Employment Standards TRIBUNAL

An appeal

- by -

Kevin Davidson
("Davidson")

- 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: David B. Stevenson

FILE No.: 2002/572

DATE OF DECISION: January 28, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Kevin Davidson ("Davidson") of a Determination of the Director of Employment Standards (the "Director") dated October 25, 2002.

Davidson had filed a complaint with the Director alleging his employer, Salmo District Golf Club. ("SDGC") had failed to pay him for all hours worked in contravention of Section 18 of the *Act*. The Determination found there was not enough evidence to prove Davidson had not been paid for all hours worked, decided the *Act* had not been contravened, ceased investigating and closed the file on the complaint.

In this appeal, Davidson contends the Director failed to consider all of the relevant facts and documents and failed to properly consider or weigh some of the facts presented during the investigation. Specifically, Davidson says the Director failed to consider two documents, a performance report for Davidson prepared by SDGC and dated June 28, 2001; and a memorandum submitted by Davidson to the SDGC executive on June 3, 2001; failed to give proper weight and effect to the statement of Bev Gowing, the TWS timesheets and a Canada Customs and Revenue Agency ("CCRA") ruling on the number of insurable hours Davidson worked; and failed to consider certain facts: that he was not allowed to attend the SDGC executive meeting on July 14, 2001 and that the payroll and employee records of SDGC were 'destroyed'.

ISSUE

The issue is whether Davidson has shown the decision was wrong, or unfair and unreasonable.

FACTS

Davidson was employed by SDGC from April 1, 2001 to July 15, 2001 as food and beverage manager. He was hired under a TWS program administered by Human Resources Development Canada ("HRDC"). According to the terms of TWS program contract, Davidson was to be paid $12.50 an hour and work 40 hours a week. HRDC contributed a portion of Davidson's wage. The duration of the TWS arrangement was to be 16 weeks.

A TWS monthly claim form for each month of the arrangement was prepared by Davidson and signed by SDGC. On each of the forms, Davidson entered that he had worked 40 hours a week and was paid $12.50 an hour.

Davidson claimed he had worked 933 hours during the period of his employment. HRDC asked CCRA to make a ruling on the insurability of the hours worked and CCRA found Davidson had worked 616 insurable hours.

Davidson claimed he had kept a record of the hours actually worked on a spreadsheet in the SDGC's computer and in his manager's logbook. He provided that information during the investigation. In

respect of that information, the Director found deficiencies in the documents sufficient to justify according little evidentiary value to them. The Determination noted that SDGC had searched their computer, but could find no daily record of hours worked by Davidson, adding that if such records did exist, they may have been inadvertently destroyed during a failed attempt to upgrade the computer's software.

During the investigation, in addition to speaking with a representative of SDGC and with Davidson, the Director interviewed 7 'witnesses'. Two of those 'witnesses' were Bev Gowing and Paula Farrell. The Director was invited to talk with both of these individuals by Davidson, who wrote in a letter to the Director dated April 15, 2002:

> I suggest that the two full-time employees: Paula Farrell and Bev Gowing can verify my hours and the last day worked.

and, later in the same letter:

> I am confident that the other staff of the Salmo Golf Club can verify that I was on duty seven days a week and worked a considerable amount of overtime.

Paula Farrell did indicate that Davidson put in a lot of hours. The Determination summarized the information provided by Bev Gowing as follows:

> Bev Gowing was also a cook at the golf course and had previously been responsible for running the concession as her own independent business. She states that she never really worked *with* the complainant. She says she used to come in for an hour or two and do business on the computer, but she only saw him cooking once or twice. She says she heard through the grapevine that he was running his own business on the side.
>
> Gowing was also aware that there was a time bank established at the golf course and that Paula may have banked hours and that the complainant may also have banked hours.

The Determination made no reference to a performance report for Davidson dated June 28, 2001 nor to a memorandum dated June 3, 2001 from Davidson to the SDGC executive, which stated, in part:

> Manager hours have exceeded 40 hours per week during start-up as expected, this will become reality as staff training, equipment purchases, and day to day operations are normalized.

There was no reference in the Determination that Davidson had not been allowed to attend the SDGC executive meeting on July 14, 2001.

