Employment Standards TRIBUNAL

An appeal

- by -

578047 B.C. Ltd. operating as Pro Gas & Heating
("Pro Gas")

- 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: Carol L. Roberts

FILE No.: 2003A/316

DATE OF DECISION: March 3, 2004

DECISION

SUBMISSIONS

Eddie Lowe:	On behalf of 578047 B.C. Ltd., operating as Pro Gas & Heating ("Pro Gas")
Luke Krayenhoff:	On behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Pro Gas, pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued November 7, 2003. Cameron Munford complained that Pro Gas contravened the Act by failing to pay him overtime and statutory holiday pay.

Following an investigation, the Director's delegate determined that Pro Gas had contravened the Act, and that Mr. Munford was entitled to overtime wages and vacation pay. The delegate also assessed an administrative penalty of $150.00, and ordered that Pro Gas pay the Director $3.963.45 in respect of wages, interest and penalties.

Pro Gas argues that the delegate erred in law and failed to observe the principles of natural justice, and contends that evidence has become available that was not available at the time the Determination was made, and seeks to have the Determination cancelled.

ISSUE TO BE DECIDED

1. Did the delegate err in his interpretation of sections 38 and 39(a) of the Act?

2. Did the delegate fail to observe the principles of natural justice?

3. Is there new and relevant evidence available that was not available at the time the Determination was made that would lead the delegate to a different conclusion?

FACTS

Mr. Munford was employed by Pro Gas, a furnace installation and repair business, as a gas fitter from April 9, 2001 until November 29, 2001. He alleged that he worked over eight hours per day, but was not paid overtime rates.

Although Pro Gas acknowledged that Mr. Munford worked over eight hours a day, it contended that he worked under a flexible work schedule of at least 26 weeks as provided under section 38 of the Act. Pro Gas submitted Mr. Munford's pay records and time cards for the period in dispute. Pro Gas acknowledged that statutory holiday pay was owed, and paid that prior to the issuance of the Determination.

Mr. Munford acknowledged that he signed a flexible work schedule. However, he argued that the schedule was not adhered to and that it did not reflect the permissible schedules or approval process established under the Act.

The delegate determined that, because Mr. Munford was neither a member of a union or subject to a collective agreement, the provisions of section 38 were not applicable. The delegate found that section 37 and the associated Regulations applied to Mr. Munford. The delegate reviewed the flexible work schedule signed by Mr. Munford and Pro Gas, and determined that, because it did not contain the daily start and finish times, it did not comply with the Regulations. Further, the delegate determined that there was no evidence the schedule was voted on by employees or submitted to the Director for approval. He found no approved flexible work schedule for Pro Gas on file at the Director's office.

Accordingly, the delegate found that section 40 of the Act (that section applicable to overtime) applied to Mr. Munford's hours of work. The delegate determined that Mr. Munford was entitled to $3,813.45.

The delegate noted that Pro Gas had been assessed a zero dollar penalty for contravention of section 40(1) on August 8, 2000. The delegate determined that a $150 penalty was needed to promote compliance with the Act and to prevent a repeat contravention.

ARGUMENT

Mr. Lowe's submissions do not relate to the grounds of appeal. Rather, he contends that Mr. Munford "forfeited his rights to overtime as a result of a previous settlement, having reached regarding this same complaint to Employment Standards." Mr. Lowe contends that Mr. Munford filed a complaint regarding overtime in 2001, and, in October 2001, sent a letter to the Branch advising that he had "cancelled labour relations action pending… work schedule to consist of 4 - 10 hour days and any and all overtime to be in writing."

Mr. Lowe submits that Mr. Munford agreed to work the 10 hour day schedule referred to in the letter, and having withdrawn that complaint, cannot now resurrect it. He further submits that Mr. Munford agreed to work overtime past 4 – 10 hour days and that overtime was to be paid after those 40 hours.

Mr. Lowe further contended that Pro Gas complied with the Regulations regarding flexible work schedules. He wrote

> All shift cycles with day at work and day off work are repeated over a period of up to 8 consecutive weeks, by viewing Mr. Munford's time cards it is easy to extrapolate a four day work week pattern. In viewing every time card submitted by this company it can be seen that Mr. Munford had at least one weekday off during the work week. This would reflect the four day ten hour work schedule as eluded to in Schedule #1 of the Employment Standards Act…[reproduced as written]

Mr. Lowe also contended that the Director was notified of its flexible work schedule under section 38, and submitted a memo from Lynn Egan, a delegate of the Director, in support of that argument.

Finally, Mr. Lowe alleged that Pro Gas had filed a lawsuit against the delegate who issued the Determination. While he acknowledged that the lawsuit had nothing to do with the Determination

regarding Mr. Munford, he contended that the lawsuit "speaks to natural justice and the Delegate of the Director of Employment Standards treatment and bias conduct towards this company".

The delegate submitted the documents Mr. Munford and Pro Gas submitted to the Branch during the investigation.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

The burden of establishing that the Determination is incorrect rests with an Appellant.

Having reviewed the submissions of the parties, I am unable to find that the delegate erred in law, failed to observe the principles of natural justice, or that new evidence has become available.

I will address the grounds of appeal separately.

Error of law

Although Mr. Lowe initially characterized the delegate's error of law as his interpretation of sections 39 and 39(a) of the Act, his submissions did not relate to this issue. Rather, the submissions related to Mr. Munford's purported withdrawal of an earlier complaint regarding overtime hours. I will address both issues.

There is no evidence Mr. Munford is a member of a union. Thus, the law relating to a flexible work schedule is section 37, as noted by the delegate. Although Mr. Lowe's submissions on this point continue to refer to section 38, that section does not apply to this worker. Section 37(1) provides that an employer may adopt a flexible work schedule for employees not covered by a collective agreement if

(a) the schedule is prescribed in the regulations and is for a period of at least 26 weeks,
(b) the employer has followed the procedure in the regulations,
(c) at least 65% of all employees who will be affected by the schedule approve of it, and
(d) within 7 days after the date of approval by the employees, the employer has provided the director with a copy of the schedule.

Mr. Lowe contends that a copy of the flexible work schedule was approved by Mr. Munford. However, he provided no evidence to the delegate, or on appeal, that the schedule was approved by at least 65% of all employees affected by it. The work schedule submitted refers only to days on and days off, not the hours of work. The Regulations set out the flexible work schedules. There is no evidence the work schedule complies with either the Regulations or section 37.

I find no basis for Mr. Lowe's argument that the delegate erred in law in his interpretation of section 38.

Mr. Munford filed a complaint with regard to overtime on October 17, 2001. On October 18, he notified the Director that he had withdrawn his complaint because he had resolved the issue with his employer. Mr. Munford reinstated his complaint by way of a letter dated December 3, 2001. In that letter, Mr. Munford indicated that he had withdrawn his earlier complaint on the condition that Mr. Lowe would not require him to work more than 10 hours per day 4 days a week. He contended that he was working 12 – 14 hour shifts, in contravention of the conditions.

I find no basis for Mr. Lowe's argument that Mr. Munford "forfeited any claims to overtime" as a result of his withdrawal of this complaint. It did not constitute a settlement, as Mr. Lowe contends, and, in any event, parties may not agree to waive, or forfeit, the minimum standards prescribed by the Act.

Failure to observe natural justice

One of the fundamental principles of natural justice is that decision makers must base their decisions, and be seen to be basing their decisions, on nothing but admissible evidence (the rule against bias). The concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" (Valente v. The Queen, [1985] 2 S.C.R. 673 at p. 685)

The onus of demonstrating bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

Although Mr. Lowe contends that the delegate is biased towards him, he does not specify how the delegate might be so biased, but for his reference to a lawsuit Pro Gas has purportedly filed against him. A statement of claim, if one has indeed been filed, is not evidence of anything. The statement of claim may contain allegations, but those allegations, without more, do not form grounds for an appeal on the grounds that the delegate failed observe natural justice.

I find no basis for the appeal on this ground.

New Evidence

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

1. 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;

2. the evidence must be relevant to a material issue arising from the complaint;

3. the evidence must be credible in the sense that it is reasonably capable of belief; and

4. 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.

Mr. Lowe presented a fax cover sheet from Lynne Egan, an Industrial Relations Officer at the Employment Standards Branch, dated August 8, 2001, as his new evidence. The message on that cover sheet is as follows:

> Here is our fact sheet on flexible work schedules. Please note all the conditions which must be met for a flexible work schedule to be permitted.

This is not new evidence. It was available at the time the delegate was investigating the complaint, and could have been provided at that time. However, even if the evidence was new, it does not support Mr. Lowe's argument.

The fax does not, as Mr. Lowe asserts, constitute either notification to the Director of a flexible work schedule, or an approval of one. Rather, it related to information provided by the Director to Pro Gas about flexible work schedules. Even if it was provided to the delegate at first instance, I am not persuaded that it would have led him to a different conclusion on the issue of whether the parties had a flexible work schedule that complied with the Act.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated November 7, 2003, be confirmed, together with whatever interest may have accrued since that date.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal