Employment Standards TRIBUNAL

An appeal

- by -

Satnam Education Society of British Columbia
(the "Employer")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2011A/32

DATE OF DECISION: June 10, 2011

DECISION

SUBMISSIONS

Jaspreet S. Malik	counsel for Satnam Education Society of British Columbia
Baldeep Singh Hehar	on his own behalf
Joy Archer	on behalf of the Director of Employment Standards

INTRODUCTION

1. Satnam Education Society of British Columbia (the "Employer") appeals, pursuant to subsections 112(1)(a), (b) and (c) of the *Employment Standards Act* (the "*Act*"), a Determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on February 8, 2011. By way of the Determination, the Employer was ordered to pay its former employee, Baldeep Singh Hehar ("Hehar"), $6,793.50 on account of unpaid wages (including concomitant vacation pay and section 88 interest). Further, and also by way of the Determination, the delegate levied a $500 penalty against the Employer (see *Act*, section 98) based on its contravention of section 17 (failure to pay wages) of the *Act*. Thus, the total amount payable under the Determination is $7,293.50.

2. On February 8, 2011, the Employer applied to have the Determination suspended pursuant to section 113 of the *Act* and also provided a cheque in the amount of $6,330.25 which I understand to be the wage award net of statutory deductions. On March 22, 2011, Tribunal Registrar Gordon issued a suspension order. Accordingly, the Determination is now suspended "until the Tribunal [has] decided the merits of the appeal of the Determination" (Tribunal File Number 2011A/33).

3. Counsel for the Employer has also applied for "an oral hearing to present arguments and to respond to the arguments of [Mr. Hehar]" (March 17, 2011 submission, para. 54). Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing (see *Act*, section 103 and *Administrative Tribunals Act*, section 36) and rarely does so. In the instant case, there are no seriously contested facts that would require an assessment of witnesses' credibility and the evidentiary record is complete with respect to the "error of law" and "natural justice" grounds. Accordingly, I am refusing the Employer's application for an oral appeal hearing and will adjudicate this appeal based on the parties' written submissions. In that regard, I have submissions from the Employer's legal counsel (dated March 17 and May 5, 2011), Mr. Hehar (received April 11, April 12 and May 5, 2011) and the delegate (dated April 12 and May 3, 2011). In adjudicating this appeal, I have also reviewed the delegate's "Reasons for the Determination" and the section 112(5) record.

4. In each of his three submissions, Mr. Hehar indicated that he wished to expand his claim by including certain additional hours that, he now says, he neglected to include in his original complaint. Further, he also seemingly wishes to advance a separate claim with respect to an alleged unlawful wage deduction (a monthly donation to the school). The donation is reflected in a "Voluntary Assignment of Wages" form that is directed to the Employer and dated and signed by Mr. Hehar. Although he did not use this term, I assume that his current position is that this donation was executed under some form of duress. On its face, it appears to be a lawful assignment under section 22 of the *Act*. The delegate notes that Mr. Hehar never advanced the claim for additional hours (beyond those identified in his original complaint), or raised the matter of the wage assignment, at the complaint hearing or, indeed, at any point in time prior to the filing of

the Employer's appeal. These matters appear to have been raised for the very first time in Mr. Hehar's submissions filed in response to the Employer's appeal. That being the case, these matters are not properly before the Tribunal and I will not address them any further in my reasons for decision.

BACKGROUND FACTS

5. The Employer operates the "Khalsa School Surrey" and Mr. Hehar was most recently employed as the Vice-Principal of the Primary School. Mr. Hehar originally began working for the Employer in September 1994 as a classroom teacher and was appointed vice-principal of the Primary School in 2007. Throughout his employment, Mr. Hehar held a valid B.C. teacher's certificate. The Primary school operated on a "double-shift" – that is, one cohort of students attended from 8 AM to 1:30 PM and a second cohort attended from Noon to 5:30 PM each day. Mr. Hehar resigned his position on August 19, 2008, effective September 1, 2008. Mr. Hehar was on medical leave during August 2008. His monthly salary of $4,860 was increased to $5,773 per month effective July 1, 2008. During the last two years of his tenure with the Employer, Mr. Hehar's employment was governed by separate 12-month contracts executed on June 26, 2007, and June 24, 2008, respectively.

6. On February 13, 2009, Mr. Hehar filed a complaint pursuant to section 74 of the *Act* in which he sought "overtime" pay from September 2004 to June 2008 in the total amount of $47,861.60 and $80,000 representing a "bus driver's salary" that allegedly had not been paid for 8 years. I should note, however, that section 80(1)(a) limit's a complainant's unpaid wage claim to the wages that became payable "6 months before the earlier of the date of the complaint or the termination of the employment" plus section 88 interest.

7. The delegate conducted a complaint hearing on October 23, 2009, and, as noted above, issued her Determination and accompanying reasons on February 10, 2011 – over fifteen months after the complaint hearing concluded. There is nothing in the material before me explaining why there was such a considerable delay in issuing the Determination following the hearing.

8. The delegate determined that Mr. Hehar was not entitled to *statutory* overtime since he was excluded from the provisions of Part 4 of the *Act* (the hours of work and overtime provisions) by section 34(c) of the *Employment Standards Regulation* (delegate's reasons, page R7). However, the delegate also determined that Mr. Hehar had a *contractual* entitlement to be paid for all hours worked beyond a 40-hour work-week during the last 6 months of his employment since his monthly salary was based on a 40-hour work-week (delegate's reasons, page R10). Thus, the delegate awarded Mr. Hehar a total of 226 "extra hours worked" based on his "regular wage" of $27 per hour ($6,102) plus 6% vacation pay ($366.12) and section 88 interest ($325.38).

THE EMPLOYER'S GROUNDS OF APPEAL

9. The Employer's appeal is based on all three statutory grounds, namely: that the delegate erred in law (section 112(1)(a)), the delegate failed to observe the principles of natural justice in making the Determination (section 112(1)(b)) and on the ground that the Employer now has evidence that was not available when the Determination was being made (section 112(1)(c)). I will summarize the Employer's arguments under each ground, below.

The Delegate Erred in Law

10. In essence, counsel for the Employer submits that the delegate erred in determining that Mr. Hehar's salary was based on a 40-hour work-week and, therefore, the award for "extra pay" cannot stand. The Employer does not contest Mr. Hehar's assertion that he typically worked more than 40 hours per week; indeed, the Employer's position is that Mr. Hehar was required, by nature of his position and by the terms of his employment contract, to regularly work something closer to a 50-hour work-week. However, counsel for the Employer says that the delegate inappropriately relied on an admitted "error" recorded on Mr. Hehar's wage statements regarding the number of hours worked in each pay period as evidence corroborating Mr. Hehar's testimony about the terms of his employment agreement. Further, the employer called three witnesses (and also submitted affidavits from three other individuals) who all testified about the standard "wage-effort bargain" for school administrators and the delegate never adequately explained in her reasons why she rejected these witnesses' apparently credible testimony in favour of Mr. Hehar's evidence as seemingly corroborated by the wage statements.

11. As noted above, the delegate did not award Mr. Hehar any overtime under section 40 of the *Act* since he was a teacher and thus wholly excluded from Part 4 of the *Act* by reason of section 34(c) of the *Employment Standards Regulation*. However, the delegate concluded that Mr. Hehar had a *contractual* right to be paid for hours worked in excess of 40 per week since his salary was based on a 40-hour work-week and, accordingly, hours worked in excess of 40 hours must be paid at his "regular wage" rate calculated in accordance with section 1 of the *Act*.

12. The delegate's reasons indicate that Mr. Hehar testified it was "his understanding…that he was to work 8 hours per day, 5 days per week for a total of 40 hours per week" and that "he was never told that he was required to work extra hours" (delegate's reasons, page R7). Mr. Hehar also testified that he raised the matter of his extra pay on several occasions but each time was rebuffed. As noted above, the delegate accepted Mr. Hehar's wage statements (dating from 2007) as corroborating his assertion that his salary was paid in exchange for a 40-hour work-week. The delegate determined "that the wage statements showing that Mr. Hehar worked 40 hours per week are in fact an indication of the agreement between [the Employer] and Mr. Hehar as to the expected hours of work". The delegate then concluded: "Being by all parties' agreement Mr. Hehar worked much more than 40 hours per week, I find that Mr. Hehar worked extra hours and is therefore entitled to extra pay for these hours worked." (delegate's reasons, page R10).

13. The Employer called several witnesses each of whom testified about their own experience regarding payment for "extra hours". I am recounting their evidence as set out in the delegate's reasons at pages R4 – R6. A former vice-principal (1995 – 2007; now retired) testified that he always understood his higher salary, relative to classroom teachers, included compensation for the "extra hours" (he typically worked a 9- or 9.5-hour day) that he would often have to work. Perhaps more importantly, this person says that Mr. Hehar was advised during his initial interview regarding the vice-principal position that "if he was the successful candidate, he would be expected [to work extra hours]" including weekend work and board meetings (delegate's reasons, page R4-R5). Another individual, a former vice-principal and currently a school principal (whose surname was apparently misspelled in the delegate's reasons), testified that he regularly worked in excess of an 8-hour day and that when Mr. Hehar was first hired as a vice-principal, he was told that he was expected to work extra hours compared to regular classroom teachers and that the administrators' comparably higher salaries reflected that additional workload. He also testified that Mr. Hehar never complained to him about having to work extra hours. The Employer's third witness, a retired principal and current school trustee, testified that he regularly worked more than 8 hours per day since that was a requisite component of the job. He also testified that Mr. Hehar never raised the question of payment for "extra hours" with him directly at any "Academic Committee" meetings.

14. Counsel for the Employer says that the delegate erred in law when she held that the wage statements corroborated Mr. Hehar's position that his salary reflected a 40-hour work-week. Counsel also says that the delegate misstated essential elements of the Employers' witnesses' testimony, and wholly ignored their evidence in other critical respects, in the summary of their evidence set out in her reasons. Thus, counsel asserts that the delegate's decision cannot stand.

The Delegate Failed to Observe the Principles of Natural Justice

15. The delegate, in the course of her reasons concerning the "wage-effort bargain" issue, discussed section 27 of the *Act*. This provision – reproduced at page R9 of the delegate's reasons – states, among other things, that employers must give their employees written wage statements each payday that include "the hours worked by the employee" and the "employee's wage rate whether paid hourly [or] on a salary basis". The wage statements provided to Mr. Hehar for the last 6 months of his employment included a number under a column headed "Qty" (which I understand to mean the "quantity", in hours, worked during the pay period). The delegate found that this information contained in the wage statements corroborated Mr. Hehar's position that his salary was based on an 8 hour per day, 5 day per week, work schedule.

16. Counsel for the Employer says that this finding not only constitutes an error in law but that in making this finding the delegate breached the principles of natural justice (Employer's March 17 submission, paras. 27 – 29):

> The rules of natural justice require each party to be aware of the case they have to meet…
>
> In the present case, no mention was made of section 27 of the Act at the hearing and no issue was raised as to the failure of the Employer to comply with section 27(1)(b) which requires each wage statement to record "the hours worked by the employee".
>
> Again no mention was made at the hearing of any type of presumption in favour of the wage statements being reflective of any actual agreement between the parties. Had such mention been made the Employer would have led evidence before the delegate as to the origin of the error in the wage statements. This evidence is now before this tribunal in the form of fresh evidence is discussed below. [sic]

17. Counsel for the Employer also says that the delegate breached the principles of natural justice "by ignoring the explicit evidence of the Employer's witnesses that [Mr. Hehar] was hired to work all of the hours he did and in ignoring the uncontradicted and unchallenged evidence that [Mr. Hehar] was hired to work all of the hours he did" (March 17 submission, para. 30). Counsel's argument on this point continues (at paras. 37 – 38):

> When evidence is unchallenged or uncontradicted it must be relied upon unless the evidence is, on its own, unbelievable or unreliable. In the present case, there is no indication that any of the evidence of the Employer's witnesses was anything but straightforward and both credible and reliable.
>
> At a minimum, the delegate has erred in failing to explain why the unchallenged and uncontradicted evidence of the Employer was discarded in favour of a presumption in favour of the wage statements.

18. One fundamental component of the rules of natural justice is that decision-makers must provide "reasoned decisions". Counsel for the Employer says that the delegate's reasons do not adequately explain why the delegate rejected the Employer's position (that the salary was given in exchange for all hours worked) in favour of Mr. Hehar's position (that the salary was based on a 40-hour work-week and that he would be compensated for any "extra hours" worked).

Evidence Not Available When the Determination Was Being Made

19. Section 112(1)(c) states a determination may be appealed on the ground that "evidence has become available that was not available at the time the determination was being made". The "new evidence" that the Employer wishes to place before the Tribunal is in the form of an affidavit from Mr. Jatinderpaul Singh Dhalla, the Employer's former accountant, affirmed on March 15, 2011. The key assertions contained in Mr. Dhalla's affidavit are set out, below:

- Prior to December 2007, Mr. Hehar's wage statements did not include any reference to hours worked in the pay period since the accounting software in use at that time did not require hours to be recorded (paras. 3 – 4);
- Effective January 1, 2008, the Employer switched to a new software system that required working hours to be recorded in the wage statements. Mr. Dhalla arranged for a "default" of 8 hours per day to be recorded in the system for all school administrators (including Mr. Hehar) (para. 7) although he now realizes that this was an error on his part (para. 12).
- In October 2009, Mr. Dhalla first learned that recording the administrators' hours at a "default" number of 8 per day was not appropriate and, accordingly, since that time all administrators' hours are recorded at 50 per week (para. 9).
- "At the times I was the accountant I did not make any deduction to the hours worked, if an administrator was sick or otherwise missed a work day. The only adjustment was the annual adjustment for unused sick days which was paid out on June 30 of each year. I understand this practice has continued". (para. 10).
- Mr. Dhalla appended sample wage statements to his affidavit confirming the above assertions (Exhibits A through F).

20. Counsel for the Employer concedes that this evidence "was in the Employer's possession at the time of the hearing" (Employer's March 17, 2011, submission, para. 52) but says that it is nonetheless admissible because the possible impact of section 27 on the outcome of the proceedings was never raised during the complaint hearing and, if it had been raised, "the Employer could have sought an adjournment to produce the evidence of [Mr. Dhalla] and dispel the notion that the wage statements were correct" (para. 53).

FINDINGS AND ANALYSIS

21. In my view, the threshold issue in this appeal is whether the delegate correctly interpreted the parties' employment contract. In this regard, this appeal raises issues that are quite similar to those addressed in *Babine Forest Products Ltd.*, BC EST # D016/11 (reconsideration refused: see BC EST # RD045/11). Accordingly, I propose to first address this issue, namely, whether the delegate erred in law in finding that that Mr. Hehar was entitled to be paid for "extra hours" worked beyond 40 in a week.

Did the delegate err in determining that Mr. Hehar was entitled to payment for "extra hours" worked?

22. As previously noted, Mr. Hehar's overtime pay award was not grounded on the *Act* overtime provision (section 40) but, rather, on the terms of the parties' employment contract. The delegate determined that Mr. Hehar was a "teacher" and thus excluded from the *Act's* hours of work and overtime provisions (Part 4) by reason of section 34(c) of the *Employment Standards Regulation* (delegate's reasons, page R7). Mr. Hehar did

not appeal this finding. Thus, this appeal turns, in large measure, on whether the delegate correctly interpreted the parties' employment contract.

23. Mr. Hehar's employment was governed by two separate written employment agreements (both described as "Administrators' Contract") during the period in question: i) an agreement executed on June 26, 2007, covering the period July 1, 2007, to June 30, 2008; and ii) a second agreement executed on June 24, 2008, covering the period from July 1, 2008, to June 30, 2009. Unfortunately, the first agreement is incomplete as it is obviously missing several pages, however, my review of the section 112(5) record, as well as the "Exhibits Filed at Hearing" brief prepared by the Employer's legal counsel, all lead me to conclude that an incomplete copy of the first agreement was tendered and marked as Exhibit "F" at the complaint hearing.

24. The first contract, incomplete as it is, seemingly does not contain any provision relating to required working hours. However, based on the payroll records contained in the section 112(5) record, it appears that the agreed monthly salary set out in this contract was $4,860 per month (paid semi-monthly). For reasons that are not immediately clear to me (perhaps it was a simple transposition error), the delegate calculated Mr. Hehar's unpaid wage claim based on a lower $4,680 monthly salary.

25. The second agreement contains the following provision regarding "Salary":

> 7. SALARY
> Your monthly salary during your appointment from July 1, 2008 to June 30/09 will be $5773[xx] based on attached formula & if yes to overtime.
>
> This quoted salary will be subject to adjustment retroactive to the date of your appointment. The salary shall be paid bi-monthly less any amount to be deducted pursuant to the Deductions Clause. [This latter clause refers to federal and provincial taxes, EI, CPP etc. and these deductions are more fully particularized in para. 8 of the document]

26. The reference in the second agreement to "yes to overtime" stems from an April 4, 2008, letter from the school principal to Mr. Hehar advising of his re-appointment. The relevant portions of that letter, insofar as the present dispute is concerned, are set out below:

> As a show of appreciation your gross salary will be increased to $5773.00 per month from the current amount of $4860.00. This is an increase of 18.8%. This takes effect from July 1, 2008 and you will continue to be on a yearly contract. All the terms and conditions from your contract signed on June 26, 2007 will still be in effect.
>
> This salary includes an additional remuneration of $400.00 for being independent in-charge [*sic*] of the new facility as well as $400 per month due to extended hours. Your hours of work will be from 7.45am to 6pm. [*sic*] You are in a management position so we will be depending on you for the overall dealings with this campus.
>
> A head teacher will also be appointed to help you in the discharge of your administrative duties. In case, you prefer to finish your day at 4.30pm and designate the head teacher to work for extended hours, the additional remuneration will be given to the head teacher at the rate of $300.00 per month and your salary will be reduced by $400.00 per month.

27. The payroll records before me indicate that Mr. Hehar received a monthly salary of $4,860 ($2,430 paid semi-monthly) for the period July 1, 2007, to June 30, 2008. The payroll records for this latter period do not include any indication of the hours worked in each pay period (the column headed "Hours" on the statement is left blank) up until December 31, 2007. Mr. Hehar's wage statements for the period January 1 to June 30, 2008, in a section identified as "Earnings and Hours", typically (but not exclusively) record "88:00"

under "Qty" which I take to mean 88 hours worked in the pay period. One exception is the statement for the pay period ending June 30, 2008 (i.e., the last pay period in the July 1, 2007, to June 30, 2008, contract) that shows an additional "Qty" of "11:00" for "Sick pay Hourly Rate" (a category that did not appear on any of the prior wage statements). The first pay period under the second contract (spanning the period July 1, 2008, to June 30, 2009) is that ending July 15, 2008, and this statement shows a semi-monthly rate of $2,886.50 (*i.e.*, $5,773 per month) and "88:00" under the "Qty" column. The statement for the July 16 to 31, 2008, pay period shows a semi-monthly salary of $2,886.50 but the number under the "Qty" column is "96:00".

28. It should be noted that Mr. Hehar was away from work on medical leave during the month of August 2008 and thus did not work at all during that month. Mr. Hehar resigned his position by letter dated August 19, 2008, "with effect from September 1, 2008". This resignation was accepted "with regret" by way of a letter dated August 25, 2008, signed by the school's principal. Mr. Hehar's wage statement for the pay period ending August 15, 2008, shows a "Qty" of "88.00". The final wage statement for period August 16 to 31, 2008, is not included in the copy of the section 112(5) record before me.

29. The delegate awarded Mr. Hehar a total of 226 hours at an hourly rate of $27 (plus 6% vacation pay) for "extra work" undertaken during the period from February 28 to August 31, 2008. As I have already noted, in calculating Mr. Hehar's unpaid wage claim, I question why the delegate utilized a monthly salary for the period ending June 30, 2008, of $4,680 rather than $4,860. Further, since the calculated "extra pay" claim spanned the period to August 31, 2008, I am also puzzled why the $4,680 monthly salary was utilized for any "extra" hours worked in July 2008 (recall Mr. Hehar did not work *any* hours in August 2008 since he was on medical leave) in light of the clear fact that his monthly salary was increased to $5,373 effective July 1, 2008, as confirmed by both the second employment contract and Mr. Hehar's July and August 2008 wage statements.

30. At page R8 of her reasons, the delegate made the following observation:

> In this case, the previous employment contracts are silent as too [*sic*] expected hours of work. When employment contracts are silent as to the amount of hours an employee exempt from the overtime provisions of the Act is required to work, the assumption then becomes that the salary amounts therein refer to and cover all hours required to do the job. As a result, I find that the previous employment contracts on their own would have shown that Mr. Hehar's salary was meant to cover all hours required to do the job as there was no specific proof in the contracts that there was an agreement between [the Employer] and Mr. Hehar to the contrary.

31. Certainly, and especially in light of the parol evidence rule, unambiguous written employment agreements constitute the best evidence regarding the parties' agreement about the terms and conditions of employment. However, the parol evidence rule is subject to several exceptions (see *e.g.*, *Sloan v. British Columbia (Hazardous Waste Management Corp.)*, 1997 CanLII 4047 (B.C.C.A.); *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 SCR 678) and extrinsic evidence must be taken into account if a written agreement is obviously incomplete. In this instance, the delegate accepted extrinsic evidence in the form of Mr. Hehar's wage statements but seemingly wholly rejected (without giving any reasons) the extrinsic evidence submitted by the Employer in the form of *viva voce* testimony from three witnesses and three other individuals' affidavits.

32. The delegate relied on the wage statements as corroboration for Mr. Hehar's position that his salary was paid in exchange for a 40-hour work-week. The delegate, at pages R9-R10 of her reasons, after noting that the employment contracts did not specify any particular agreement regarding the number of working hours that were expected to be worked in exchange for the specified salary, made the following findings:

> That said, I must also consider the wage statements that Mr. Hehar received dating back to 2007, showing that the amount of hours that he was being paid for were 40 hours per week, 8 hours per day, 5 days per week – [the Employer] confirms this. This evidence supports an agreement between the parties in regards [*sic*] to expected hours of work for the agreed upon salary, 40 hours per week (88 hours semi monthly).
>
> [The Employer] argues that this was a "typo", and it is not a reflection or evidence of an agreement or expectation by [the Employer]. They again rely on the testimony of their witnesses as evidence to the expected amount of hours to be worked by Mr. Hehar. [*sic*]

33. The delegate then quoted section 27 of the *Act* [dealing with "wage statements"] and continued:

> The Act makes it an employer's responsibility to have the wage statements accurately reflect the hours the employee worked, and how the wages were calculated. [The Employer] did this, however they claim that everyone [*sic*] of Mr. Hehar's pay checks dating back to 2007 all had typos on them.
>
> Had this mistake happened on one or two occasions, I could have accepted this as a typo. However, this typo happens throughout Mr. Hehar's employment as a VP, a period of two years, making it very hard to explain it away as simply being a typo.
>
> Consequently, I find that the wage statements showing that Mr. Hehar worked 40 hours per week are in fact an indication of the agreement between [the Employer] and Mr. Hehar as to the expected hours of work. Being that by all parties' agreement Mr. Hehar worked much more than 40 hours per week, I find that Mr. Hehar worked extra hours and is therefore entitled to extra pay for these hours worked.
>
> Mr. Hehar claims that he worked 9.5 – 10 hours each day. [The Employer] stated that they found the hours that Mr. Hehar claimed to be credible. Consequently, I will use Mr. Hehar's record of hours for the calculation of wages owed.

34. As noted above, the delegate ultimately awarded Mr. Hehar 226 hours at $27 per hour (based on a $4,680 monthly salary) plus 6% vacation pay.

35. In my view, the Employer has quite legitimately questioned the delegate's reliance on section 27 of the *Act*. The delegate incorrectly stated that the wage statements showed "hours worked" dating back to 2007. This is simply not so. I have reviewed the wage statements from 2007 and none of them includes any reference to "hours". The 2008 wage statements vary somewhat. For example, the January 15 wage statement shows a "Qty" of "88:00" but the January 31 wage statement shows "96:00" (as does the July 31 wage statement). Thereafter, the wage statements generally show a "Qty" of "88:00" but occasionally show "80:00". There is nothing in the *Act* that deems a wage statement to be irrebuttable proof of its contents. Section 27 is not referred to in section 126 of the *Act* – this section contains several "deeming" provisions and other rebuttable presumptions. Indeed, in this case, Mr. Hehar's position is predicated on the *inaccuracy* of the wage statements – he says he worked more hours than were recorded in the statements and the Employer accepts that position. Clearly, the wage statements incorrectly recorded "the hours worked by the employee" (section 27(1)(b)). It would appear that the Employer could have been penalized under section 98 of the *Act* and section 29 of the *Employment Standards Regulation* for having issued incorrect wage statements, however, no such penalty was imposed.

36. The pivotal question in this appeal is whether the delegate was entitled to treat the wage statements as proof of the parties' "wage-effort bargain"; *i.e.*, that the statements corroborated Mr. Hehar's position that his salary was based on a 40-hour work-week and that, at least by implication, he was entitled to additional pay for all hours worked beyond 40 in a week. For my part, I do not see how information concerning hours worked in a pay period, contained in wage statements that are acknowledged by all parties to be inaccurate, can be reliably utilized to determine a factual question regarding the number of weekly hours that were agreed to be worked in exchange for a given salary.

37. As recounted above, the delegate heard testimony from three separate witnesses each of whom testified that Mr. Hehar was clearly informed that his salary was paid in exchange for an extended work-week and that all other school administrators were paid on the same basis. So far as I know, Mr. Hehar never filed an unpaid wage complaint during the entire time that he was employed and this could be taken as condonation of the Employer's position. He says that he raised the "extra wages" issue with his employer but the Employer resolutely refused to pay him anything on that account. Although I note the Employer's evidence was that Mr. Hehar never raised the issue, even if he did, the Employer's refusal to pay is entirely consistent with the Employer's view that Mr. Hehar had no contractual entitlement to extra pay. Further, to the extent that Mr. Hehar continued to work under the Employer's terms (*i.e.*, no extra pay), that amounts to an affirmation of the contract or an implied acceptance of the Employer's terms and conditions through acquiescence (see, *e.g.*, *Belton v. Liberty Insurance Co. of Canada*, 2004 CanLII 6668; *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327; *Chapman v. The Bank of Nova Scotia*, 2008 ONCA 769).

38. The delegate does not say why she rejected the evidence tendered by the Employer's witnesses; she certainly did not make a finding regarding the relative credibility of any of the witnesses who testified before her. Further, the Employer also tendered three affidavits from other school administrators who all indicated they understood that their salary was paid in exchange for an extended workday – this evidence is not addressed, in any fashion, in the delegate's reasons.

39. It bears repeating that Mr. Hehar's claim is not grounded in the overtime provisions of the *Act*. Rather, his claim is purely contractual. The general principle, correctly stated by the delegate, is that a person's salary is paid in full compensation for all work undertaken in order to fulfill the duties associated with the employee's position. Of course, if an employee has a statutory right to be paid overtime, the parties' contract must respect that statutory right and, to the extent that the contract does not, the offending contractual provision is void and the statutory provision applies (see *Act*, section 4). In this case, there is no conflict between the statute (the *Act*) and the contract since Mr. Hehar was excluded from Part 4 of the *Act* by reason of section 34(c) of the *Employment Standards Regulation*. The uncontroverted evidence before the delegate was that *all* school administrators (all of whom were similarly excluded from Part 4 of the *Act*) were expected to work extended hours (compared to teachers) and that all – including Mr. Hehar – did so. Mr. Hehar frankly conceded in his testimony that he was expected to work extended hours, however, he also testified that he believed he had a contractual entitlement to payment for those extra hours. That being the case, Mr. Hehar's claim for additional compensation hinged on there being clear and unambiguous evidence that *his* contract (apparently standing alone relative to all other school administrators) was based on a 40-hour work-week and that the agreement between the parties was that he would be paid additional compensation for any "extra hours" worked.

40. The fact that he was *never* paid any additional pay during his entire tenure is some evidence against Mr. Hehar's position. The fact that no other administrator apparently ever received any extra pay for working more than 40 hours in a week is also some evidence tending to show that *all* school administrators' contracts were predicated on their working extended hours. Mr. Hehar cannot point to a single document that expressly corroborates the agreement that he asserts regarding "extra pay for extra hours" other than the wage statements – and, in my view, they show no such thing. As stated earlier, the wage statements were obviously incorrect as to the hours worked in each pay period and all parties acknowledge that fact. Mr. Hehar cannot point to even *one* wage statement where his hours were correctly recorded and where, in addition, the statement recorded additional payment for extra hours beyond 40 in a week. Such a statement would corroborate his position but, as previously stated, no such statement exists. As such, the wage statements have no probative value in terms of the "wage-effort bargain" issue.

41. In my view, the evidentiary record before the delegate, considered in totality, did not support her finding that the parties' employment contract included a provision that Mr. Hehar would be paid "extra wages" for all hours worked beyond 40 in a week. The evidence, at least on one view of it, suggests that Mr. Hehar was dissatisfied with his compensation arrangements and he may well have expressed some frustration in this regard to the Employer. However, a statement to the effect that one is *dissatisfie*d with a term of their employment contract is quite a different matter from pursuing a claim for *breach* of that contract. Apparently, the Employer ultimately was prepared to offer Mr. Hehar some dispensation in an effort to assuage him, at least to a degree. Thus, the agreement executed June 24, 2008, included a "rider" regarding an additional $400 payment for now being required to work a 10.25-hour day (7:45 AM to 6 PM). Mr. Hehar agreed to this "rider" and the wage statements show that he was paid the additional agreed sum in July 2008 and August 2008 (as matters transpired, his final four pay periods).

42. Tribunal Member Roberts held, in *Babine Forest Products Ltd.*, *supra*, at para. 25: "The interpretation of an employment contract is a question of general law and the Director must be correct in his interpretation (*Re Dingman* (BC EST # D002/10) and *Re Kosis* (BC EST # D331/98)." In my view, the delegate did not correctly interpret the parties' employment contract in the case at hand.

43. An error of law includes a misapplication of a statutory provision and in my view the delegate misinterpreted or otherwise misapplied the effect of section 27 of the *Act* in this case. An error of law can also be found in a decision that is predicated on an unreasonable assessment of the evidentiary record. In my view, and for the reasons stated above, I find that the delegate's reasons do not reflect a reasonable assessment of the evidentiary record. The delegate, in my judgment, also erred in rejecting the evidence of the Employer's witnesses regarding the terms of the parties' "wage-effort bargain" without providing any reasons for so doing (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12*), 1998 CanLII 6466 (B.C.C.A.)).

44. Having considered the totality of the evidence before the delegate, I am of the opinion that the only legally and factually justifiable decision open to the delegate was to dismiss Mr. Hehar's claim for "extra pay". I therefore conclude that she erred in law in finding in Mr. Hehar's favour. The vacation pay award was based solely on the "extra pay" award as was the $500 administrative penalty and, accordingly, both the vacation pay award and the administrative penalty must also be cancelled.

45. In light of my above conclusions, I do not find it necessary to deal with the "natural justice" or "new evidence" grounds.

ORDER

46. I order, pursuant to section 115(1)(a) of the *Act*, that the Determination be cancelled in its entirety.

47. I understand that the Director is currently holding $6,330.25 in his trust account representing the net wages payable to Mr. Hehar under the Determination. I order that these funds, together with any accrued interest, be released to the Employer after 30 days from the date of this decision unless, within that interim period, either Mr. Hehar or the Director applies for reconsideration under section 116 of the *Act* and Rule 22 of the Tribunal's *Rules of Practice and Procedure*. If a timely reconsideration application is filed, the funds shall continue to be held by the Director until further order of the Tribunal.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal