

An appeal

- by -

Mathew McGreish  
(“McGreish”)

- 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:** David B. Stevenson

**FILE No.:** 2004A/194

**DATE OF DECISION:** March 9, 2005

## DECISION

### SUBMISSIONS

Martin C. Spieker on behalf of Mathew McGreish

Lynn Ranger on behalf of the Director

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Mathew McGreish (“McGreish”) of a Determination that was issued on September 27, 2004 by a delegate of the Director of Employment Standards (the “Director”).

The Determination related to complaints that had been filed by thirteen employees, including McGreish, of several numbered companies operating under the name Pardue Inc. (“Pardue Inc.”). McGreish had complained that he was owed regular wages, overtime wages, annual vacation pay and reimbursement for supplies he purchased on behalf of Pardue Inc. In respect of this complaint, the Director found Pardue Inc. had contravened Part 3, Section 18, Part 4, Section 40, and Part 7, Section 58 of the *Act* and ordered Pardue Inc. to pay McGreish an amount of \$1719.66.

The Director also imposed an administrative penalty on the numbered companies under Section 29(1) of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$500.00.

McGreish says the Director failed to comply with the principles of natural justice in making the Determination on his overtime claim. McGreish has provided additional evidence with the appeal, and seeks to have the Tribunal consider this evidence on the ground that it was not available at the time the Determination was made.

The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

### ISSUE

The issues in this case are whether the Director failed to comply with principles of natural justice in making the Determination on McGreish’s claim for overtime wages and whether there is evidence which has become available which was not available at the time of the Determination.

### THE FACTS

Pardue Inc. operated a construction company and manufacturing plant. McGreish was employed by Pardue Inc. from October 14, 2003 to April 15, 2004 as Quality Control at a rate of \$20 an hour. McGreish was part of a training on the job program involving Pardue Inc. and the Workers’ Compensation Board (the “WCB”) under which the WCB paid 100% of McGreish’s wage from November 24, 2003 to January 31, 2004 and 75% of his wage from February 1, 2004 until his

employment with Pardue Inc. ended. The material shows the program was based on McGreish working a 40 hour week.

The background provided in the Determination suggests Pardue Inc. closed its operations in the province on or about April 30, 2004. There is an outline in the Determination of the efforts made by the Director to communicate with Pardue Inc. concerning the complaints, of discussions with complainants, directors and representatives of Pardue Inc. and, ultimately, of the failure or refusal of Pardue Inc. to acknowledge any responsibility for the wage claims made by the thirteen complainants.

The Determination specifically indicated that Pardue Inc. had failed to provide daily records for any of the complainants. The Determination noted that Pardue Inc. denied McGreish had worked any overtime and that their position was not accepted, because “the employer agreed that he was not always at the production site and did not know if the overtime claim was accurate even if it was not authorized.”

During the complaint process, McGreish provided the Director with a “contemporaneously kept calendar from October 2003 to April 2004” in which he marked the total number of overtime hours worked each day during October, November, December 2003, January 2004 and for the period up to February 20, 2004. From February 23, 2004 until April 15, 2004, McGreish marked the total number of hours worked each day on his calendar.

The Director accepted the record of hours worked each day for the period February 23, 2004 to April 15, 2004 but did not accept the overtime record for the period up to February 20, 2004. The reason for that decision is contained in the following passage in the Determination:

The calendar shows that from October 30 to February 20, 2004 he simply wrote down the number of overtime hours he worked each day. From February 23 through to April 15, 2004 he changed his method of record keeping to reflect the total number of hours worked per day. I find that in order to determine that overtime wages are owing, one must establish that an employee has worked 8 hours in a day, therefore all hours worked during in [sic] a day must be documented. Therefore M. McGreish is owed overtime for all days marked on his calendar, which demonstrate, he work [sic] more than 8 hours in day.

