Employment Standards TRIBUNAL

An appeal

- by -

R. J. Somers Enterprises Ltd.

- 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

TRIBUNAL MEMBER: Frank A.V. Falzon

FILE No.: 2004A/173

DATE OF DECISION: March 3, 2005

DECISION

OVERVIEW

R.J. Somers Enterprises Ltd. (the Employer) appeals to this Tribunal under section 112 of the *Employment Standards Act* (the *Act*) from an August 26, 2004 Determination issued by a Delegate of the Director of Employment Standards. The Determination ordered the Employer to pay the amount of $5449.54, consisting of $3949.54 in wages for overtime, holiday pay and associated vacation pay owed to Alain Primeau (the Employee), and $1500 in administrative penalties.

The Employer alleges that the Delegate committed two errors of law. The first error alleged is that the Delegate failed to consider the Employer's argument that, pursuant to section 76(3)(c) of the *Act*, the Delegate should not have processed the complaint because it was made in bad faith. The second error alleged is that the Delegate erred in failing to properly consider the evidence before him in deciding that the Employer owed the Employee wages. As issue also arises as to the Delegate's standing to make submissions on appeal to this Tribunal.

For the reasons give below, the appeal is dismissed.

BACKGROUND

The Employer, who is in the construction and communication business, employed the Employee at a rate of $19 per hour as a telecommunication technician at its Fort Nelson operation for nearly 7 months (October 28, 2002 to June 12, 2003).

The Employee filed a complaint under section 74 of the *Act* in early July 2003. The Complaint alleged that the Employer contravened the *Act* by failing to pay: (1) compensation for length of service, (2) overtime wages, (3) vacation pay and (4) regular wages for hours worked in the three days before the employment relationship ended (June 9-11, 2003). The complaint alleged a total entitlement of over $16,000.

Each element in the claim was contested between the parties. The Delegate conducted an electronic hearing in July 2004, at which hearing the parties gave their evidence under oath.[1]

The Delegate dismissed the Employee's claim for compensation for length of service (claimed $760) based on the finding, on the evidence, that the Employee quit. The Delegate also rejected the Employee's claim for regular wages ($456) in the three days leading up to the quit, based on his finding that the Employee did not work on those days. Neither of those findings is under appeal to this Tribunal.

[1] The delay between the filing of the complaint and the hearing was due in part to the fact that the Employer filed an appeal in early 2004 from the Delegate's process decision to conduct a telephone hearing. That appeal was dismissed by this Tribunal in March 2004 as being an improper appeal, outside the Tribunal's jurisdiction.

The central question of overtime wages – a claim of $14,278.50 – was more complex. The question whether the Employee was entitled to any overtime was reasonably straightforward – the Delegate's reasons state that the Employer did not dispute that the Employee worked some overtime hours and the payment records showed that the only payments received were straight-time payments for 40 hours per week. The difficult question was how much overtime the Employee worked, so as to apply the formula set out in section 40 of the *Act*:

> **40** (1) An employer must pay an employee who works over 8 hours a day, and is not working under an averaging agreement under section 37,
>
> (a) 1 1/2 times the employee's regular wage for the time over 8 hours, and
>
> (b) double the employee's regular wage for any time over 12 hours.
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> (2) An employer must pay an employee who works over 40 hours a week, and is not working under an averaging agreement under section 37, 1 1/2 times the employee's regular wage for the time over 40 hours.
>
> (3) For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.

Determining the extent of overtime worked was problematic because of the absence of records the Employer should have been kept, and questions as to the reliability of other records tendered by the Employee.

The Employer kept no records of the Employee's daily hours of work, contrary to section 28(1)(d) of the *Act*. For his part, the Employee claimed to have worked over 500 overtime hours (based on a claim of working from 7 a.m. – 11 p.m. "almost every day"), but gave what the Delegate found to be an unconvincing explanation for why the Employee produced a handwritten statement but could not produce a printout of those hours he said he recorded daily on his personal computer and a company laptop.

Making matters even more complex and contentious, the Employer retrieved deleted files from the company laptop. On their face, these files supported the Employee's position that he recorded overtime hours, but also supported the Employer's position that the Employee recorded far fewer overtime hours than he later claimed in his handwritten summary. The Employer claimed that this laptop evidence showed the overtime claim to be fraudulent in its excess. The Employee claimed that the Employer must have tampered with the overtime file before deleting it.

The Delegate found that the Employee's handwritten summary was unreliable, and also held that the cell phone records relied upon by the Employee did not support his claim for over 500 hours. The Delegate found that the deleted laptop records were, in the imperfect circumstances before him, the best and most reliable guide to the overtime actually worked.

On this basis, the Delegate calculated the overtime owed as $3308.25 rather than the $14,278.50 claimed. In making this calculation, the Delegate recognized that the Employer had actually submitted two printouts of retrieved records, one of which had a missing page that omitted any overtime that might have been recorded between January 8-February 21, 2004. The Delegate relied on the printout which, on its face, covered the entire employment period.