ARGUMENT AND ANALYSIS

I will address one matter before considering the substance of the appeal. In his final communication to the Tribunal, dated December 12, 2002, Davidson provided the name of another 'witness'. Davidson says this person "had moved and may have been unavailable" to the Director during the investigation. It is difficult to assess the purpose for this communication, but it can be given no effect in the context of this appeal. If this person has information that is germane to the appeal, then under the Tribunal's Rules of Procedure, Davidson was required to provide it with his appeal. The appeal was received by the Tribunal on November 2, 2002. Even if the Tribunal was inclined to accept that Davidson could submit

information from this person well after the time limited for appeal had expired, there is nothing in the communication indicating what information this person could provide that might support the appeal or impact on the Determination.

The burden in this appeal is on Davidson, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. More specific to the application of that burden in the case, Davidson must persuade the Tribunal that it was unfair and/or patently unreasonable for the Director to have concluded there was insufficient evidence that he had worked additional (overtime) hours for which he was not paid.

I am not persuaded that burden has been met. In effect, Davidson is simply asking this Tribunal to review the evidence and reach a different conclusion than the Director. Overall, the appeal does not provide any compelling analysis of the alleged deficiencies or demonstrate the Director erred in deciding the *Act* had not been contravened.

Davidson says the performance report should have been included in the Determination because, "it is significant to establish that the complainant was an employee in good standing." With respect, I do not share Davidson's perspective on the significance of the performance report. As the Director has pointed out in reply, the central finding in the Determination was that there was insufficient evidence to prove Davidson worked additional hours for which he was not paid. The performance report has no bearing on that finding. The absence of any reference to it does not demonstrate any error in the Determination. If there is some relevance to this reason for appeal, it is not apparent from the appeal material.

In respect of the June 3, 2001 memorandum to the SDGC executive, I agree with Davidson that the document provides some support to the contention that he worked extra hours prior to June 3, 2001. However, the comment found on that memo must be read against the other available information and I agree with the Director that the reference to working additional hours is not evidence that Davidson actually worked additional hours.

Davidson says that Bev Gowing's statement requires an explanation. In effect, Davidson's appeal on this point does no more than seek to distance himself from the information she provided, even though he invited the Director to seek information from her on the basis that she could 'verify' his hours. He now says the other employee, Paula Farrell, was in the best position to verify his hours of work. In reality, the information provided by both two individuals would not been particularly helpful in determining whether Davidson worked hours for which he was not paid. The statements made by both Bev Gowing and Paula Farrell are long on impression and short on detail. I also accept the comments made in the reply of SDGC that her ability to say with any certainty that Davidson worked 'a lot of hours' is limited by several factors and some of what she says in her statement is speculative or likely based on information provided by Davidson himself.

The Director, in reply to the appeal, says the TWS time sheets were not found to be an accurate reflection of the hours worked by Davidson. The Director re-iterates that the Determination was not based on any single piece of information, but on a global assessment of whether there was enough reliable evidence to determine whether Davidson was owed any wages and, if so, what amount was owed. In his appeal, Davidson infers that the CCRA ruling, and possibly the reason it was not appealed, was because there were no employee time sheets to verify the actual hours he worked. That explanation does not strengthen either the complaint or this appeal. While the Director does not specifically comment on the CCRA ruling in reply to the appeal, I do not read the Determination as indicating their ruling was determinative

on the issue of hours worked. In its analysis, the Determination only makes note of the ruling and the fact that Davidson did not appeal it. In any event, nothing in the appeal identifies the potential relevance of the either of these points in the context of the burden on Davidson to show the Determination was wrong.

Davidson says the fact he was not allowed to attend the SDGC executive meeting on July 14, 2001 was a 'relevant fact' not considered by the Director. Once more, the appeal does not indicate the relevance of that fact to the question of whether he had worked additional hours for which he was not paid. There is, in fact, some dispute by SDGC about whether he was told not to attend that meeting. Regardless, if Davidson feels there is some relevance in that, it is his obligation in this appeal to identify what that relevance is, how it relates to the matter under appeal, how it demonstrates an error in the Determination and why it justifies the intervention of the Tribunal to cancel or vary the Determination or refer the matter back to the Director.

Finally, Davidson says the Director failed to consider that the employee records were destroyed. The Director says it is wrong to say that fact was not considered. I agree. The Determination clearly references the loss of the employee records. The difficulty for Davidson is that in light of the other evidence available, the destruction of the employee records did not create any adverse inference against the position of SDGC or strengthen the information provided by him. As the Director points out in the reply:

> . . . lack of start-finish times, evidence of operating his own business and of spending less time at the golf course operation all cast an element of doubt on the records which were provided, ...

In sum, Davidson has not shown any error in the Determination and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 25, 2002 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal