employer saw him working additional hours but never asked him not to do so. However, he conceded that his employer told him that his shift was from 8:00 a.m. until 5:00 p.m., and that is what he would be paid. When asked why he had not submitted a time card for his additional hours, Mr. Dustan testified that he was told his hours had already been submitted for him.
10. Mr. Dustan testified that he recorded his start and finish times, and whether he took lunch, on a daily basis in his journal, which he submitted in support of his complaint.
11. Mr. Dustan's evidence that he often worked late, over lunch and on Saturdays was corroborated by two witnesses, Travis MacDougall and David McCreary.
12. Mr. Knapp's evidence was that he told Mr. Dustan his hours of work were from 8:00 a.m. until 5:00 p.m. and that he never asked Mr. Dustan to work beyond those hours. Although Mr. Knapp's evidence was that there was no time bank, he did confirm that Mr. Dustan was given additional days off at Christmas time to reflect his hard work. Mr. Knapp said that when he heard Mr. Dustan was at the office at 6:00 a.m., he told him not to come to work early. He also testified that Mr. Dustan never requested payment for his banked hours until after he was let go.
13. Although Mr. Knapp observed Mr. Dustan at the office after 5:00 p.m. he said he was not certain that Mr. Dustan was working on the employer's business.
14. CTTR's witness, Tony Clark, also acknowledged that he saw Mr. Dustan at the office before 8:00 a.m., although he could not say what he was working on.
15. The delegate found that Mr. Dustan worked in excess of 8 hours per day and 40 hours per week based on the evidence of all of the parties. He found that Mr. Dustan had recorded his hours of work in a meticulous fashion on a daily basis. In the absence of any contrary records from the employer, he found those records reliable.
16. The delegate relied on Tribunal cases setting out the "correct legal test" to determine whether the employer was obliged to pay overtime in circumstances where the employer argues that overtime is only recognized and payable when pre-approved.

17. The delegate found that the employer “directly or indirectly” allowed Mr. Dustan to work overtime. He further found that the employer had not paid Mr. Dustan for those overtime hours. The delegate allowed Mr. Dustan’s claim in the amount sought, and calculated vacation pay on the overtime hours, arriving at the amount noted above.
18. CTTR contends that the delegate erred in calculating the overtime hours from June 1, 2005 until December 31, 2005. It says the hours must be calculated from July 4, 2005 until January 3, 2006. The delegate made no submissions in response to this argument. Mr. Dustan submits that when he first filed his complaint, he calculated his six months running from June to December rather than July in error. He says that this error was corrected before the hearing.
19. CTTR also says there are discrepancies in Mr. Dustan’s journal of hours worked, and cites several examples of those discrepancies. The delegate submits that Mr. Dustan’s journal was available at the hearing and CTTR did not make the arguments it now makes on appeal with respect to the hours recorded in it. He submits that this is “new evidence” and ought not be allowed on appeal. Mr. Dustan responded in some detail to all of CTTR’s submissions about his journal entries, which I need not summarize here for the reasons set out below.
20. Finally, CTTR says that the company’s policy regarding overtime was very clear, and that Mr. Dustan was paid for all authorized overtime actually worked. It further argues that Mr. Dustan was paid every two weeks and at no time did he question the accuracy of the amounts he was paid.
21. The delegate submits that CTTR did not maintain a record of hours worked, although it acknowledged that Mr. Dustan was in the office beyond his regularly scheduled hours.

ANALYSIS

22. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made

Error of Law

23. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
 1. A misinterpretation or misapplication of a section of the Act;
 2. A misapplication of an applicable principle of general law;
 3. Acting without any evidence;
 4. Acting on a view of the facts which could not be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle

24. I will address each issue on appeal separately.

Typographical error

25. I am unable to find that the Determination should be set aside because of a typographical error. Section 123 of the *Act* provides that a technical irregularity does not invalidate a proceeding, and I find it unnecessary to comment further on this point.

Journal entry discrepancies

26. CTTR was represented by an agent at the hearing. Although I do not find the arguments raised by CTTR about Mr. Dustan's journal to constitute new evidence, they certainly constitute arguments that should have been raised at the hearing. Given that CTTR did not, even though it was given full opportunity to make its case and respond to the evidence, I will not consider them. Furthermore, questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained. The original decision maker was in the best position to consider the arguments at the hearing, and in the absence of a palpable and over riding error in his decision, which CTTR has not demonstrated, I find no basis to set aside or vary the Determination in this respect.

Entitlement to overtime

27. CTTR continues to advance the argument that Mr. Dustan was made aware of the company's policy regarding the approval of overtime, and the delegate erred in finding that he was entitled to it. In my view, the delegate correctly applied the Tribunal jurisprudence on this point, and in particular *Small Town Press Ltd.* (BC EST #RD016/04). CTTR has failed to establish an error of law on this point.

Statutory limitation on wage entitlement

28. Section 80(1)(a) of the *Act* provides that, in the case of a complaint, the amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning 6 months before the earlier of the date of the complaint or the termination of the employment. Mr. Dustan's employment was terminated January 3, 2005. Therefore, any wages payable prior to July 3, 2005 cannot be claimed against CTTR by operation of section 80(1)(a). Nevertheless, it appears that Mr. Dustan's claim for overtime from June 1, 2005 to December 31, 2005 was awarded in full by the delegate. Although Mr. Dustan submitted that his "error" was corrected by a mediator, it does not appear that this matter was addressed by the delegate. As I am unable to determine from the Record how the delegate arrived at his calculations, I refer the matter back to the delegate for reconsideration.

ORDER

29. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated November 10, 2006, be referred back to the Director for recalculation of Mr. Dustan's overtime entitlement in accordance with these reasons for decision.

Carol L. Roberts
Member
Employment Standards Tribunal