

An appeal

- by -

David Brent Yalowica

- 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/182

DATE OF DECISION: March 4, 2011

DECISION

SUBMISSIONS

D. Brent Yalowica on his own behalf
Hans Sur on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by D. Brent Yalowica, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued December 10, 2010.
2. Mr. Yalowica filed a complaint alleging that Urban Beach Resort Ltd. carrying on business as Urban Beach Café “Urban Beach” had contravened the *Act* by failing to pay him regular and overtime wages and annual vacation pay. Following an investigation into the complaint, a delegate of the Director determined that Urban Beach had contravened Sections 18 and 58 of the *Act* in failing to pay Mr. Yalowica wages and vacation pay on those wages. The delegate determined that Mr. Yalowica was entitled to payment of \$989.41. The delegate was unable to determine that Mr. Yalowica was entitled to overtime wages or compensation for length of service.
3. The delegate imposed a \$500 penalty on Urban Beach for each of the two contraventions, pursuant to section 29(1) of the *Regulation*.
4. Mr. Yalowica contends that the delegate erred in law and failed to observe the principles of natural justice. Mr. Yalowica also contends that evidence has become available that was not available at the time the Determination was being made.
5. 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 is based on the written submissions of the parties.

ISSUES

6. Whether or not the delegate erred in law in determining that Mr. Yalowica was not entitled to overtime wages or compensation for length of service.
7. Whether or not the delegate failed to observe the principles of natural justice in making the Determination.
8. Whether or not relevant evidence has become available that was not available at the time the Determination was being made that would cause the delegate to arrive at a different conclusion on the material issue.

FACTS

9. Mr. Yalowica was employed as a chef/kitchen worker for Urban Beach from July 16, 2010, until August 7, 2010. The parties agreed that Mr. Yalowica was to be paid \$3,500 per month for a 60 hour work

week, that Mr. Yalowica received \$1,750 for the first two weeks of work and that he was not paid for his last week of employment. The delegate calculated Mr. Yalowica's outstanding wages and vacation pay on this amount based on the agreement between the parties. Finally, the delegate found that Urban Beach had contravened s. 18 of the *Act* in failing to pay all of Mr. Yalowica's wages within 48 hours of terminating his employment. None of these findings are under appeal.

10. Mr. Yalowica alleged that he was not paid for his overtime hours, contending that he worked every day until his employment was terminated. Urban Beach took the position that Mr. Yalowica was a self employed contractor. As a result, it had not maintained employer records as a result. The delegate determined that Mr. Yalowica was an employee and found Urban Beach in contravention of s. 28 of the *Act* in failing to maintain employer records.
11. Mr. Yalowica submitted a calendar he alleged was a daily record of the actual hours he worked. Mr. Yalowica told the delegate that his hours of work were from 7 am until 3 pm. He also told the delegate that he was usually on a break from 2 pm until 6 pm. Urban Beach contended that Mr. Yalowica provided approximately 7 hours of services from approximately 9 am to 1 pm, was on call from 1 pm to 6 pm and was again working from 6 pm until 9 pm. Mr. Yalowica agreed that he had not provided this calendar to Urban Beach while he was employed.
12. Urban Beach also contended that it was only open for a total of 294 hours during the time Mr. Yalowica was employed there and thus his claim for 310 hours of unpaid work was not realistic. Urban Beach provided the delegate with examples of daily cash register tapes indicating the first and last transactions of the day and contended that those records demonstrated that Mr. Yalowica worked for 34 hours, 7 minutes during his last week of work.
13. The delegate found Mr. Yalowica's evidence regarding his daily hours of work, the daily hours not worked and the actual work done to be inconsistent. The delegate noted that although Mr. Yalowica stated that he normally had from 2 – 6 pm as a rest period, the hours worked as recorded on the calendar were not consistent with that statement. The delegate also found Mr. Yalowica's assertions that he served 75 people to be unsubstantiated. The delegate also found no evidence for Mr. Yalowica's assertion that if any alcohol was being served, he was the one serving it. The delegate considered the employer's assertions that it had insufficient customers to warrant Mr. Yalowica's excessive hours. It provided the delegate with its cash register tapes indicating the first and last transactions of the day in support of this assertion.
14. In the absence of any employer records and noting the inconsistencies in Mr. Yalowica's evidence, the delegate said that he would not "speculate" as to Mr. Yalowica's hours of work. He was unable to find sufficient evidence to prove Mr. Yalowica's claim for overtime wages.
15. The delegate also dismissed Mr. Yalowica's claim for compensation for length of service under s. 63 of the *Act* which provides that compensation for length of service was required after 3 consecutive months of employment.

ARGUMENT AND ANALYSIS

16. 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
17. The appellant has the burden of showing clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal. A disagreement with the result, in and of itself, is not a ground of appeal.
18. While it is apparent from Mr. Yalowica's submission that he is not happy with the delegate's decision to deny his overtime and compensation for length of service claim, he does not identify any errors of law or describe how he was denied natural justice. Included with Mr. Yalowica's appeal form is a copy of the Determination with notations written in the margins, a number of emails that verge on the incomprehensible and copies of documents that were previously provided to the delegate and form part of the record.
19. As noted by the Tribunal in *Triple S Transmission Inc.* (BC EST # D141/03), although most lawyers generally understand the fundamental principles underlying the "rules of natural justice" and the other grounds identified under the *Act*, the grounds for an appeal "are often an opaque mystery to someone who is untrained in the law." The Tribunal found that appeals should not be "mechanically adjudicate[d]... based solely on the particular "box" that an appellant has – often without a full, or even any, understanding – simply checked off."

Error of Law

20. 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
21. I have proceeded on the assumption that Mr. Yalowica believes he is entitled to overtime wages. He appears to say that the delegate made several factual mistakes in arriving at his Determination. One of those factual mistakes is the delegate's failure to determine that a bonus was to be paid for overtime. Mr. Yalowica contends that the delegate did not fairly consider the time he spent on preparation and cleanup. Mr. Yalowica also says that his evidence was overlooked, quoted out of context, and that the delegate preferred the false evidence of the employer over his.
22. Although it is not entirely clear, I have also assumed, from the notations on the Determination, that Mr. Yalowica disagrees with the delegate's conclusion that he is not entitled to compensation for length of service. I have assumed that Mr. Yalowica believes the delegate erred in law on these points.

Overtime wages

23. Mr. Yalowica argues that he gave the delegate a "general outline" of his daily hours and says that he was, in essence, "on call" to work when he was requested to do so. He repeats his assertion that he worked

approximately 310 hours. Mr. Yalowica also contends that the delegate erred in relying on the employer's records and contends that an "independent audit" of the receipts is required to establish his claim for overtime. I understand Mr. Yalowica to say that he unlocked the restaurant at 7 a.m. because he had to prepare meals for the remainder of the day and that the time of the first sale does not adequately or accurately account for the time he spent doing that work before the first customers arrived.

24. In the absence of any employer records, the delegate must apply the 'best evidence' rule first articulated in *Gordon Hofer*: (BC EST # D538/97):

In the absence of proper records which comply with the requirements of Section 28 of the *Act*, it is reasonable for the Tribunal (or the Director's Delegate) to consider employees' records or their oral evidence concerning their hours of work. These records or oral evidence must then be evaluated against the employer's (incomplete) records to determine the employees' entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate may accept the employees' records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable. Under those circumstances, if an employer appeals a determination, it would bear the onus to establish that it was unreasonable for the Director's delegate to rely on the employees' records (or evidence) and to establish that they were unreliable. (my emphasis)

25. The delegate had a duty to carefully examine all documents before him and arrive at a reasoned conclusion as to Mr. Yalowica's hours of work. After reviewing all of the evidence, the delegate rejected Mr. Yalowica's documents, finding that they were not accurate or reliable. I am not persuaded that he erred in doing so. Having reviewed the record, I note that Mr. Yalowica confirmed to the delegate that the hours recorded on the calendar were accurate, not that they were a "general outline". Although the delegate does not expressly say so, I infer that he concluded that the calendar notations were not made contemporaneously and were thus not reliable. Coupled with Mr. Yalowica's inconsistent statements to the delegate, I find no error in the delegate's decision to reject Mr. Yalowica's claim for overtime. Further, there is no basis for the delegate to order an independent audit of the employer's records in order to establish Mr. Yalowica's claim.

Compensation for length of service

26. Section 63(1) of the *Act* provides as follows:

After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

27. Given that Mr. Yalowica only worked for 3 weeks, I find no error in the delegate's conclusion that he is not entitled to compensation for length of service.

Natural Justice

28. 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.

29. I find no basis for Mr. Yalowica's second ground of appeal.

30. The record shows that the delegate had an ongoing email dialogue with Mr. Yalowica, asking him for clarification of his documents and allegations. Mr. Yalowica was provided with Branch information sheets,

had the opportunity to provide all relevant information, and responded to all the delegate's questions. I find no grounds for his contention that the delegate failed to observe the principles of natural justice.

New Evidence

31. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
32. Mr. Yalowica did not submit any new evidence on appeal.
33. The delegate says that the only “new evidence” provided by Mr. Yalowica is the name of two potential witnesses. He submits that Mr. Yalowica never mentioned these two individuals as potential witnesses during the investigation and further, that Mr. Yalowica has not explained why this information was not available during the course of the investigation.
34. Given that Mr. Yalowica has not identified any new evidence or how that evidence would have led the delegate to a different conclusion, I dismiss the appeal on this ground.

ORDER

35. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated December 10, 2010, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal