Employment Standards TRIBUNAL

An appeal

- by -

Henry Tung
("Tung" or the "employer")

- 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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/530

DATE OF HEARING: January 8, 2001

DATE OF DECISION: January 23, 2001

DECISION

APPEARANCES:

Bruce C.E. Russell, Barrister & Solicitor	for Henry Tung
Shari Shigehiro, Law Student	for Edna Labuguen
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Henry Tung ("Tung" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 12th, 2000 under file number ER 078659 (the "Determination").

The Director's delegate determined that Tung owed his former employee, Edna Labuguen ("Labuguen"), the sum of $10,793.21 on account of unpaid wages (principally, overtime pay) earned during the period March 1st, 1995 to June 14th, 1996.

Tung's appeal of the Determination was heard at the Tribunal's offices in Vancouver on January 8th, 2001 at which time I heard the testimony of both the appellant employer, Mr. Tung, and his former employee, the respondent Ms. Edna Labuguen. Both parties were represented by counsel; no one appeared at the appeal hearing on behalf of the Director.

ISSUES ON APPEAL

Mr. Russell, on behalf of Mr. Tung, advances four separate grounds of appeal.

Firstly, he says that Mr. Tung was "wrongfully and unfairly prejudiced" by reason of the "unconscionable, inexplicable and/or wholly improper delays" in the investigation and original determination of Ms. Labuguen's complaint (see "Particulars of Appeal", para. no. 5, appended to Tung's Notice of Appeal).

Secondly, he asserts that Ms. Labuguen and Mr. Tung settled the former's unpaid wage complaint prior to the issuance of the Determination.

Thirdly, and in a somewhat related vein to the second ground, Mr. Russell says that Ms. Labuguen quite correctly agreed that her workday was 12.5 hours and that, accordingly, the Director's delegate erred in determining her unpaid wage complaint based on a 13-hour workday since the parties had previously "settled" her complaint on the basis that her unpaid wage entitlement would be calculated based on a 12.5-hour working day.

Fourthly, Mr. Russell says that the Director's delegate incorrectly calculated Ms. Labuguen's "regular wage" for purposes of determining her overtime pay entitlement. More specifically, Mr. Russell asserts that the imputed value of Ms. Labuguen's monthly room and board ($300) and a further $35 monthly payment, which was to reimburse Ms. Labuguen for the cost of her medical insurance, should not have been included in the "monthly wage" from which her "regular wage" was derived.

BACKGROUND FACTS

Ms. Labuguen was employed by Mr. Tung as a "domestic" commencing on or about April 7th, 1993. A "domestic" is defined in section 1 of the *Act* as follows:

> *"domestic" means a person who*
>
> > *(a) is employed at an employer's private residence to provide cooking, cleaning, child care or other prescribed services, and*
> >
> > *(b) resides at the employer's private residence;*

Ms. Labuguen was hired by Tung to serve, in the latter's words, as the family's "nanny"; Ms. Labuguen appears to have been the primary caregiver for the Tung's three young children and, in addition, provided cooking, cleaning, laundry and chauffeuring services. Ms. Labuguen was paid a monthly salary and was also provided with room and board in the Tung family home (for which she was apparently charged $300 per month). Ms. Labuguen also received a $35 monthly allowance which I understand was to offset the cost of her medical insurance. In or about April 1996, Ms. Labuguen ceased living in the family home but still continued to provide childcare and other services to the Tung family. It would appear from the material before me that when Ms. Labuguen ceased being a "live-in" nanny, her monthly wage (inclusive of the $35 medical insurance payment) was reduced from $2,215 to $2,035 (a difference of $180 which, it should be noted, is inconsistent with the appellant's position as to the value of the monthly room and board).

In April 1996, Ms. Labuguen no longer resided in the Tung family home and, thus, was no longer employed as a "domestic" as that term is defined in the *Act.* Further, prior to March 1st, 1995, "domestics" were excluded from the overtime provisions of the *Act.* Accordingly, the delegate only awarded Ms. Labuguen overtime pay as and from March 1st, 1995 until the end of her employment on June 14th, 1996. The delegate's calculations regarding Ms. Labuguen's unpaid wage entitlement was predicated on her having worked a 13-hour day. As noted above, Mr. Tung takes issue with that aspect of the Determination.

I now turn to the issues raised by the appellant in support of his position that the Determination ought to be either set aside or varied.

ANALYSIS

Delay

Undeniably, the determination of Ms. Labuguen's complaint did not proceed expeditiously. Ms. Labuguen's complaint was filed on July 17th, 1996--well within the 6-month statutory time limit governing the filing of complaints [see section 74(3)]. However, inexplicably, the Determination was not issued until July 12th, 2000--*over 4 years* after the end of Ms. Labuguen's employment.

There is nothing in the material before me which would suggest that Mr. Tung was in any fashion responsible for this delay. On the other hand, there is some suggestion in the material before me (principally, letters from the delegate to Ms. Labuguen) that Ms. Labuguen did not keep in regular contact with the delegate and may have relocated during the course of the delegate's investigation without providing information as to her current whereabouts in a timely fashion. Nor can it be said that this delay in determining the complaint was without pecuniary significance to Mr. Tung; the interest component of the award represents approximately one-quarter of the total wages that were determined to be owing to Ms. Labuguen. It might also be noted that, in light of the mandatory language of section 88 of the *Act*, the delegate was obliged to award interest (at a prescribed rate) on the amount of unpaid wages that were determined to be owing. Simply put, a delegate does not have any discretion with respect to the matter of interest even though the investigation of the complaint may have been inordinately delayed (see *e.g., Insulpro Industries Inc.,* BC EST #D405/98 and *Piney Creek Logging Ltd.,* BC EST # D546/98; *Common Ground Publishing Corp.,* BC EST # D433/00).

One of the purposes of the *Act* is "to promote the fair treatment of employees and employers"; another purpose is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of [the] *Act*"--see subsections 2(b) and (d). It would seem to me that both of these laudable purposes may be frustrated if investigations are allowed to interminably drift on without there being a timely resolution of the complaint.

The Tribunal has addressed the question of delay in the investigation and determination of an unpaid wage complaint on at least two occasions. I might add, at this juncture, I do not consider the Tribunal's decisions concerning the timeliness of section 116 (the reconsideration provision) applications (*e.g., MacMillan Bloedel,* BC EST # D279/00) to be apposite since a section 116 application represents, under the *Act,* the third opportunity to have the merits of a particular complaint reviewed. The courts have generally considered delay associated with *initiating proceedings* to be on a somewhat different footing than delay in adjudicating matters that have been *properly initiated.* The timeliness of an appeal or reconsideration application raises quite different considerations as compared to the alacrity of an initial adjudicative process. Among other things, it should be remembered that *the decision to appeal or to apply for reconsideration lies solely within the control of the*

applicant whereas, even though a complainant may have filed a timely complaint the Director's investigation of that complaint may be delayed due to circumstances wholly outside the control of the complainant.

In *Westhawk Enterprises Inc.* (BC EST # D302/98), Adjudicator Lawson cancelled a determination where there had been a 20-month delay in investigating and determining a dismissed employee's complaint. In *Westhawk* there was no explanation for the delay in processing a comparatively simple and straight-forward complaint. Adjudicator Lawson specifically relied on the British Columbia Court of Appeal's decision (since overturned) in *Blencoe v. British Columbia Human Rights Commission,* 2000 SCC 44 reversing (1989), 49 B.C.L.R. (3d) 216, 160 D.L.R. (4th) 303 (B.C.C.A.).

In *Ecco II Pane Bakery Inc.* (BC EST # D390/00), the delay in investigating and determining the subject complaint exceeded three years, however, Adjudicator McCabe, citing the absence of any evidence of prejudice flowing from the delay, was not prepared to set aside the determination.

Prior to the Supreme Court of Canada's decision in *Blencoe,* I might well have preferred the approach taken in *Westhawk* (particularly in light of the expressed purposes of the *Act* previously noted). However, having now considered *Blencoe* (this case was not referred to by either counsel in written or oral submissions), I am of the opinion that the Determination cannot be set aside solely by reason of the excessive delay involved in this case.

While counsel for Mr. Tung did not specifically raise a *Charter* argument, he did obliquely refer to the *Charter* in argument. Clearly, the *Charter* applies to the Employment Standards Branch in the investigation and determination of unpaid wage complaints--"Bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government" (*Blencoe* at para. 35). Although section 11(b) of the *Charter* states that a person charged with an offence must be tried within a reasonable time it is now clear that this "speedy trial" provision does *not* apply to civil or administrative proceedings (*Blencoe* at para. 88). Section 7 of the *Charter* is not implicated in this case since Mr. Tung cannot show that, as a result of the delay, his "liberty" or "security of the person" have been infringed in any fashion.

Counsel for Mr. Tung explicitly submitted that the delay in this case resulted in a denial of Mr. Tung's right to natural justice. "However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law...In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay." (*Blencoe*, at para. 101). Prejudice may result where, for example, the delay is such that witnesses no longer have a clear memory of the events in question, key witnesses have died or are otherwise unavailable, or key documents have been destroyed. There is absolutely no such prejudice in the instant case.

"To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate. There is no abuse of process by delay *per se*. [It] must [be] demonstrate[d] that the delay was unacceptable to the point of being so oppressive as to taint the proceedings" (*Blencoe* at para. 121). While I am of the view that the delay in this case was inordinate (this was not a complicated matter and it ought to have been dealt with considerably more expeditiously), I cannot conclude that this delay "tainted" the proceedings.

Clearly, the investigation of Ms. Labuguen's complaint ought to have proceeded more quickly; perhaps some of the responsibility for the delay lies with Ms. Labuguen herself. Since the Director chose not to appear at the appeal hearing, I am unable to fully understand why this case took so long to conclude. However, it also seems equally clear that the lengthy delay did not result in a procedurally unfair adjudicative process. Mr. Tung was well aware of the allegation against him; he was given a full and fair opportunity to respond to Ms. Labuguen's complaint; and, other than the payment of additional interest, he cannot point to a single circumstance whereby he was prejudiced due to the tardiness of the delegate's investigative and decision-making process. For the most part, Mr. Tung's claims of prejudice (appearing at hearings, hiring legal counsel) flow from the fact that he was forced to respond to what, in his view, was a nonmeritorious complaint. As for the matter of interest, I consider this to be, at best, a neutral factor since, it must also be remembered, interest only compensates Ms. Labuguen for the loss of use of money that was owed to her since the summer of 1996. Further, Mr. Tung, for his part, has had the use of money that properly belonged to Ms. Labuguen for several years and he has thus benefited to that extent.

To summarize, I am of the view that the approach taken by the Tribunal in *Westhawk* is incorrect; I consider *Ecco Pane II Bakery* to be more in line with the dictates of the Supreme Court of Canada's decision in *Blencoe.* Accordingly, although I consider the delay here to be excessive, in the absence of evidence of "actual prejudice of such magnitude that the public's sense of decency and fairness is affected" (*Blencoe* at para. 133), the Determination cannot be cancelled solely on the basis of unreasonable delay.

Settlement and the length of the workday

There is no evidence before me that Ms. Labuguen's complaint was settled prior to the issuance of the Determination. While there were settlement discussions, even a "settlement conference" at which the parties and the delegate were present, these discussions never resulted in a concluded agreement. Further, while Ms. Labuguen may have been prepared to settle on a particular dollar amount based on a 12.5-hour workday, her proposal (which was expressly rejected by Mr. Tung) involved extending her claim back to her original date of hire.

Further, the evidence before me shows that Ms. Labuguen worked *at least* 13 hours each day over a five-day work week. Indeed, if anything, she may well have worked a longer day. The employer did not maintain any records recording her hours of work (itself a

contravention of the *Act*) and now says that certain time should be deducted from the workday to reflect meal or other "breaks". However, the evidence shows that even if Ms. Labuguen did take "breaks"--and I believe she did--she nonetheless had to be available for work throughout the day (and into the evening) and thus her entire shift must be treated as compensable working time.

Ms. Labuguen's "regular wage"

So far as I can gather, the delegate correctly calculated Ms. Labuguen's "regular wage" for purposes of determining her overtime pay entitlement. The $35 cash payment each month, although it may have been paid to offset Ms. Labuguen's medical insurance costs, was nonetheless an amount paid to her for "work". It should be noted that Ms. Labuguen was free to spend the $35 monthly cash payment entirely as she saw fit and that it was not paid to her as reimbursement for any personally incurred, but work-related, expense (such as, say, a vehicle allowance).

The employer's own payroll records show that Ms. Labuguen's monthly wage (including the $35 cash payment) was $2,215 up until March 1996 and $2,035 thereafter. The delegate calculated Ms. Labuguen's "regular wage" using these latter figures. Each month, prior to April 1996, the sum of $300 was supposedly debited from her pay as "room and board". In my view, this sum reflecting "room and board", where the latter was not a gratuitous benefit provided by the employer, was properly included in the "regular wage" calculation--see *e.g.*, *Gateway West Management Corp.* (BC EST # D356/97).

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$10,793.21** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

KENNETH WM. THORNICROFT

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal