Employment Standards TRIBUNAL

An appeal

- by -

Geotivity Limited
("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

TRIBUNAL MEMBER: Alison H. Narod

FILE No.: 2005A/15

DATE OF DECISION: April 19, 2005

DECISION

This Decision relates to an appeal by Geotivity Limited (the "Employer") of a Determination dated January 6, 2005 (the "Determination"), issued by a Delegate of the Director of Employment Standards (the "Delegate"). In that Determination, the Delegate decided that the Employer contravened s. 40 of the *Employment Standards Act* by failing to pay its former employee, Anne Leistner (the "Employee"), overtime wages in accordance with the *Act*. A penalty of $500 was imposed on the Employer.

The Employer argues that the Delegate erred in determining that overtime wages were owed and in calculating the amount owed.

FACTS

There is no dispute that the Employee was hired on February 10, 2003, was promoted on October 6, 2003 and quit on May 14, 2004. At the time she was promoted, she was paid a salary based on $30,000.00 per annum and that amount was raised, on March 1, 2004, to $35,000.00 per annum. If she is entitled to overtime wages at all, she is only entitled to collect unpaid overtime wages for the last six months of her employment. Therefore, her claim for unpaid overtime spans the period of November 15, 2003 to May 14, 2004.

The Delegate conducted a hearing and issued the above-noted Determination. In the Determination, the Delegate stated that overtime is calculated hourly. Therefore, in order to determine the quantum of any amount owed for overtime, he would have to ascertain the Employee's regular hourly wage.

The Delegate referred to the definition of "regular wage" in the *Act* and the fact that the Employee was paid by way of annual salary. In those circumstances, the Delegate noted, he was required to review the normal or average weekly hours of work the Employee was required to work in order to determine the Employee's regular wage and whether or not she was entitled to unpaid wages for overtime worked.

The Delegate reproduced the statutory definition of the term "regular wage", as it relates to an employee paid an annual salary, which is as follows:

> "**Regular wage**" means
>
> (e) if an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work

The Delegate noted that the Employer and the Employee disagreed about how many hours the Employee worked over the relevant period of time. The Employer did not keep records of the hours the Employee worked. The Employer gave evidence that when the Employee was promoted, she understood and agreed to work 50 to 60 hours per week to perform her new job. The Employee did not dispute this statement. Additionally, she supplied the Delegate with her daily time records for the period of December 15, 2003 to May 14, 2004. The Employer disputed some of the hours claimed by the Employee. It pointed out certain days she was off work on vacation, but had claimed to have worked, and certain errors relating to a few other dates. The Delegate concluded the Employee did not provide any meaningful rebuttal to the Employer's specific objections and accepted the Employer's objections.

On the basis of the Employer's evidence, the Delegate accepted that the normal or average weekly hours the Employee was expected to work was 55 hours per week. The Delegate pro-rated the Employee's annual salary as follows to determine her regular wage:

"Nov 2003 $30,000 divided by 52 divided by 55 hrs = $10.49 per hour"

and:

"March 1, 2004 $35,000 divided by 52 divided by 55 hrs = $12.24 per hour"

As a result, the Delegate concluded that the Employee's hourly wage from November 2003 to the end of February 2004 was $10.49 per hour and from March 1, 2004 to May 14, 2004 was $12.24 per hour. The Delegate then calculated the Employee's entitlement to unpaid overtime wages using the Employee's daily time records for the period of December 15, 2003 to May 14, 2004, adjusted in accordance with the Employer's objections to those hours.

RELEVANT STATUTORY PROVISIONS

As noted above, the statutory definition of "regular wage" in s. 1 of the *Act* indicates that, where an employee is paid a yearly salary, that employee's regular wage is the yearly wage divided by 52 times the lesser of the employee's normal or average weekly hours of work.

Section 35 of the *Act* states that an employer must pay an employee overtime wages in accordance with s. 40 if the employer "requires, or directly or indirectly allows," the employee to work more than 8 hours a day or 40 hours a week.

Section 40(2) of the *Act* stipulates that an employer must pay an employee who works over 40 hours in a week (except one who is working under circumstances not relevant here) 1½ times the employee's "regular wage" for the time over 40 hours.

THE PARTIES' SUBMISSIONS

The Employer made detailed submissions in which it canvassed a number of issues. I have considered the Employer's submissions and have summarized the issues raised, below. I will canvass the Employer's arguments more extensively under the heading "Reasons".

The Employer disagrees with the Delegate's finding that the Employee's normal hourly salary for the purposes of calculating her entitlement to overtime wages was her annual salary divided by 52 weeks, further divided by 55 hours per week.

The Employer says that the Employee agreed to work 50 to 60 hours a week based on the salary paid and agreed that no overtime over and above the salary would be paid, on the understanding that the salary encompassed all overtime issues.

Moreover, the Employer says that the Employee could be required to work as many hours as her salary allowed as long as she was paid an amount that was not less than the statutory minimum hourly rate at

straight-time rates for the first 40 hours, plus the overtime rate applicable to hours in excess of 40 in a week, based on that minimum wage.

Further, the Employer says that the Employee was not entitled to be paid for overtime over the agreed hours, since it was not authorized or approved by the Employer in advance. The Employer cites the Tribunal's decision in *Small Town Press Ltd.*, BCEST No. RD016/04 in support.

In addition to the foregoing, the Employer contends the Delegate failed to take into account a cheque in the amount $845.99 which was sent to an Employment Standards Officer and was neither returned to the Employer nor addressed in the Determination. Further, the Employer says that although the Determination references the issue of expenses, it fails to note that the Employer agreed to pay the expenses and says it in fact did so. Finally, the Employer contends that no penalty should be issued.

In response, the Delegate says that the Employer is re-arguing the case and asserts that his reasons set out the issues, summarized the positions of the parties, and analyzed the relevant evidence and conclusions. The Delegate submits that the Employer relies on a different method of calculating overtime than is found in the *Employment Standards Act*. The Delegate says that he clearly made reference to the application of the *Act* as it relates to determining regular rate of pay and calculating overtime. Additionally, the Delegate, citing s. 4 of the *Act*, notes that although the Employer relies on an agreement between it and the Employee, such an agreement does not waive the requirements of the *Act.* In short, he submits that the Employee is entitled to wages as calculated in the Determination.

REASONS

I will address the Employer's arguments, below. The Employer's argument is premised on the assertion that the Employee agreed to work 50 to 60 hours a week for an annual salary that was all-inclusive of any claims for overtime.

With respect to the Employer's first point, that the Delegate erred in calculating the Employee's hourly rate, the Employer says, in effect, that the Employee's hourly rate should be determined by calculating the number of hours she was entitled to be paid, at straight time and overtime rates, and then dividing her weekly salary by that number of hours. For instance, it says:

> If we take an average of 55 hours per week less a 40 hour work week we have overtime hours of 15 hours per week. 15 overtime hours multiplied by time and a half gives us 22.5 regular hours. 40 regular hours plus 22.5 hours gives a total of 62.5 regular hours per week. If you take Ms. Leistner's annual salary of $30,000.00 and divide by 52 weeks and then divide by 62.5 hours you will get her hourly wage of $9.23. For any weeks that Ms. Leistner had more than 55 hours worked overtime hours should be calculated at $9.23 per hour and not $10.49 per hour as per the directors decision and the same calculation should be applied to her March 1st salary of $35,000.00 which would yield an hourly rate of $10.76 per hour and not $12.24 as calculated by the director.

The Employer appears to confuse the number of hours for which the Employee is entitled to be paid at straight and overtime rates (i.e. the number of hours she was to work each week) with the rate at which she is to be paid for those hours. Moreover, in order to be consistent with its theory that the Employee's salary was all-inclusive of any overtime claims, it effectively says that her hourly rate must be calculated "backwards".

The Employer does not dispute the Delegate's finding that the normal or average weekly hours of work the Employee was expected to perform was 55 hours per week. By the Employer's reckoning, the Employee's hourly wage would be divined by dividing her weekly salary by the total number of hours she would be entitled to be compensated for, at straight time and overtime rates, for the 55 hours a week she agreed to work, which it says was 62.5 hours (40 hours at straight time, plus 15 hours at time and a half, for a total of 62.5 hours a week), and not by dividing her weekly salary by the average 55 hours per week the Delegate found that she worked.

That result may have been acceptable had the parties actually agreed that her hourly rate would be calculated in that manner. However, the Employer's own evidence is that the Employee's hours of work would fluctuate between 50 and 60 hours a week. Therefore the evidence as to the parties' agreement is not sufficiently specific to yield the hourly rate the Employer now asserts. In the absence of evidence of a specific agreement between the parties to calculate the Employee's hourly wage on the basis of the formula proposed by the Employer, the Delegate was entitled to, and indeed ought to, have had regard to the statutory formula for determining an employee's hourly rate where he or she was paid an annual salary.

As noted above, the *Act* requires that overtime is to be calculated on the basis of an employee's "regular wage" and where an employee is paid a yearly wage, the employee's regular wage is to be calculated by dividing his or her yearly wage by the product of 52 times the lesser of the employee's normal or average weekly hours of work. The Employer's evidence was that the parties agreed that the Employee would work 50 to 60 hours a week. Given this evidence, the Delegate was entitled to conclude that the Employee's normal or average weekly hours of work were 55 hours per week and use that as the basis for calculating her hourly rate.

With respect to the Employer's second point, that the Employee could be required to work as many hours a week as her salary allowed, at straight time and overtime rates, based on the minimum wage applicable at the time, I note that the statutory language does not permit that result. As noted above, the statute requires that overtime be calculated on the basis of an employee's "regular wage" and not the "minimum wage". Accordingly, the minimum wage requirement is not a basis for a conclusion that an employer is in compliance with the overtime provisions as long as the total amount paid to the employee, at straight time and overtime rates, exceeds the amount that the employee would be paid if his or her wage rate was the minimum wage rate. Moreover, there is no basis in the *Act* for a conclusion that an employer who pays an employee an annual salary that exceeds the statutory minimum wage can require the employee to work as many hours per week as it wishes as long as the total hours paid to the employee is not less than what the employee would be entitled to, had he or she been paid straight time and overtime rates based on the minimum wage.

With respect to the Employer's third point, that it did not approve or authorize the Employee to work overtime in excess of the agreed hours in advance, I note that this is not the applicable test.

As noted above, the Employer relies on the Tribunal's decision in *Small Town Press Ltd.* The portions of the decision it quotes do not reflect the Tribunal's decision. In that case, a reconsideration panel found that an adjudicator erred and narrowed the governing statutory test by requiring the employer's "pre-approval" or "informed acquiescence" to overtime before an employer's obligation to pay overtime was crystalized.

The reconsideration panel stated:

> We find this approach to the overtime issue to be incorrect and that no previous decision of the Tribunal supports the approach taken by the adjudicator. Section 35 imposes a responsibility on the employer to control an employee's hours of work, if the employer wants to avoid liability to pay overtime. Regardless whether there is an overtime policy in a workplace, if an employer "directly or indirectly" allows an employee to work more than eight hours a day or forty hours a week, that employer is liable to pay overtime wages.

In the instant case, the Employer does not deny that the Employee worked the hours she claims, except with respect to the hours that were the subject of the Employer's specific objections. It was the Employer's responsibility to control the Employee's hours of work if it wished to avoid liability for overtime wages (*Small town Press Ltd.*). If the Employer did not wish her to work overtime, it not only had to order her not to work, but it was required to ensure she did not work any hours that it did not schedule (*International Energy Systems Corp.*, BCEST #D189/97). Additionally, it was required to supervise and record her hours of work to ensure that no overtime hours were worked (*BCA Industrial Controls (1995) Ltd.*, BCEST #D245/97). The Employer did not do this. Accordingly, it is liable for overtime wages for the hours worked by the Employee.

The Employer's fourth point is that it is unfair for an employee to agree on the number of hours she will work and the salary to be paid for those hours, refrain during her tenure from raising overtime issues and then, after termination, seek additional pay for overtime. The Employer goes on to argue that the Employee knew that the number of hours and salary she agreed to work encompassed all forms of payment including overtime. It contends that she did not have to agree to these terms.

The evidence before me, which includes the record that was before the Delegate, does not substantiate the Employer's claim that the Employee understood and agreed that her annual salary was to encompass all forms of payment including overtime. If that was indeed the case, it may seem unfair to one party to such an agreement to find that the other party to that agreement seeks additional compensation for overtime after the agreement is terminated.

However, irrespective of the alleged unfairness, I am bound by the terms of the *Employment Standards Act*. Section 4 of that *Act* states that the requirements of the *Act* and the *Regulations* are minimum requirements and an agreement to waive those requirements, not being an agreement referred to in Sections 3(2) or (4), has no effect. Sections 3(2) and (4) refer to collective agreements and are not applicable in the instant case. The effect of Section 4 in the instant case is that requirements of the *Act* cannot be waived by agreement of the parties. In short, the parties in this case cannot contract out of the applicable overtime provisions of the *Act*. Therefore, the Employee is entitled to make a claim for overtime wages not paid in accordance with the *Act*, despite the fact that it may appear unfair to the Employer for her to do so.

With respect to the Employer's concern that the Determination fails to reference a cheque in the amount of $845.99 it supplied to the Employment Standards Branch in payment of the amount it believed was owing for overtime hours (which cheque has not been returned to the Employer), in my view, this is a matter to be dealt with between the Employer and the Employment Standards Branch. The Delegate made a determination respecting the total amount owing, and that amount exceeds the amount of the cheque. The fact that the cheque was supplied does not alter the amount of the penalty imposed, as that amount is triggered by the fact that there has been a contravention of the *Act* and not by the amount that

an employer was ordered to pay. Accordingly, I suggest that the Employer contact the Employment Standards Branch to follow up on how the Branch intends to deal with the cheque.

With respect to the issue of expenses, the Employer notes that although this issue was referenced in the Determination, the Employer agreed during the hearing before the Delegate that it would pay these expenses. The Employer has since paid these expenses. However, this fact has not been mentioned in the Determination. It is correct that the Delegate noted that the Employee made a claim for travel expenses. He observed that the Employee conceded she had not sought prior approval to incur these expenses. The Delegate concluded that the evidence the Employee supplied was neither clear nor sufficient to support the claim. At the end of the day, the Delegate made no order that the Employer pay this claim. Although the Delegate could have mentioned in the Determination that this claim had been settled, it was not necessary for him to do so. Nor was it an error for him to fail to reference a settlement in a determination.

With respect to the Employer's argument that no penalty should have been issued, I note that Section 29 of the *Employment Standards Regulation* requires a person who contravenes a provision of the *Act* or the *Regulation* to pay certain administrative penalties. Once a contravention has been found, there is no discretion in this regard. Section 29 of the *Regulation* states that the penalty applicable to a person who contravenes a prohibition that has not been previously contravened by that person or has not been contravened by that person in the three year period preceding the contravention is a fine of $500.00. In view of the fact that the Delegate found the Employer contravened s. 40 of the *Act*, an administrative penalty in the form of a fine of $500.00 was automatically payable as a result of the operation of s. 29 of the *Regulation*.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated January 6, 2005, be confirmed in the amount of $2,946.93, plus whatever interest might have accrued since the date of issuance.

Alison H. Narod
Member
Employment Standards Tribunal