Employment Standards TRIBUNAL

An appeal

\- by -

Babine Forest Products Ltd.
("Babine")

\- 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.: 2010A/158

DATE OF DECISION: February 8, 2011

DECISION

SUBMISSIONS

Alissa I. Macpherson	counsel for Babine Forest Products Ltd.
Larry Higginson	on his own behalf
Hans Sur	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Babine Forest Products Ltd., ("Babine"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued September 24, 2010.

2. Larry Higginson filed a complaint alleging that Babine had contravened the *Act* by failing to pay him overtime wages. Following an investigation into the complaint, a delegate of the Director determined that Babine had contravened Sections 18 and 58 of the *Act* in failing to pay Mr. Higginson wages and associated vacation pay. The delegate determined that Mr. Higginson was entitled to $7,605.85 in wages, vacation pay and interest. The delegate imposed a $1,000 penalty on Babine for each of the contraventions, pursuant to section 29(1) of the *Regulation.*

3. Babine contends that the delegate erred in law in interpreting Mr. Higginson's contract and awarding him additional wages. Babine also sought a suspension of the Determination.

4. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 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.) This decision is based on the written submissions of the parties.

ISSUE

5. Whether or not the delegate erred in law in interpreting the employment contract to find that Mr. Higginson was entitled to additional wages

FACTS

6. The essential facts, as set out by the delegate, are not in dispute.

7. Mr. Higginson was employed as an electrical supervisor for Babine, a lumber manufacturing facility, until October 14, 2009. Initially hired in 1975, Mr. Higginson was a member of the bargaining unit until 1990 at which time he was promoted to the position of Head Electrician, or Electrical Supervisor. At that time, Mr. Higginson became a member of the management team.

8. Babine was purchased by Hampton Affiliates in late 2006. Until the company was sold, Mr. Higginson had been given the option of taking time off or receiving additional pay for work in excess of his normal hours. After the sale, he was permitted to take time off in lieu of working excess hours at a rate of time and one half.

In February 2007, Babine presented Mr. Higginson with an employment contract. Mr. Higginson alleged that when he refused to sign the contract, Babine reduced his responsibilities. In April 2007, Babine presented Mr. Higginson with another contract which he alleged that he signed "in protest".

9. The contract of employment contained the following clauses:

> *We are pleased to extend an offer of employment with Hampton Affiliates, from the recorded date on this document forward, as the Electrical Supervisor. In this capacity, you will supervise and direct human and other resources. Should you accept this position by signing and dating this document, you agree to administer and adhere to Hampton Affiliates company policies and procedures ...*
>
> *The compensation package you will receive includes a monthly salary of $8050.00 Canadian, which is paid twice a month on the 15th and 31st, and is subject to all applicable deductions and includes the standard salaried benefits package. The attached list of key expectations outlines the specific responsibilities and accountabilities associated with this position, including the commitment and flexibility to accomplish assigned tasks, which may include evening and weekend work. Overtime is not compensable. Your compensation and performance will be reviewed annually ...*
>
> *Nothing herein shall be construed as a substitution or modification of the Company's employment policy or any applicable criteria in the British Columbia Employment Standards Regulations ...*

10. Mr. Higginson provided the delegate with a record of his hours of work that he maintained on a daily basis. The delegate found that those records disclosed that Mr. Higginson worked a total of 170 hours in excess of 40 hours per week in the 6 months before the complaint was filed.

11. In July 2009, Mr. Higginson requested compensation for overtime wages from his employer. Babine told Mr. Higginson that he was considered a manager and expected to work whatever hours it took to do his job. Mr. Higginson was also told that even though he had previously been promised 'banked time', that arrangement was not part of his current employment terms and conditions.

12. After hearing from the parties and considering the evidence, the delegate determined that Mr. Higginson was a manager and not entitled to overtime pay. This conclusion is not appealed by either party.

13. The delegate also determined that Mr. Higginson was owed wages under his employment contract. In arriving at this conclusion, the delegate found that although Mr. Higginson was not entitled to overtime wages by virtue of the fact that he was a manager, he was not excluded from section 16 of the *Act*. The delegate's reasoning was as follows:

> … a "manager" is required to be paid for all hours worked subject to the terms of the employment agreement between the parties. That decision would have to take into account the employment relationship between the parties, the accepted practise (sic) of the parties and, as well, any related contract of employment with any accompanying employer policies and procedures. The *Act* does not consider the payment of wages for work in excess of an established "normal" schedule for a "manager" as compensation for overtime, as a "manager" is excluded from Part 4 of the Act; rather it is payment of wages for hours worked as required by Part 3, section 16 of the Act.
>
> The statements from the contract of employment that require the Complainant to have a commitment and flexibility to accomplish assigned tasks, which may include evening and weekend work" is not inconsistent with a finding of the agreed work week being 40 hours.
>
> Further, the Employer's own payroll records indicate that the semi-monthly salary was predicated on standard hours of 86.67 semi-monthly or 40 hours per week.

> The Employer's Salaried Handbook issued some 6 weeks after the Complainant signed his contract of employment provides that the "the normal workweek consists of 40 hours". This supports the complainant's position that his work week was understood to be 40 hours.
>
> The Employer drafted both the Complainant's contract of employment and the Salaried Handbook and would have ensured that there were no inconsistencies between these documents. To support the Employer's contention that the Complainant was to work all hours necessary to do the job, the Employer could have made note in the Salaried Handbook that salaried employees with managerial responsibilities did not have a "normal work week of 40 hours". Alternatively, the Employer could have redrafted the Complainant's contract of employment to make it clear that the requirement to "agreed to administer and adhere to Hampton Affiliates company policies and procedures" excluded the provisions of point 6. Hours of Work, as that did not apply to salaried employees with managerial responsibilities. The Employer did neither.

14. The delegate concluded

> Based on the above, the evidence provided to date and on the balance of probabilities, I find that the contract of employment for the Complainant was based on 40 hours work per week for the salary amount stated and that the Complainant is entitled to be paid for hours worked in excess of those 40 at straight time rates of pay.

15. The delegate accepted Mr. Higginson's records as the best available evidence and a reasonable reflection of the extra hours of work in concluding that Mr. Higginson was entitled to be paid for 148.92 hours of work.

ARGUMENT

16. Babine argues that the Director's delegate incorrectly applied the legal principles related to the interpretation of the employment contract and made an unreasonable interpretation that cannot be supported by the contract and the evidence before him.

17. Babine says that the proper approach to contract interpretation is to determine the intention of the parties at the time of the execution of the contract. It says that the contract was clear and unambiguous, and the delegate erred in not giving 'overtime' its plain and ordinary meaning.

18. Babine contends that Mr. Higginson's salary was compensation for all of the hours he worked and the delegate's interpretation is patently unreasonable. It argues that the phrase 'overtime is not compensable' can have only one interpretation, that being that Mr. Higginson was not entitled to any pay for hours worked above a standard day. Babine also argues that the delegate's conclusion that Mr. Higginson was entitled to be paid for extra hours implies a meaning opposite to the express term 'overtime work is not compensable'.

19. Babine argues that the delegate erred in law when he relied on extrinsic evidence, including the handbook and payroll information to support his interpretation of the agreement since there was no ambiguity within the words of the contract. Babine also submits that even if the delegate did not err in admitting extrinsic evidence, the handbook does not support his interpretation of the employment contract since it was created after the employment agreement was signed. Babine also submitted that the payroll system contains standard information for all employees regardless of the hours worked.

20. The Director says that the Appellant is simply re-arguing the position it took during the investigation and that the Determination clearly sets out the evidence and reasons for the decision. The Director's submission is, in essence, a repetition of those reasons.

21. In his response to Babine's appeal, Mr. Higginson claims that the employment agreement relied on by the delegate is incorrect as it sets out an incorrect wage. He further contends that he signed the employment agreement under duress and received no consideration for it. For those reasons, Mr. Higginson argues that the employment agreement is unenforceable.

22. In reply, Babine says that Mr. Higginson's submission, rather than responding to Babine's appeal, raises a separate and new issue of appeal. Babine says that enforceability of the contract is not an issue before the Tribunal as it was addressed by the Director's delegate and not raised in Mr. Higginson's own appeal of the Determination. Babine says that Mr. Higginson has raised a new issue at this stage of proceedings which not only constitutes an improper response but violates the Tribunal's rules and procedures.

ANALYSIS

23. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination; or
- evidence has become available that was not available at the time the determination was being made.

24. 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

25. The interpretation of an employment contract is a question of general law and the Director must be correct in his interpretation. (*Re Dingman* (BC EST # D002/10) and *Re Kosis* (BC EST # D331/98)

26. In *UAP Inc.* (BC EST # D418/01) the Tribunal recognized several principles relating to additional compensation for managers: there are no implied limits on the number of hours a manager might be required to work; whether or not a manager is entitled to extra pay for additional hours worked depends on the terms of the employment contract; and if a manager is hired at an agreed upon salary that is paid regardless of the number of hours worked, the agreement should be given effect unless it does not meet the minimum requirements of the *Act*.

27. Mr. Higginson's arguments that the employment contract is unenforceable are improperly raised in reply to Babine's appeal. The delegate considered and dealt with Mr. Higginson's initial argument that he signed the agreement "under duress". Mr. Higginson filed his own appeal of the Determination. His appeal was on the sole issue of the amount of wages determined owing. In *Renshaw Travel* (BC EST # D050/08), the Tribunal held that it was a contravention of the appeal provisions of the *Act*, the Tribunal's *Rules of Practice and Procedure* as well as the objectives of the *Act* for a party to raise a new issue on appeal for the first time in reply submissions. The Tribunal found that:

> A reply submission is meant to address arguments raised in the submissions of respondents delivered in response to the materials filed by an appellant in support of its appeal. It is not meant to raise new issues which the respondents have not had an opportunity to address in their submissions, and which were not identified as issues on appeal in the material an appellant has filed with the Tribunal in order to perfects its appeal.

28. I have, therefore, not considered Mr. Higginson's reply submissions.

29. As the Tribunal said in *Dingman*, the Director's interpretation of the employment contract must conform to accepted legal principles relating to contract interpretation:

> The goal of contract interpretation is to determine, objectively, the parties' intentions at the time the contract is made. The words of the contract are the primary source. If the words are not clear, reference may be had to extrinsic evidence.

30. The general law of contract interpretation provides that words of an agreement must be given their plain, ordinary meaning and that an objective test should be applied to the interpretation of words used in the agreement.

31. In my view, the employment contract between the parties was not ambiguous. It expressly and clearly stated that in order for Mr. Higginson to accomplish certain responsibilities and accountabilities he might have to work evenings and weekends. It clearly provided that overtime was not compensable. The plain and ordinary meaning of these words is that Mr. Higginson was not entitled to additional pay for work performed to accomplish those responsibilities.

32. I find that the delegate erred in law when he resorted to extrinsic evidence, including Mr. Higginson's understanding that his work week was 40 hours (which understanding was not shared by the employer), the Handbook (which was not in existence when the contract was signed and was not applicable retroactively) and the standardized payroll system in an effort to determine the meaning of these unambiguous words and to conclude that Mr. Higginson's employment agreement was based on 40 hours work per week for the stated salary. The evidence supports the conclusion that as a manager, Mr. Higginson was expected to put in extra hours without extra pay.

33. I have concluded that the delegate's interpretation of the contract is patently unreasonable and as such, constitutes an error of law. Therefore, the Determination finding that Mr. Higginson is entitled to additional wages must be cancelled.

ORDER

34. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated September 24, 2010, be cancelled.

Carol L. Roberts
Member
Employment Standards Tribunal