Finally, the Delegate determined that the Employer breached section 46 of the *Act* by failing to pay the Employee for working 11 hours on New Year's Day, January 1, 2003, a statutory holiday ($297):

> **46** An employee who works on a statutory holiday must be paid for that day
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> (a) 1 1/2 times the employee's regular wage for the time worked up to 12 hours,
>
> (b) double the employee's regular wage for any time worked over 12 hours, and
>
> (c) an average day's pay, as determined using the formula in section 45 (1).

The Delegate's total of $3749.46 in wages owed was therefore the sum of $3308.25 (overtime pay) + $297 (holiday pay) + $144 (4% vacation pay).

The Delegate's administrative penalty consisted of three $500 penalties, imposed under section 29 of the *Employment Standards Regulation*, for the Employer's contraventions of section 28 (failing to keep proper records), section 40 (overtime) and section 46 (holiday pay). The Employer does directly challenge the administrative penalties on appeal.

DECISION

Section 76(3)(c)

Despite the Delegate's decision that the Employee was entitled to roughly 25% of what he originally claimed, the Employer argues there is a larger point to be made - namely, that but for its discovery of the laptop records the Employee would have successfully defrauded the Employer of at least $10,000. The Employer says the Delegate committed a legal error in failing to consider or even acknowledge its submission that, in these circumstances, section 76(3)(c) of the *Act* was triggered:

> **76** (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if:
>
> (c) the complaint is frivolous, vexatious or trivial or is not made in good faith…

The Employer submits as follows:

> Ironically … the Delegate implicitly found that the Employee's claim was not made in good faith. Accordingly, the Delegate should have dismissed the complaint under Section 76(3)(c) of the Act. The Delegate found that the Employee's story and his records were "unreliable" and "fraught with credibility gaps" and could not be used to determine his entitlement to premium pay. Yet, despite these findings, which are in our view strong evidence that the complaint was made in bad faith, the Delegate did not consider applying Section 76(3)(c). Therefore, it is our submission that the Delegate erred in law and denied the Employer a fair hearing by not considering whether the complaint was made in bad faith and the consequence of such a finding…. [If] Section 76(3)(c) of the Act is not applied herein, the fraudulent actions of the Employee will be condoned. There must, in other words, be consequences to the filing of a blatantly fraudulent claim.

It would have been preferable if the Delegate's reasons had been more direct and explicit regarding the Employer's bad faith argument under section 76(3)(c) of the *Act*. However, I am not convinced that the Delegate failed to *consider* the Employer's submission that the complaint should be rejected as having been fundamentally tainted by fraud. I find he did. The Delegate provided extensive, carefully-

considered reasons. Those reasons make clear that the Delegate was very much aware of the Employer's bad faith submission[2], which the Employer stressed both in evidence and argument. Those reasons make clear that Delegate was not prepared to take the extraordinary action under s. 76(3) of exercising the discretion to effectively bar the claim from going to decision in circumstances where the best evidence showed that the claim had some merit, where the Delegate found Employer itself conceded that some overtime was worked, and where the evidence showed that the Employer failed to comply with provisions of the *Act*. Such an outcome is not an error in principle, and it does not condone what the Employer refers to as "blatantly fraudulent behaviour". Where the Employee's evidence was found not to be credible, it was rejected. That the Employer took the steps of recovering the laptop files was a good and helpful thing to do, but it must also be noted that the Employer found itself in that position by failing to keep proper records under the Act.

In *Provident Security and Event Management Corp.,* BC EST # D279/01, Adjudicator Stevenson wrote as follows about the purpose of Section 76(3)(c):

> …the Director is not compelled or required by the Act to refuse to investigate or stop or postpone an investigation even if there is "bad faith" on the part of the complainant. It is a matter of discretion. Bearing in mind that the purpose of the Act and the statutory mandate of the Director to ensure employees receive at least minimum employment standards and that employers comply with the minimum requirements of the Act, it is consistent with that purpose for the Director to give consideration to the merits of a complaint before denying a complainant their rights under the statute….
>
> The purpose of Section 76(2)(c) [now 76(3)(c)] of the Act is not to refuse or discontinue investigation of valid employment standards claims. The purpose and objective of that provision is to allow the Director to prevent abuses of the legislation, where it is apparent that a complaint has been filed not for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In *Re Health Labour Relations Association of British Columbia et al v. Prins et al*, (1982), 140 D.L.R. (3d) 744 (B.C.S.C.), the Court stated, at page 748:
>
> > It would take the clearest kind of language to exclude the right of any citizen to the direct remedy furnished by this [the Act] legislation.
>
> The same considerations would apply in Section 76(2)(c) [now 76(3)(c)]. It would take the clearest kind of circumstances to deny an employee the basic standards of compensation and conditions of employment provided by the Act.

I agree.

Even if the Employee's evidence was seen as having crossed the rubicon from being lacking in credibility to having been intentionally exaggerated, it was not in my opinion a legal error in these circumstances for the Delegate to continue deciding the claim and to separate wheat from chaff, particularly given the finding that the Employee was in fact denied certain minimum employment standards, and given the Employer's acknowledgement that it did not meet these standards. This was not a one-sided case. I see no basis on which to conclude that the Delegate erred in law in failing to characterize the circumstances here as "the clearest kind of circumstances to deny an employee the basic standards of the Act."

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[2] At page 4 of the Determination the Delegate quoted the Employer's submission "that the Employee 'in bad faith (and) complete abuse of the process … went big', thinking that the deleted files were irretrievable". At page 5 the Determination also reference the Employer's submission that the overtime claim was "fraudulent" and "outrageous" and "*should be dismissed as such*".

Before closing on this point, I would address the statement in the Employer's appeal submission that: "For clarity, the Employer disputed that the Employee worked any overtime". In my opinion, the Delegate's finding to the contrary was not unreasonable and did not constitute an error of law. As the Delegate points out in his response submission, there was evidence – independent of the retrieved laptop records - to support the Delegate's finding that the Employer conceded overtime was worked. This included the purpose of the cellphone (to respond to calls outside regular office hours), the Employer's acknowledgement that Employee did receive service calls outside office hours (confirmed by the cellphone bills) and the Employer's argument before the Delegate that the overtime hours were "inflated", "falsely doubled" and "went big", which necessarily concedes that some overtime was worked.

Issues regarding Evidence

The second branch of the Employer's appeal is that the Delegate erred in law "in failing to properly consider the evidence before him". The Employer argues that in choosing between the two sets of retrieved records, the Delegate wrongly made a negative inference against the Employer as a result of the missing page 2 from one of the two sets. The Employer argued that, instead of seeking an explanation about the missing page 2, the Delegate wrongly inferred that the Employer's evidence also had credibility gaps. Further, the Employer argues that its disclosure of documents was wrongly taken as an admission that the Employee worked overtime.

As to the latter point, I have already concluded above that there was ample evidence, independent of the laptop evidence, to support the Delegate's conclusion that some overtime was worked and that the Employer conceded as much. As to the former, it is my view that the Delegate's inference about the missing page 2 was reasonable given that it was the Employer who tendered the information without page 2. Further, and in any event, this statement by the Delegate was subsidiary to his primary conclusion that the best available evidence was the other printout that encompassed the all of January and February (the Delegate called these the "revised records"), which printout specifically identified customers to whom services were provided in a given time period. The Delegate was entitled to make his decision on the best available evidence, and in my opinion his resolution of that question was entirely reasonable in the circumstances of this case.

The Delegate's Standing on Appeal

The Employer submitted his appeal through counsel. The Delegate submitted the record, and a response to the appeal. The Employee made no submission on the appeal.

The Employer objected to the Delegate's submission. The Employer says that Delegates should not be allowed to make *any* submissions where they have conducted an evidentiary hearing, and in any event should not be allowed to make submissions as to the correctness of the decision, particularly where, as here, that participation crossed the "fine line" between explanation and advocacy. The Employer's submission elicited a reply from counsel for the Director, who argued that the recent amendments and process changes to the *Act* have not altered the Director's role, and should therefore not alter that role in appeals before the Tribunal. Counsel argues:

> Addition of oral hearings to the Director's tools for compliance does not mandate his absence from meaningful participation in the appeal process.

I do not see this decision as being the appropriate springboard for an exhaustive dissertation on the Director's proper role on appeals to this Tribunal where the Delegate has conducted an evidentiary hearing. It will suffice to say that I have never considered that the standing of statutory decision-makers before specialized appeal tribunals to be determined according to the tribunal standing rules applicable in courts of law. Rules of standing in administrative law are fundamentally rules of policy, and must balance competing factors in ways that best serve the objects of the particular legislation and the needs of the particular tribunal. I am therefore very much inclined to agree with those who would call for a flexible, practical and context-specific approach to this issue: see for example, Mullan, *Administrative Law* (2001), c. 18, p. 1; Jacobs and Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 Can. Bar Rev. 619 at 621; and see *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2003), 66 O.R. (3d) 692 (S.C.J.) at paras. 40-52.

In this case, where the Employee did not appear and where the Appellant's objection raised evidentiary issues that the record did not address, it was not only helpful, but necessary, to have the Delegate's assistance. The vast majority of that submission I found to be helpful and fair. Indeed, this case shows the importance of being able to hear from Delegates even where they have given extensive reasons. One cannot predict what parties will argue on appeal. Given the absence of transcripts of what transpired at first instance, even the most comprehensive reasons will not always arm the Tribunal with the information necessary to properly address a particular ground of appeal.

This said, I would like to discourage Delegates from going so far as to say, as the Delegate did at one point in his submission before me, that certain factors "validate the correctness of" a particular factual finding that is in issue. The Tribunal rightly gives those sorts of statements no weight. It is better in every case to simply outline what the Delegate considered in the decision, in an objective way, and then to let the Tribunal arrive at its own conclusions about correctness.

ORDER

The appeal is dismissed.

Frank A.V. Falzon
Member
Employment Standards Tribunal