Employment Standards TRIBUNAL

An appeal

- by -

The Taiga Works Wilderness Equipment Ltd.
("Taiga")

- 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.: 2007A/135

DATE OF DECISION: February 6, 2008

DECISION

SUBMISSIONS

Lindsie Thompson	counsel for Taiga
Lynn Egan	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Taiga Works Wilderness Equipment Ltd., ("Taiga"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued September 28, 2007.

2. Taiga is a garment factory. Eleven complainants who were employed as seamstresses, or garment workers, filed complaints against Taiga alleging that it had contravened the *Act* by failing to pay them regular wages and overtime wages. They also contended that they were entitled to compensation for length of service after Taiga substantially altered their conditions of employment.

3. Following an investigation, the Director's delegate concluded that Taiga had terminated the complainants' employment by substantially altering their conditions of employment. The delegate determined that Taiga had contravened Sections 63 and 58 of the *Employment Standards Act* in failing to pay the complainants compensation for length of service and annual vacation pay. The delegate concluded that the employees were, collectively, entitled to wages and interest in the total amount of $41,633.11. The delegate also imposed a $500 penalty on Taiga for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.

4. The delegate found that Taiga did not owe the complainants regular wages and dismissed this aspect of the complaints. The delegate also dismissed the claims for overtime wages dating back to January 2005 on the basis that they were outside the wage recovery period allowed by the *Act*.

5. Taiga contends that the delegate erred in finding that the complainants' conditions of employment were substantially altered. In the alternative, Taiga submits that if the complainants were terminated, they were provided with 2.5 weeks notice of the changes and any compensation ought to be reduced by that amount. Taiga also submits that the delegate failed to observe the principles of natural justice in making the Determination and seeks to have the Determination cancelled.

6. Taiga's request for a suspension of the Determination was granted by the Vice Chair on November 5, 2007.

7. 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 Practise 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). This appeal is decided on the section 112(5) "record", the submissions of the parties and the Reasons for the Determination.

ISSUES

8. Did the delegate err in law in determining that the employees' conditions of employment were substantially altered; and

9. Did the delegate fail to observe the principles of natural justice in making the Determination?

FACTS

10. All of the complainants are female. They alleged that there were washroom, heating and lighting problems at the factory and that the male employees occasionally used the female workers' washroom. The delegate found these problems were minor and did not constitute an alteration in the complainants' conditions of employment.

11. In September and October 2005, Taiga introduced a new garment production system. The system involved breaking down sewing steps into smaller and purportedly simpler steps. Each seamstress was given more items to complete at one time. The system of work distribution also changed. "Helpers" and "Runners" were assigned to seamstresses to assist them with non-sewing tasks and to ensure they had a ready source of supplies. The complainants were paid by piece rate with a guaranteed base rate of $9.00 per hour. Taiga also replaced two 10 minute paid coffee breaks each day with a "Quality Bonus" which was based on the quality of the workmanship. The criteria for receiving this bonus was not defined or known to the employees. The employer, Mr. Behrmann made the decision as to whether the bonus was payable. An "Attendance Bonus" was replaced by a "Good Behaviour Bonus" which was similarly determined solely by Mr. Behrmann.

12. According to the employer, this process was designed to make the process more efficient, resulting in the opportunity for employees to earn more money under the piece rate as their productivity would increase. The employer also contended that the new system would eliminate unfairness and distribute work more efficiently among workers. The employees felt the new process was cumbersome and time-consuming. They believed that the changes would slow down the production process and create more stress.

13. After the changes were implemented, a majority of the workers earned fewer wages. Three employees earned more. Taiga submitted that the decrease in wages was a result of a deliberate decrease in production.

