Employment Standards TRIBUNAL

An appeal

- by -

Thomas Wilkinson

- 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: Frank A.V. Falzon

FILE No.: 2005A/191

DATE OF DECISION: February 14, 2006

DECISION

OVERVIEW

1. This decision pertains to an appeal filed with this Tribunal by Thomas Wilkinson (the Employee) in 2004 respecting a claim for approximately $18,000 in overtime wages. The claim arises from work the Employee says he undertook, in the field, for his then employer, Double 'R' Safety (the Employer) in the first part of 2004.

2. The Employee's appeal was the subject of my June 7, 2005 decision: *Wilkinson v. Director of Employment Standards*, BCEST #D078/05. I will not repeat everything contained in that decision, and will only summarize by noting that it held that the Delegate's first Determination (January 24, 2005) had unfortunately failed to address the considerations that led the Delegate to reject the vast majority of overtime hours claimed by the Employee. As noted in that decision:

> If the Delegate was to reject the Employee's claim of overtime hours worked as lacking in credibility or reliability, he would, in order to conduct a fair hearing, need to hear from the Employer and Employee on this issue, and then articulate why he was rejecting some or all of the Employee's evidence. In these circumstances, that would very likely have required the Delegate to hear evidence about the nature of the job, the industry practice and the circumstances in which the Employee prepared and made entries in his day planner. The Delegate would also have to have given some reasons as to why he readily accepted evidence of some very long work days as corroborated in the day planner, but rejected evidence of all the other days claimed….
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> In the result, the most appropriate order is an order that the Determination be referred back to the Director for a full and proper consideration of whether the Employee is entitled to overtime pay over and above the overtime awarded in the January 24, 2005 Determination.

3. On November 2, 2005, the Delegate issued a letter to the Tribunal following the referral back. In that letter, the Delegate found that the Employee is entitled to a further $5220.41 in wages. The Delegate's letter makes clear, however, that he did not accept all of the hours claimed. He writes:

> The employer was given a copy of the complainant's day planners, and disputed some of the claims the complainant had made for overtime wages. In some instances, the complainants claim of hours worked were reduced because the employer was able to demonstrate the claim was not credible.

ANALYSIS

4. The Employee strongly contests the revised amount which, even though it is in the Employee's favour, is still significantly lower than the amount to which the Employee says he is entitled. While the Employee makes a number of points, the most legally significant for this Tribunal's purpose is his objection that the Employee was never told or given a chance to respond to what the Employer had told the Delegate, and does not know what caused the Delegate to conclude that the Employee's claim was not credible in respect of numerous hours. The Employee's submission states, in part, as follows:

> I was never given any new evidence nor was I asked or given the opportunity to offer any comment or testimony in regards to this sudden change of heart …. At no time was I ever invited

> or requested to comment on this issue. [The Delegate] directed me to provide only my day-date books. This plainly goes against the order … that "in order to conduct a fair hearing, need to hear from the employer and employee on this issue…." At no time was I asked about the nature of the business etc. and neither was I able to question the veracity of statements made to [the Delegate] by [the Employer] which preceded this change of heart reducing my claim by around 40 overtime hours. Indeed I have not even been given access to see the new "evidence" much less been given the opportunity to refute same….

5. This Tribunal provided the Delegate with an opportunity to respond to the Employee's statements, quoted above, regarding the process. The Delegate's submission was silent on the process issue.

6. In the circumstances, the conclusion is regrettable, but inescapable, that the process used by the Delegate was contrary to natural justice and contrary to this Tribunal's June 7, 2005 referral back order.

7. While the law of natural justice can be somewhat complex at the periphery, its most elementary core requirement is that a person against whose interest a decision may be made must be given a reasonable opportunity to hear and respond to key evidence against their interest. In investigative settings such as this, the manner in which the obligation is carried out is relaxed: the Delegate is permitted to speak with each party separately, and obtain documents from them separately. But the right to speak to parties separately does not mean the right to keep evidence private. There remains the substantive obligation to ensure that documents, once obtained, are shared with both parties, and that key points made verbally are also communicated, however informally, so that the other party may have a fair chance to respond, however informally. Put in more traditional terms, the "complainant" in this case should have been give a chance to "reply" to the Employer's evidence.

8. The purpose of the law of natural justice and procedural fairness is not to fetter decision-making, but to assist it. The law reflects the time-tested reality that giving both sides a fair chance to know and respond to the other party's case not only leads to a process that is seen as legitimate in the eyes of both parties, but also leads to better decisions, as there is nothing like the self-interest of one party to point out weaknesses or frailties of the evidence of the other.

9. I have searched the appeal materials with care for any indication that might explain why, for practical or other reasons, the Delegate's communications with the Employer could not have been shared with the Employee for his response during the four months this matter was under referral back. I have found none. I have also considered whether, despite the natural justice error, the factual findings made by the Delegate are so clearly right and unassailable as to make this one of those highly exceptional cases where it would have been futile to hear the Employee's response to the Employer's evidence: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202. I cannot responsibly answer that question "yes", especially as this Tribunal is not aware either of the Employer's evidence to the Delegate (just as the Employee has not been told of the evidence, no record of that has been given to the Tribunal either), or even of the reasons for the Delegate's credibility finding on this key issue, which is not explained in the November 2, 2005 letter.

10. The statutory function of making findings of fact in a case such as this rests with the Director. This Tribunal rightly gives considerable deference to substantive findings of fact lawfully made, but no deference can be given where an unlawful process has been used. To exercise the fact-finding function lawfully, the Director must proceed in accordance with basic fairness. This requires ensuring that relevant information is shared with both parties, that both parties have a fair chance to respond to each

other's key evidence, and that the Director explains in his reasons why, in a case of conflicting evidence on a key point, he accepts the key evidence of one party over the key evidence of another.

11. I conclude this decision by emphasizing (if it is not already clear) that I have come to this conclusion reluctantly, as I have approached this case with considerable sympathy for the Employer's stated desire for finality. But the desire for finality cannot override the requirement of justice, and justice is not served - nor is this Tribunal's duty fulfilled - by allowing an order tainted by fundamental unfairness to stand. While it is most regrettable for this matter to have be considered by the Director for now the third time, this is the only option available to this Tribunal pursuant to its present jurisdiction, which allows the Tribunal to identify jurisdictional and legal errors, but no longer to "roll up its sleeves" and ensure finality by making necessary findings of fact in cases such as this.

ORDER

12. My June 7, 2005 Order provided as follows:

> I am of course not in any position to make a finding as to what additional Overtime hours the Employee is entitled to. Indeed, after full and fair consideration of the material, the answer may be "none". In the circumstances before me, however, I am not prepared to conclude that "none" is the only possible answer that would follow a proper consideration of the issue.
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> In the result, the most appropriate order is an order that the Determination be referred back to the Director for a full and proper consideration of whether the Employee is entitled to overtime pay over and above the overtime awarded in the January 24, 2005 Determination.

13. For the reasons given in this decision, the finding made in the November 2, 2005 letter to the Tribunal is void: *Cardinal v. Kent Institution (Director)* (1985), 24 D.L.R. (4th) 44 (S.C.C.). As such, the June 7, 2005 Order remains an outstanding order to be complied with by the Director.

Frank A.V. Falzon
Member
Employment Standards Tribunal