## ARGUMENT AND ANALYSIS

The burden is on McGreish, as the appellant, to persuade the Tribunal there is a reviewable error in the Determination. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) *the director erred in law;*
  - (b) *the director failed to observe the principles of natural justice in making the determination;*
  - (c) *evidence has become available that was not available at the time the determination was made.*

One of the grounds of appeal is that evidence has become available that was not available at the time the Determination was made. The evidence which is the subject of this ground of appeal comprises a photocopy of a calendar covering the first four months of 2004, a handwritten note from McGreish to Maureen King concerning banking of overtime and a letter from the WCB dated November 17, 2004.

In response to the appeal, the Director objects to the additional evidence for three reasons: the evidence was reasonably available to McGreish at the time the Determination was made and no explanation has been given for providing it; there are discrepancies between the overtime record provided by McGreish during the investigation and the additional evidence provided with the appeal that does not assist in demonstrating any error was made in the Determination; and the letter from the WCB does not assist in determining the daily hours worked by McGreish.

When new, or additional, evidence is presented to the Tribunal with an appeal, the Tribunal uses the following considerations to determine whether it will be accepted:

- could the new evidence, with the exercise of due diligence, have been discovered and presented to the Director during the complaint process and prior to the Determination being made?
- is the new evidence relevant to a material issue arising from the complaint?
- is the new evidence credible, in the sense that it is reasonably capable of belief? and
- does the evidence have probative value, in the sense that if believed it could, on its own or in combination with other evidence, have led the Director to a different conclusion on the material issue?

It is clear the handwritten letter to Maureen King was reasonably available to McGreish to provide to the Director during the complaint process and on that basis I refuse to accept it.

I take the same view about the calendar covering the first four months of 2004. The submission made on behalf of McGreish suggests this calendar was acquired after his complaint was filed with the Director, but was in his possession before the Determination was made. No explanation was given for not providing this information to the Director, particularly in light of the number of conversations between McGreish and the Director in the period from July 21 to August 24, 2004. I do not accept this evidence.

The Director argues the letter from the WCB is not probative of the issue raised in this appeal. The submission of the Director on this letter says, in part:

The adjudicators' [sic] conversations with Mr. McGreish WCB's [sic] advisor was that WCB's commitment was for payment based on a 40 hour work week, but they had no record of daily hours worked. On wage statements supplied by Mr. McGreish from WCB there is no indication of hours worked. The statement shows "Payment Type = work assessment - I.D.", therefore this cannot be used as evidence to prove hours worked.

I agree the letter does little more than confirm what appears to have already been apparent to the Director - that WCB's commitment to pay McGreish's wages was based on the understanding that McGreish would be working a 40 hour week that did not include overtime. However, the letter also speaks to confirmation by Pardue Inc. that McGreish was working 40 hours a week and is relevant and probative in that it lends some support to the assertion made by McGreish that he was working 8 hours a day, five

days a week during his period of employment with Pardue Inc. There is no question about the credibility of the information and while the evidence might have been discovered and presented to the Director during the complaint process, in the circumstances I do not place the obligation to have provided that evidence on McGreish. For these reasons, I accept the letter as additional evidence and will consider it in the course of this appeal.

The other ground of appeal raised by counsel for McGreish contends the Director failed to comply with principles of natural justice in denying his overtime claim for the period October 30, 2003 to February 20, 2004. Counsel argues such a decision should not have been made without providing McGreish a fair opportunity to address any questions or concerns the Director might have had with the overtime records provided by him. He says that had the Director raised any concern about the overtime record for that period of time, McGreish would have explained that he was recording only hours worked in excess of his regular hours worked, which was 8 hours a day, five days a week.

In reply, the Director says there was no question or concern about the overtime record for the period in question. The Director says it was clearly understood how McGreish had recorded his overtime during the period, but his method of recording his overtime hours did not include recording all hours worked in a day, which from the Director's perspective was essential to a finding that overtime was worked. The position of the Director is fairly summarized in the following excerpt from the January 28, 2005 submission:

The adjudicator was able to clearly interpret the calendar supplied, and there was no confusion regarding the method of record keeping. It is important to understand that from October, 2003 to February 23, 2004 the claimant did not provide daily hours of work and therefore one cannot establish that Mr. McGreish worked over 8 hours in a day and that overtime hours are owing.

The concern I have with the position taken by the Director is that McGreish did provide evidence of daily hours of work during the period in question. He told the Director that he regularly worked eight hours a day, five days a week and that he contemporaneously recorded the hours he worked in excess of his regular hours. As well, his evidence that he worked an 8 hour day and five day work week found some support in the documents on record and in the evidence presented by both Pardue Inc. and the WCB.

The Director's response to that evidence was to say, "I don't accept it". Fundamentally, that is a finding going to the credibility of the evidence presented by McGreish to the Director, without any reason being given in the Determination for that finding. I do not accept that "all hours worked in a day must be documented" is any reason to reject the evidence.

While I appreciate the Director's comments about the importance (from an evidentiary perspective) of providing contemporaneous records to support an overtime claim, the evidence, accepted by the Director, was that McGreish did keep contemporaneous records of the overtime hours he worked. The only reason given for rejecting the records for the period in question is that they did not show all hours worked in a day.

The Director is given the authority to make Determinations on complaints made under Part 10 of the *Act*. That authority necessarily involves an adjudicative function which carries with it a requirement to act judicially. Some aspects of the requirement to act judicially, particularly relating to receiving and considering evidence and addressing issues of credibility, were noted by the Tribunal in *John D. Edwards*, BCEST #D155/03:

The Director has considerable latitude in deciding to accept or reject evidence, in whole or in part. However, in doing so the Director must act judicially, and not arbitrarily or unreasonably, in weighing and assessing the credibility of the evidence. More specifically, the Director may not reject evidence on an important point without good reason, which must include a finding against the credibility of the evidence and an explanation why the evidence was found to lack credibility.

The Director correctly assessed the evidence provided by Pardue Inc. and decided, for the reasons set out in the Determination, not to accept that evidence, but no good reason was given for making a finding against the credibility of the evidence provided by McGreish for the period in question.

The need to provide sufficient reasons for conclusions reached in a Determination relates to the fairness of the process, particularly in a difficult case where hard choices have to be made. Sound reasons show the process has operated fairly - in the sense that the Director properly considered the relevant issues, applied the appropriate principles and addressed the key points of evidence and argument submitted. Section 2 of the *Act* incorporates considerations of fairness into the procedures for resolving disputes as one of the purposes of the *Act*.

In replying to the appeal, the Director has attempted to point out perceived inconsistencies in the evidence presented by McGreish in order to justify the position taken on the October 2003 to February 20, 2004 overtime records. Most of those perceived inconsistencies, however, only reinforce my concern with the Determination, since they are based on suppositions which are not supported by evidence or which are inconsistent with the evidence. As well, to some extent they reinforce the argument made by counsel for McGreish in the appeal submission as there is no indication on the record that these perceived inconsistencies were ever put to McGreish for an explanation.

The failure of the Director to provide good reasons for not accepting the evidence given by McGreish in support of his overtime claim for the period in question justifies allowing this appeal. It is not necessary to refer the claim back to the Director for further consideration of the evidence. The record justifies a conclusion that McGreish worked overtime during the relevant period and that he is entitled to be paid for that overtime based on the records he maintained during the period.

The Determination will be varied to include the overtime hours claimed for the period October 14, 2003 to February 20, 2004, which I estimate to be 146.5 hrs. The matter will be referred back to the Director to calculate the wages and interest owed for that period and make the necessary adjustments to the Determination.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination, dated September 27, 2004, be varied to include the overtime claimed for the period October 14, 2003 to February 20, 2004, together with vacation pay and interest on that amount.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**