14. On November 3, 2006, the employer told the employees that their guaranteed base wage would be reduced in the following pay period. There were now four guaranteed base wage rates: $9.50, $9.00, $8.60 and $8.00 per hour. If the piece work wages in a pay period were lower than their guaranteed base rate, then the guaranteed base rate would be lowered one step. Each time an employee's piece work wages were lower than her guaranteed base rate, the guaranteed base rate would be lowered one step and it could eventually drop to $8.00 per hour. Taiga asserted that the guaranteed base rate cut was of no consequence to most employees since they normally earned piece rate wages of between $10.00 and $13.00 per hour. The eleven complainants objected to the changes and walked off the job.

15. Over the next 10 days, the supervisors called the complainants asking them to return to work. Mr. Behrmann asserted that Taiga offered to cancel the changes if they did so. The complainants asserted that they were told they would earn more money but there was no promise to revert to the old system or maintain the base rate.

16. Mr. Behrmann asserted that the complainants were misled by "ringleaders", or a minority core of workers who "sabotaged" Taiga's efforts to become more productive. The complainants denied that they were influenced by other employees.

17. The complainants also filed for Employment Insurance benefits and were successful. Taiga objected to the introduction of this evidence on the basis that it would bias the delegate against the employer. The delegate stated:

> The director is charged with decision-making authority under Section 66 of the *Act* while the EI Umpire's decisions are based on another statute. The purposes of the EI statute and its regulations differ from the Act's purposes. One of the purposes of the *Act* is to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment. As a delegate of the director, I will assess the evidence and apply the proper legal tests to that evidence to reach a decision. My decision may or may not agree with the EI Umpire's.

18. The delegate concluded that the system of garment production, elimination of paid coffee breaks and the Attendance Bonus and progressive lowering of a guaranteed base rate were substantial alterations to the conditions of employment. She found that the old system of garment production had been in place for many years and that the new production system and redistribution of work had adversely affected the workers. She analyzed the payroll record and Taiga's Summary of Earnings and found that, with some exceptions, the workers' hourly earnings progressively dropped since the new earning system came into effect. She did not accept Mr. Behrmann's assertion that the workers deliberately slowed down production resulting in lower earnings as she did not find it plausible that a worker would deliberately earn less money. She disagreed with Mr. Behrmann's assertion that the changes to the guaranteed base rate were not a concern to the workers since they usually earned between $10.00 and $13.00 per hour:

> First of all, the workers were paid by piece rate and a guaranteed base rate. What this means is if their based rate dropped then their wages were topped up to the base rate, so it is part of their condition of employment. Secondly, the payroll record shows most of the workers earned less after the new system was implemented so it was a real concern for these workers to have a reasonable top-up base rate.

19. The delegate also rejected Mr. Behrmann's argument that the replacement of the paid coffee break and Attendance Bonus with the "Quality Bonus" and "Attitude Bonus" enabled workers to earn more. She found the criteria for earning money before the changes were clear to the workers and provided a steady stream of income, whereas both the Quality Bonus and Attitude Bonus were discretionary and not well defined or understood by the workers. Although she concluded that employers were not required to provide their employees with paid coffee breaks, it was a condition of employment the workers had enjoyed for many years. She concluded that the workers had suffered an adverse effect as a result of these changes to their conditions of employment.

20. The delegate found the date of the change of conditions of employment was November 3, 2005 and that the employees had 1.5 weeks verbal notice of those changes.

21. The delegate also did not accept Taiga's assertions that it promised the workers that all the changes would be reversed if the workers returned to work. She determined, on a balance of probabilities, that if the complainants, who had been happy with their conditions of employment for many years, had been offered those conditions back, they would have returned to work.

22. The delegate found that while an employer was entitled to make lawful changes to the terms and conditions of an employee's employment, any changes which amounted to a substantial alteration could only be done with proper notice under the *Act*. She concluded that given that the complainants had been employed between 6 and 17 years, they were to have 6 to 8 weeks notice.

23. The delegate calculated each complainant's entitlement based on their length of employment.

ARGUMENT

24. Taiga contends that, in reaching the conclusion that the change to the guaranteed base rate together with the implementation of the new system and removal of paid coffee breaks and Attendance Bonus constituted a substantial alteration of the employees' conditions of employment, the delegate misapplied section 66 of the *Act*, adopted a methodology that was wrong in principle and acted on a view of the facts that cannot be entertained. While conceding that Taiga implemented changes to the employment relationship, counsel submits that the alterations were not substantial or sufficiently material such that they could constitute a fundamental change.

25. Counsel says the change from an Attendance Bonus to a Good Behaviour Bonus was not substantial. Both paid an additional $.30 per hour. Counsel submits the delegate's analysis of determining whether those workers who received the Attendance Bonus also received the Good Behaviour Bonus was flawed. She submits that the proper analysis is to examine whether the employees who failed to obtain the Good Behaviour Bonus would have received an Attendance Bonus for the same pay period. Counsel says that because the Good Behaviour Bonus was "more general" than simply perfect attendance (she submits it could be based on "good behaviour" of any kind) it actually increased an employee's opportunity to receive the bonus. In any event, counsel submits that even if the change was adverse, it was not substantial as they were worth the same amount of money and "both could be earned based on good employee behaviour".

26. Counsel submits that Taiga introduced an additional bonus opportunity through the "Quality Bonus", which paid an additional $.50 per hour to those employees whose work met "quality standards". She submits that there was no basis for the delegate to find that this constituted a substantial alteration of a condition of employment.

27. Counsel for Taiga also contends that the delegate erred in finding that the employer's decision to introduce a Quality Bonus and eliminate a paid 10 minute coffee break was an "adverse" change. She argues that the loss of $.37 per hour could be more than made up for by the use of "Helpers and Runners" and the Quality Bonus which were earned by the majority of the employees. She contends that, even if an employee did not receive a Quality Bonus, the loss of $.37 per hour is not sufficient to be considered substantial. She relies on Tribunal decisions *Oriental Interiors*(BC EST #D 281/02) where a unilateral 40% reduction in gross pay was found to be a significant alteration and *Hua Hai International Enterprises Co. (cob Bob's Famous Restaurant)* (BC EST #D057/03) where a 25% reduction in salary was ruled a significant alteration. She also relies on *Gill* (BC EST #D060/03) where a reduction in wages of $26.80 every two weeks was found not to constitute a substantial alteration to the terms and conditions of employment.

28. Taiga's counsel submits that the change to the production system was an improvement which provided the employees with an opportunity to earn significantly more money. She contends that after the changes were implemented, productivity decreased because the employees did not like the changes and many had

to be paid the guaranteed base rate. Counsel submits that the four guaranteed base rates were designed as rewards and incentives to productivity and the lowest of which was intended only for new workers on probation. Counsel asserts that on November 3, 2005, when the employees reduced their productivity in an effort to pressure the employer to revert to the old system, the employer advised them that if an employee's productivity dropped such that they would be paid their base rate in a pay period, their guaranteed base rate would be dropped one level. This measure was to take effect November 21, 2005. The workers quit, en masse, after this announcement. Counsel says that the delegate provides no reasons for concluding that this was a substantial alteration and that, in any event, it was unclear whether this would have affected the complainants since they left their employment before the measure was implemented. Counsel submits that the delegate could not assess whether the changes constituted a substantial change and contends that had the employees remained at work and worked at their normal speed they would have seen an overall increase to their pay.

29. Counsel further submits that, in any event, the wage changes represented a decrease in the guaranteed base rate from $8.60 to $8.00 per hour, or 7% and that this change did not constitute a significant change.

30. Finally, counsel submits that none of the changes, whether considered individually or together, amounted to a substantial change.

31. Counsel argues that the delegate incorrectly rejected the employer's argument that the employees deliberately slowed down production. She submits that the delegate concluded that it was "hard to believe anyone would deliberately slow down production" without any explanation. Counsel submits there could be many reasons provided for such a slow down including the elimination of the opportunity to falsify time cards, a general drop in morale caused by aversion to new system and a pressure tactic to induce the employer to revert back to old system. She says that the delegate failed to recognize that employees were ultimately in control of their production and a piece rate system was designed to provide opportunities for efficiency and bonuses.

32. In the alternative, Taiga's counsel submits that the delegate erred in finding that the employer gave 1.5 weeks' notice of the change. She says that the Employer gave 2.5 weeks notice of the change and that this period of notice should be taken into account when calculating termination pay owing.

Breach of natural justice

33. Taiga also asserts that the delegate failed to observe the principles of natural justice in failing to consider relevant evidence, failing to disclose relevant materials and allowing the Employer to respond, and in assuming overlapping functions.

34. Taiga says that it was not adequately made aware of material evidence submitted by the Employees and relied upon by the delegate. Specifically, Taiga says the only information it received from the delegate concerning the specific allegations were those set out in a one page attachment to the original complaints. Later, the delegate informed Taiga that she was relying on information from the EI proceedings and when Taiga requested copies of information the delegate was relying on, it asserts the delegate refused to provide this information, stating that she had copies of the Employer's allegations and responses and would consider them.

35. Taiga says this is a serious breach of natural justice because the Employer was deprived of knowing whether the delegate actually had all the relevant submissions. Counsel submits that it appears from the

Determination that the delegate only had the Employees' appeal and the Umpire's decision and did not have the Employer's submission. Counsel says that the delegate appeared to recite the Employees' allegations in the EI proceedings but failed to refer to the Employer's rebuttal to those allegations, leaving the impression that either the Employer had no response or she did not consider it. In any event, counsel submits that reliance on EI submissions and arguments is wholly improper, notwithstanding the delegate's acknowledgement of the different legislative schemes. Taiga's counsel also submits that the timing of the Determination is troubling in that it appears that the delegate waited until the Employees were successful before she rendered the Determination.

36. In response to the appeal, The Director provided the record that was before Ivy Hallem, the delegate who made the Determination, but made no submissions. In its reply, Taiga asserts that the record confirms that the delegate had documents which had never before been disclosed to the Employer. Taiga says there were three additional documents and a letter disclosed with the s. 112 record that had never been previously disclosed to the Employer.

37. Taiga says that it is a basic principle of administrative law that where an agency is responsible not just for hearing cases but also for investigating and making decisions, it is imperative that those involved to not have overlapping functions. Counsel argues that the delegate acted as both the investigator and the mediator, which amounted to a breach of natural justice.

38. Finally, Taiga contends that the delegate failed to consider relevant evidence or ignored relevant evidence in making the Determination. It says that on September 27, 2007, the Employer provided a final submission setting out its position relating to the alleged breaches of the *Act.* Counsel says that the Determination, which was issued the following day, did not refer to the letter or submissions. Counsel submits this constitutes a breach of natural justice.

ANALYSIS

39. 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

40. An appellant must show clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal.

Error of Law

41. 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

42. Section 66 of the *Act* states:

> If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

43. There must be a finding that there is a change in the conditions of employment, that the change is substantial and that the change constitutes termination. The language of section 66 provides that the delegate has a discretion to exercise once she determines that a condition of employment has been substantially altered and the exercise of that discretion is reviewable by Tribunal (*Jaeger* BC EST#D244/99).

44. Conditions of employment mean all matters and circumstances that in any way affect the employment relationship (section 1 of the *Act*). However, not all changes will constitute termination. They must be substantial, or "sufficiently material that it could be described as being a fundamental change in the employment relationship". (see *Helliker* BC EST #D338/97, a reconsideration of *Stordoor Investments Ltd* BC EST#D357/96)

45. The test of what constitutes a substantial change includes a consideration of the following factors:

> a) the nature of the employment relationship;
> b) the conditions of employment;
> c) the alterations that have been made;
> d) the legitimate expectations of the parties; and
> e) whether there are any implied or express agreements or understandings
>
> (*Helliker, A.J. Leisure Group Inc.* BCEST #D036/98 and *Big River Brewing Company Ltd.* BCEST #D324/02)

46. Furthermore, the employer's motives or the employee's perception of the change is irrelevant; an objective assessment of the employer's action is required.

47. Unilateral changes that may amount to constructive dismissal include:

> a) changes in remuneration, which is at the heart of the bargain between employee and employer (see *Farquhar v. Butler Brothers Supplies Ltd.* (1988), 23 B.C.L.R. (2nd) 89 (C.A.)) or the method of determining remuneration (*Farber v. Royal Trust Company*, [1997] 1 S.C.R. 846) and

b) changes to benefits, including non-discretionary bonuses or decreasing vacation entitlement (see *Campbell v. Merrill Lynch Canada Inc.* (1992), 47 C.C.E.L. 248 (B.C.S.C.), [1992] B.C.J. No. 2294)

48. There is no dispute that Taiga unilaterally altered the method of determining the employees' compensation and eliminated two non-discretionary bonuses. Taiga contends, however, that those changes were not substantial and that they were more than made up for by changes to the piece rate payment system and the introduction of discretionary bonuses. I am not persuaded that the delegate erred in her conclusion that the changes, viewed objectively, constituted constructive dismissal.

49. The complainants' guaranteed base rate would be reduced from $9.50 per hour to as much as $8.00 per hour (I do not accept, on the basis of the record, that the lowest guaranteed base rate was intended only for probationary employees) if they did not meet a prescribed productivity level. Although it is difficult to determine whether the complainants would have experienced an overall pay reduction under the new system, the fact is that their guaranteed rate reduction was significant. I do not accept that the employees were obliged to continue to work under the new scheme to determine whether their wages would have been equivalent or more under that scheme. On an objective standard, to ensure that they were paid their previous base rate of $9.50 per hour they had to meet minimum production standards that had not been imposed on them in the previous six to 17 years of employment. The reduction could have been up to $1.50 per hour, or potentially close to $150.00 per pay period. Furthermore, Taiga also eliminated two non-discretionary bonuses and a paid coffee break, an amount the employer calculated at $.37 per hour. Although the non-discretionary bonuses were replaced by discretionary ones, there were no established criteria by which an employee could determine whether they would be entitled to one. Together, these changes represented a potential decrease of close to $155.00 per pay period. I find that these changes represented a significant reduction in pay and confirm the delegate's determination in this respect.

50. I find that the delegate erred in her conclusion that the employer gave 1.5 week's notice of the changes. The evidence was that the employer gave notice on November 3, 2005 of changes to take effect on November 7, 2005. Therefore, although the first pay period in which the changes would have consequences was November 21, 2005, the employer gave 4 days notice of the changes. I refer the Determination back to the delegate for a recalculation of amounts owing on this basis.

Natural Justice

51. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.

52. I am persuaded that the delegate did not disclose all relevant information to Taiga to enable it to fully respond. I am also persuaded that the delegate did not consider Taiga's final submission on its response to the alleged breaches of the *Act*. However, as I have reviewed and considered those documents provided on appeal, it is unnecessary to remit the matter back to the delegate for reconsideration. The Tribunal has held that any breaches of natural justice may be cured on appeal and having reviewed the submissions, any procedural defects have been addressed. (see *Dusty Investments d.b.a. Honda North* BC EST #RD043/99 and *Takarabe and others* BC EST #D160/98).

53. Finally, I am not persuaded that the delegate acted as both mediator and investigator. The record does not disclose that to be the case. I am aware that the Branch's practise is to appoint a delegate who is not the

adjudicator to mediate a dispute. There is no evidence that was not done in this case. However, even if that did not occur in this matter, I conclude that any breaches of natural justice would also be cured on appeal.

ORDER

54. I Order, pursuant to Section 115 of the Act, that the Determination, dated September 28, 2007, be referred back to the delegate to recalculate amounts owing to the employees.

Carol L. Roberts
Member
Employment Standards Tribunal