Employment Standards TRIBUNAL

An appeal

- by -

Takhar Electric Ltd.
("Takhar")

- 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 (as amended)

TRIBUNAL MEMBER: John Savage

FILE No.: 2008A/29

DATE OF DECISION: May 8, 2008

DECISION

INTRODUCTION

1. Takhar Electric Ltd. ("Takhar") appeals a determination of the Director dated December 21, 2007 (the "Determination") in which the Delegate found that Takhar owed wages in the amount of $16,858.71 to Gursharan Singh Bamrah ("Bamrah") and Tejinder Singh Thind ("Thind").

2. The Delegate also found that sections 17, 18, 27, 28, 29, 40 and 46 of the *Employment Standards Act* (the "Act") had been contravened and imposed administrative penalties in the aggregate amount of $3,000.00.

3. Takhar's appeal is late. Takhar seeks to extent the time period for requesting an appeal pursuant to Rule 8(4) of the Tribunal's *Rules of Practice and Procedure* and section 109(1)(b) of the Act.

4. Takhar and the Director made written submissions on the issue of extending the time for the appeal. The Tribunal ruled it would determine the application on the basis of the written submissions received.

5. With regard to the merits of the appeal, Takhar says that the Tribunal should not have preferred the evidence of the complainants Bamrah and Thind over that of its own witnesses. It says that it has new evidence to produce and believes the evidence of Bamrah and Thind, which was preferred by the Delegate, would not stand up to appropriate cross-examination.

ISSUE

6. Should the Tribunal extend the time period for requesting the appeal in the circumstances of this case?

LEGISLATION

7. Appeals under the Act are governed by section 112 of the Act which provides as follows:

> 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 being made.

8. Section 112 also provides for time limits for appeals, however section 109(1)(b) of the Act allows the Tribunal to extend the time for appeal:

> 109. (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:
>
> (a) [Repealed 2002, c. 42, s. 58(a)]
>
> (b) extend the time period for requesting an appeal even though the period has expired;

9. This is also reflected in the Tribunals *Rules of Practice and Procedure*.

APPEALS UNDER THE ACT

10. An appeal under the Act is a statutory appeal. It is well-established that a right of appeal must be expressly conferred: *Re Engineering Profession Act* (1963), 42 W.W.R. 598 (B.C.C.A.), and can never be implied: *Re Glassman v. Council of the College of Physicians and Surgeons*, [1966] 2 O.R. 81 at 90 (Ont. C.A.).

11. The Act therefore constitutes a code respecting such appeals: *A.-G. v. Sillem* (1864), 10 H.L.Cas. 704, 11 E.R. 1100; *Re Glassman and Council of College of Physicians & Surgeons*, [1966] 2 O.R. 81, 55 D.L.R. (2d) 674 (C.A.).

12. When an appeal is based on an error of law (section 112(1)(a)) it is not open to an appellant to appeal findings of fact or mixed findings of fact and law.

13. In a number of decisions of the Employment Standards Tribunal, panels have adopted the definition of "error of law" enunciated by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.).

14. The *Gemex* case describes an error of law as occurring where the adjudicator:

1. misinterprets or misapplies a section of a statute;
2. misinterprets or misapplies an applicable principle of general law;
3. acts without any evidence;
4. acts on a view of the facts which could not reasonably be entertained; or
5. adopts a methodology that is wrong in principle.

15. Errors of law are to be contrasted with findings of fact and findings of mixed fact and law. An error or law typically arises where a statutory provision is misinterpreted, or there is an error in legal principle. Mixed findings of fact and law, such as whether a thing falls within the definition of its term, are not reviewable.

16. The weight of evidence, on the other hand, is a matter for the Delegate and is a question of fact, not law: *Ahmed v. Assessor of Vancouver* (1992) BCSC 325; *Provincial Assessors of Comox, Cowichan and Nanaimo v. Crown Zellerbach Canada Ltd.* (1963) 42 WWR 449 at page 471.

17. It is only where a conclusion reached is one that could not reasonably be entertained that an error of law is shown: *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.).

18. In considering an issue on appeal it is not necessary that the Tribunal necessarily agree with the conclusion of the Delegate.

19. It is only if no reasonable person, acting judicially and properly instructed as to the law, could have come to the determination that a successful appeal lies on the basis that there has been an error of law: *Delsom*

Estates Ltd. v. Assessor of Area 11 – Richmond / Delta (2000), SC 431 (B.C.S.C.), approved in *Britco Structures Ltd.*, BC EST #D260/03.

RULES FOR EXTENDING TIME FOR APPEALS

20. In considering whether an extension of time should be granted this Tribunal looks at a number of different factors:

> (a) whether there is a reasonable and credible explanation for the failure to appeal on a timely basis,
>
> (b) whether there is a genuine ongoing *bona fide* intention to appeal the determination,
>
> (c) whether the Respondent and the Director have been made aware of the intention to appeal,
>
> (d) whether the Respondent will be unduly prejudiced by the extension, and
>
> (e) whether there is a strong *prima facie* case
>
> see: *Niemesto* (EST D# 099/96), *Round Table Enterprises* (EST D# 052/05), *MAC's Convenience Store* (EST D# 066/05).

21. In the context of applications for an extension of the time for appealing it is also important to consider the purposes of the Act:

> 2. The purposes of this Act are as follows:
>
> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
>
> (b) to promote the fair treatment of employees and employers;
>
> (c) to encourage open communication between employers and employees;
>
> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
>
> (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
>
> (f) to contribute in assisting employees to meet work and family responsibilities.
>
> 1995, c. 38, s. 2.

SHOULD AN EXTENSION BE GRANTED IN THIS CASE?

Discussion

22. The Determination that the applicant seeks to appeal concerns some of the central provisions of the Act, namely, the enforcement of basic standards of compensation, fair treatment, and the efficient resolution of disputes.

23. In this case it is acknowledged that the applicant intended to appeal. There is no evidence that the affected employees, Bamrah and Thind, were made aware of the intention to appeal. While part of the explanation for the delay in appealing concerns the principal of Takhar being absent from the jurisdiction,

I accept the Directors submission that this does not explain the further delay after the company became aware of the Determination.

24. In any event, in my opinion, the most important factor in this case concerns the case that Takhar proposes to advance. Under the criterion enumerated in *Niemesto* (BCEST #D099/96), *Round Table Enterprises* (BCEST #D052/05), *MAC's Convenience Store* (BCEST #D066/05) and many other cases, the Tribunal requires that there be a strong prima facie case.

25. The major issue in the case was the hours worked. On this there was a conflict in evidence. The evidence of the Bamrah and Thind was preferred over that produced by Takhar.

26. In argument Takhar takes issue with the Delegates application of what has been called the "best evidence rule". In the Determination the Delegate noted the conflicting evidence and preferred the evidence of the Bamrah and Thind of that from Takhar. In addition to the oral evidence of all the witnesses the Delegate had before him records from both parties.

27. With respect to the records produced by Takhar the Delegate noted that original records were not originally produced, and these records were not as informative as they only showed the total hours worked.

28. When the original records were produced later in the hearing the Delegate noted that they "appear to be written with the same pen" and "appear to have been written at one sitting" and are close copies of the secondary records. The record before the Tribunal contains the employer records which I observe are consistent with the findings of the Delegate.

29. On the other hand, the records produced by Bamrah and Thind "have a start and finish time each day, are written in various coloured pens or pencil and do not appear to have been written at the same time or in one sitting". The record before the Tribunal contains the employee records which are consistent with the observations of the Delegate.

30. Takhar argues that the fact that the records produced by Bamrah and Thind have start and end times does not mean they worked for those periods, however, the evidence before the Delegate was that the Employer told Thind to keep a record of the hours worked by everyone and he would write down the date, location and the work done and give it to the employer. Bamrah's evidence was that he kept a record of the hours he worked each day in a book.

31. In my opinion the evidence before the Delegate entitled him to make the findings that he made, bearing in mind the oft-quoted dicta of the Court of Appeal in *Farnya v. Chonrny*, [1952] 2 D.L.R. 354 at page 357: "…the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances".

32. The Delegate noted that, with regard to contraventions under section 17, it was uncontradicted that Bamrah and Thind were not paid semi-monthly as required by the Act. In its submission Takhar does not assert that they employees were paid semi-monthly.

33. The Delegate found that Bamrah and Thind were not paid vacation pay on termination as required by section 18 of the Act. In its submission Takhar asserts that this is in error but points to no evidence that

suggests the employees were paid vacation pay on termination. There is no record in the material before me that shows they were paid vacation pay on termination.

34. The records and evidence of the complainants show that the complainants were not paid overtime as required by section 40 of the Act. The Act requires payment of 1.5 times their regular pay when they worked more that 8 hours in a day or 2 times their regular rate of pay when they worked over 12 hours in a day or over 40 hours in a week.

35. The complainants worked statutory holidays but the records do not show that they were paid as required by section 46 of the Act for working those holidays.

36. Regarding breaches of section 27 and 28 of the Act, the evidence was uncontradicted that (1) they were not given wage statements with their cheques as required and (2) the records that Takhar produced do not itemize the required detail required by the Act.

Conclusion on Prima Facie Case

37. The gravamen of Takhar's case is its intention to question the credibility of the evidence of the complainants. The Delegate accepted their evidence which is consistent with the records they kept. He preferred their evidence to that of Takhar's witnesses. The Delegate, as a finder of fact, was entitled on the evidence to make those findings.

38. Takhar requests "an oral hearing to be able to make an appropriate finding and to weight the evidence". Takhar says "The employee's documents provide at the hearing were manufactured documents and would not stand up to the scrutiny of cross-examination by a competent litigant".

39. In my respectful view the submissions of Takhar misconstrue the nature of an appeal to this Tribunal under the Act.

40. The Tribunal does not hear appeals de novo. It is an appellant tribunal, and appeals to it must be made out based on the specific grounds set out in section 112. Its duty is not to re-weigh or second guess the Delegate respecting findings of fact, such as matters of credibility, or the weight to be given certain evidence.

41. In my view Takhar has failed to show there is any merit in this aspect of their proposed appeal. There is no strong prima facie case made out based on the existing record. Takhar, however, proposes to introduce new evidence.

New Evidence

42. Takhar attached to its submission documents that it asserts are new evidence consistent with the submissions Takhar made at the hearing before the Delegate. A review of this material and the record filed by the Delegate shows that some of it was already before the Delegate. For example, calculations made by the employer regarding payments made, time sheets, and cancelled cheques.

43. None of this material, however, qualifies as new evidence that opens a ground of appeal under the Act. For new evidence to be adduced on appeal it must be that such "evidence has become available that was not available at the time the determination was being made".

44. This possible ground of appeal is not intended to allow a dissatisfied litigant to seek out more evidence to supplement that already provided: *Re Merilus Technologies Inc.*, BCEST #D171/03. Such evidence must not have been *available*, so information that was simply overlooked through poor record keeping, or which the applicant chose not to advance at the hearing, does not qualify: *Re Triple S Transmission Inc.* BCEST #D141/03.

45. The appeal process is not one that allows the re-examination of the complaint. The 'new' evidence here should and could have been presented at the original hearing of the complaint: *Re EMB Transport*, BC EST #D419/00, *Re Jagir Enterprises Ltd.*, BC EST #D191/05.

Conclusion

46. In my opinion the applicant has not made out that they have a strong prima facie. The basis of the proposed appeal is that the applicant be given an opportunity to introduce additional evidence and have another opportunity to cross-examine the complainants who were successful before the Delegate. This misconstrues the nature of appeals under the Act which are based on the record and findings of the Delegate below.

47. In the circumstances, the requirements set out by the Tribunal in *Niemesto* (BCEST #D099/96), *Round Table Enterprises* (BCEST #D052/05), *MAC's Convenience Store* (BCEST #D066/05) and other cases are not met. The application for an extension of time would serve no purpose as the appeal is bound to fail. The application is refused.

ORDER

48. The application to extend the time for requesting an appeal is refused.

John Savage
Member
Employment Standards Tribunal