

An appeal

- by -

Kelco Drywall Ltd.
("Kelco")

- 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: Carol L. Roberts

FILE No.: 2009A/039

DATE OF DECISION: June 8, 2009

DECISION

SUBMISSIONS

Daniel Shea, FH & P Lawyers	on behalf of Kelco Drywall Ltd.
Kathleen Demic	on behalf of the Director of Employment Standards
Jurgen Kleiber	on his own behalf

OVERVIEW

1. This is an appeal by Kelco Drywall Ltd., ("Kelco"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued February 18, 2009.
2. Kelco employed Jurgen Kleiber as a drywall finisher from August 27, 2007 until August 11, 2008. Mr. Kleiber filed a complaint alleging that Kelco had contravened the *Act* by misrepresenting the conditions of employment, making unauthorized deductions from wages and failing to pay overtime wages.
3. Following an investigation into Mr. Kleiber's complaint, the Director's delegate determined that Kelco had contravened Sections 40 and 58 of the *Act* in failing to pay Mr. Kleiber overtime wages and vacation pay and Section 28 for failing to maintain a record of overtime hours. The delegate concluded that Mr. Kleiber was entitled to wages and interest in the total amount of \$6,521.31. The delegate also imposed a \$1,000 penalty on Kelco for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulation*.
4. The delegate concluded that Kelco had not misrepresented Mr. Kleiber's conditions of employment or made unauthorized deductions from Mr. Kleiber's wages.
5. Kelco contends that the delegate erred in law and failed to observe the principles of natural justice in both finding that Kelco failed to record overtime hours and in determining that Mr. Kleiber worked 177.5 overtime hours.
6. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the *Tribunal's Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUE

7. 1. Whether the delegate erred in law in
 - a) concluding that Mr. Kleiber was entitled to 117.5 hours of overtime wages; and
 - b) determining that Kelco had contravened section 28(1)(d) in failing to maintain payroll records.

8. 2. Whether the delegate failed to observe the principles of natural justice in
 - a) failing to disclose evidence she found relevant and ignoring the employer's evidence; and
 - b) determining that Mr. Kleiber was entitled to 177.5 hours of overtime wages.

FACTS

9. The facts relevant to this appeal are as follows.
10. Mr. Kleiber was hired under the federal government's Temporary Foreign Worker Program (TFWP). After quitting his employment on August 11, 2008, he filed a complaint alleging that he had not been paid overtime wages.
11. Mr. Kleiber asserted that Kelco's practice was to bid on a job based on an estimate of how many hours it would take to complete and the employees were expected to complete a job within that time estimate. He said that it was common to have construction delays that were outside the control of the worker and it was not always possible to complete the job within the time allotted. Mr. Kleiber claimed that he had to work additional hours in the evenings or on the weekend to catch up and that he and other Kelco employees were required to fill out and sign weekly time sheets indicating they worked eight hours per day regardless of the actual number of hours worked. He said that he maintained a separate daily journal in which he recorded his hours of work during his employment. He submitted two "daily planner" type books to the delegate and provided her with names of several people who would testify to him having worked evenings and weekends.
12. The delegate interviewed, by telephone or email, five witnesses, two of whom had previously worked for Kelco. One of the former employees stated that he observed Mr. Kleiber working overtime but could not provide details on which job sites Mr. Kleiber was working or his days or hours of work. The other former employee said that it was "general knowledge amongst the staff that people worked overtime" but did not provide any specific evidence with respect to Mr. Kleiber. Two of the witnesses were project managers for Dilworth Quality Homes, a project on which Kelco was contracted to perform services. While both project managers stated that they observed Kelco employees on the job site on weekends and evenings, only one specifically recalled Mr. Kleiber. The fifth witnesses stated that he visited Mr. Kleiber at a jobsite one evening after 6 p.m.
13. On August 15, 2008, the delegate sent a preliminary findings letter to Jim Byrne, the President and owner of Kelco and, at the same time, issued a Demand for Employer Records. Mr. Byrne responded on September 10, 2008, refuting the allegations and provided the delegate with documents relevant to the complaint, including payroll records and time sheets. The delegate met with Mr. Byrne in November 2008 to discuss the issues arising out of the complaint. Mr. Byrne submitted a further response on December 5, 2008, questioning the veracity of Mr. Kleiber's personal record and disputing his daily record of hours worked. Mr. Byrne contended that Mr. Kleiber's employment contract provided for a scheduled work day from 7:00 a.m. to 3:30 p.m. and that no overtime was to be worked without prior written approval. Mr. Byrne also asserted that no employee was obliged to work more than eight hours a day or on weekends. He referred the delegate to time sheets signed by Mr. Kleiber, identifying discrepancies between Mr. Kleiber's personal daily record and the signed time sheets. Those discrepancies included notations on Mr. Kleiber's timesheets indicating that he had started work at 7:00 a.m. that conflicted with the time recorded in his daily planner.
14. Mr. Byrne contended that if Mr. Kleiber worked overtime, he had ignored Kelco's rules about the scheduled hours of work and simply worked the hours he chose. Mr. Byrne argued that, by signing the timesheets,

Mr. Kleiber had misrepresented what he was actually doing. Mr. Byrne also suggested that Mr. Kleiber had taken advantage of working alone at an unsupervised job site to work whatever hours he chose. Mr. Byrne also stated that it was impossible for supervisors to verify each hour worked on each site and that each employee had to be relied on to truthfully report the starting and ending time for each day worked.

15. The delegate noted that witnesses provided direct evidence that they witnessed Mr. Kleiber working evenings and/or weekends. She stated that the two former employees

made comments alluding to employees working overtime on a regular basis at Kelco. The generality of their statements would not bear much weight on their own except that it is supported by comments made by Martin Lehmann and Brandon Briggs of Dilworth Quality Homes who stated that they witnessed Kelco employees working evenings and weekends in an effort to meet a tight deadline.

16. The delegate found that Kelco did not actually know whether or not an employee may have worked more than 8 hours a day. She concluded that Kelco's policy of directing employees not to work overtime without prior approval did not mean that overtime hours did not occur and that it was the employer's burden to monitor the daily hours worked by employees. She determined that all overtime hours had to be paid whether or not Kelco was aware of the overtime hours worked.

17. The delegate found that Mr. Kleiber had worked overtime hours and that Kelco had contravened section 40 of the *Act* in failing to pay those wages.

18. The delegate applied the "best evidence rule" and concluded that Mr. Kleiber's records were to be preferred over Kelco's records. She concluded that, in the absence of any recorded overtime hours by Kelco, Mr. Kleiber's records were accurate for the purpose of calculating his overtime entitlement. The delegate calculated Mr. Kleiber's overtime wage entitlement in the amount of \$6,133.12 and vacation pay entitlement to be \$245.32 for a total of \$6,378.44.

19. The delegate also imposed an administrative penalty on Kelco for a failure to record overtime hours:

Section 28 of the *Act* sets out the requirement for employers in terms of payroll records. Specifically 28(d) of this section stipulates that employers are obliged to keep records of the hours worked by employees for each day. In the case at hand, although the employer has provided records pertaining to regular hours worked, it has become apparent during the course of my investigation that Kelco has not acknowledged and, therefore has not recorded, overtime hours that its employees may be working. As a result, I find that Kelco has contravened Section 28(d) of the *Act* and a mandatory penalty of \$500.00 is issued.

ARGUMENT

Errors of law

1. Section 28 contravention

20. Kelco submits that the delegate erred in imposing an administrative penalty on Kelco for a failure to maintain a record of hours worked. It says that the evidence before the delegate was that, throughout his employment, Mr. Kleiber submitted signed timesheets to Kelco on a weekly basis in which he reported that he worked no overtime. Kelco kept detailed daily records based on Mr. Kleiber's timesheets and that these records comply with section 28(1)(d) of the *Act*. Kelco says that the *Act* does not impose any obligation on an employer to go behind the information self-reported by an employee and that there is no evidence it failed to record any time that Mr. Kleiber submitted and acknowledged to be correct. Kelco argues that section 28 does not require

employers to treat information provided by an employee as unreliable and that the delegate's interpretation places unreasonable demands on employers. Moreover, Kelco says, if the employer's records, based on the self reported hours of an employee and signed by an employee, are completely discounted as they were by the delegate, there is no benefit to an employer to maintain records in the first place.

21. Kelco argues that the delegate's view of the facts cannot reasonably be entertained and that she erred in imposing an administrative penalty.

22. The delegate says that the contravention arises from her finding that Kelco failed to keep track of all the hours Mr. Kleiber worked. While acknowledging that Mr. Kleiber admitted signing the time sheets but claimed he worked more hours than he recorded, the delegate submits that

it became evident during the investigation that Mr. Kleiber was on thin ice in regard to his continued employment. His reason for signing the time sheets was that he wanted to ensure he continued to receive regular pay cheques and not "rock the boat". This sentiment is quite understandable considering his worry about his employment especially in light of the fact he was a temporary foreign worker in a new country with a young family who's children were enrolled in school. To lose his job would have been disastrous.
[reproduced as written]

23. The delegate says that section 28 places a burden on the employer to monitor the hours worked by the employee.

2. Overtime hours

24. Kelco further asserts that the delegate erred in law in determining that Mr. Kleiber worked overtime of 177.5 hours by acting on evidence that could not rationally support that finding.

25. Kelco says that the delegate erred in finding Mr. Kleiber's private records as being the "best evidence". It also argues that the delegate erred in miscalculating the number of overtime hours Mr. Kleiber allegedly worked.

26. Kelco says that a delegate may accept an employee's records as the best evidence where an employer cannot produce proper payroll records or other substantial evidence to refute the employee's own records. Kelco says that the delegate erred in finding that Mr. Kleiber's records were "best evidence" since Kelco produced its own payroll records, records that were submitted and signed by Mr. Kleiber himself.

27. Kelco submits that even if it failed to keep records, Mr. Kleiber's records should not be accepted since there are good reasons to find they are not reliable. It submits that Mr. Kleiber's records were not reliable for the following reasons:

- he did not submit a complaint until after his resignation, not while he was employed and allegedly not being paid overtime wages;
- his records differed significantly from the hours of work he submitted to Kelco's payroll, and he offered no plausible explanation why he did not submit the alleged overtime hours to Kelco during the time of his employment;
- there is no evidence his personal records were created contemporaneously; and in fact, there is good reason to doubt that they were created contemporaneously.

28. Kelco says that Mr. Kleiber's log is not a reliable record and ought to be rejected where it contradicts the employer's records.
29. The delegate's submission does not directly address the issue of the reliability of Mr. Kleiber's records. She does suggest, however, that Kelco's assertions about the slowness of Mr. Kleiber's work supported his explanation about why he worked extra hours.

Breach of natural justice

30. Kelco says that the delegate failed to advise Kelco of the case it had to meet and relied on information she had not disclosed to Mr. Byrne, misconstrued evidence in a way that Kelco could not have foreseen and failed to consider relevant evidence.
31. Kelco argues that the delegate failed to observe the principles of natural justice in not disclosing the statements from the project managers of Dilworth Quality Homes to Kelco either in written form or during her meeting with Mr. Byrne in November, 2008. Kelco says it only became aware of the statements when it received the Determination. It argues that the delegate failed in her section 77 duty to put information she gathered in the course of the investigation to Mr. Byrne and afford him an opportunity to respond to that information.
32. Kelco asserts that the delegate failed to observe the principles of natural justice in failing to consider evidence relevant to Mr. Kleiber's overtime presented by Kelco. It says that the delegate appears to have ignored evidence from the employer's witnesses indicating that Mr. Kleiber was not at work at scheduled times. It says that the delegate's failure to consider evidence that bore upon the Mr. Kleiber's credibility resulted in fundamentally unfair and erroneous findings of fact.
33. Finally, Kelco also says that the delegate failed to observe the principles of natural justice in determining that Mr. Kleiber worked overtime of 177.5 hours.
34. Kelco also says that, despite its explanation of its estimating and bonus systems, the delegate relied upon Mr. Kleiber's incorrect explanation of that system and makes no reference to the employer's explanation.
35. The delegate says that she did not disclose Mr. Lehmann's evidence about Kelco employees working overtime to Mr. Byrne in the November letter or during her subsequent meeting with Mr. Byrne because she did not speak to Mr. Lehmann until January. However, she says that Kelco knew overtime was an issue from early in the investigation and that Kelco had the opportunity to respond to both Mr. Kleiber's records as well as the evidence of Mr. Reusch, who witnessed Mr. Kleiber working overtime. She says that Kelco never challenged Mr. Reusch's evidence.
36. The delegate says that she did not disregard the evidence of Kelco's witnesses. She says that the evidence of the employer's witnesses was provided to support Kelco's reasons for lowering Mr. Kleiber's hourly wage and that she relied on this evidence to arrive at her conclusions on that issue. She submits that only one of the witness statements touches upon Mr. Kleiber's hours of work, and then only to say that Mr. Kleiber often started work after 7 a.m.
37. The delegate acknowledges that she miscalculated Mr. Kleiber's hours of overtime. She says that the total number of overtime hours should have been 180.0 rather than 177.5.

38. Mr. Kleiber's submission contained a restatement of the argument he provided to the delegate, new allegations and a commentary about Mr. Byrne's motives. I have not considered this submission as it does not relate to the grounds of appeal.

ANALYSIS

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

the director erred in law

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

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

40. The burden of establishing the grounds for an appeal rests with an Appellant. Kelco must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice.

41. I have concluded that Kelco has demonstrated both an error of law and a denial of natural justice and refer the matter back to the delegate for a new investigation. I arrive at my conclusion for the following reasons.

Error of Law

42. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:

1. A misinterpretation or misapplication of a section of the *Act*;
2. A misapplication of an applicable principle of general law;
3. Acting without any evidence;
4. Acting on a view of the facts which could not be reasonably entertained; and
5. Exercising discretion in a fashion that is wrong in principle

43. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.

44. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.

45. In my view, the delegate erred in law in her application of the "best evidence" rule and the finding of a contravention of section 28.

46. Section 28(1)(d) of the *Act* states

28 (1) For each employee, an employer must keep records of the following information:

d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis.

47. On August 15, 2008, the delegate served an amended Demand on Kelco for payroll records relating to wages, hours of work and conditions of employment. The records were to be delivered on or before September 19, 2008. The Demand indicated that a failure to produce the records as required would result in a Determination being issued and an administrative penalty being imposed in the event a contravention was found.

48. Kelco provided the delegate with a copy of the policy requiring all employees to have approval in writing for any work in excess of an 8 hour day. It also submitted a document titled “Tapers Job and Bonus Summary” in which Mr. Kleiber identified the location and type of work he did and the rate. The summary was signed by Mr. Kleiber and his supervisor, and dated. The record suggests that these forms were discontinued in 2007 and new ones, titled “Weekly Time Sheet” were used for 2008. Kelco provided the delegate with Mr. Kleiber’s weekly time sheets for 2008. All of those documents, which were completed and signed by Mr. Kleiber, indicated that Mr. Kleiber started work at 7 a.m. and finished at 3:30 p.m. These documents formed the basis for Kelco’s payroll.

49. There is no evidence Kelco failed to comply with section 28(1)(d). The employer did maintain records of the hours worked by Mr. Kleiber. Those records were prepared on information submitted by Mr. Kleiber and verified by him as being accurate. Although the delegate seems to conclude that Kelco ought to have known that Mr. Kleiber’s statements were false, there was simply no basis on which it ought to have done so. In *Gordon Hofer* (BC EST # D538/97) a decision on which the delegate appears to rely, the employer appeared to have access to two different sets of records maintained by the employee. That is not the situation before the delegate. Indeed, there was no indication that Mr. Kleiber maintained a separate record of his hours until after he quit and filed his complaint. There is nothing in the language of section 28(1)(d) which imposes an obligation on the employer to “monitor” an employee’s hours. Given an employee’s duty of honesty and good faith to his or her employer, an employer must be able to rely on an employee to comply with established hours of work and overtime policies. Unless there is some reason for an employer to suspect the employee is intentionally misrepresenting his or her hours, the employer must be able to rely on the employee’s reported hours of work.

50. I find that the delegate’s conclusion was based on a view of the facts that cannot be entertained.

51. I also find that the delegate erred in applying the “best evidence” rule in preferring Mr. Kleiber’s personal record over the signed timesheets he provided to the employer. The “best evidence” rule applies only to those circumstances where an employer has failed to maintain employee records in contravention of section 28. In *Gordon Hofer*, the decision relied on by the delegate, the Tribunal said:

In the absence of proper records which comply with the requirements of Section 28 of the *Act*, it is reasonable for the Tribunal (or the Director's Delegate) to consider employees' records or their oral evidence concerning their hours of work. These records or oral evidence must then be evaluated against the employer's (incomplete) records to determine the employees' entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate may accept the employees' records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable. Under those circumstances, if an employer appeals a determination, it would bear the onus to

establish that it was unreasonable for the Director's delegate to rely on the employees' records (or evidence) and to establish that they were unreliable. (my emphasis)

52. As I have concluded above, because the employer maintained records that complied with section 28 of the *Act* there is no basis to apply the best evidence rule.
53. In the face of clearly contradictory records the delegate had a duty to scrutinize all of the documents before her and arrive at a reasoned conclusion as to Mr. Kleiber's hours of work. The delegate rejected the employer's records without articulating any reason for doing so apart from suggesting that Mr. Byrne did not monitor his workers at every site. She also provided no reason for preferring Mr. Kleiber's personal record over his signed weekly time sheets even though Kelco challenged the veracity of those records. There may be circumstances in which a delegate would reject signed time sheets as being unreliable. One of those circumstances would be if there was some evidence they were prepared under duress. However, there were no facts before the delegate from which she could draw such an inference. While the delegate suggests that Mr. Kleiber signed the timesheets under duress, those suggestions are contained not in the Determination itself but in her submissions on appeal. Not only does this submission appear to be advocating on behalf of an employee, which goes beyond the proper role of the Director on appeal (see *BWI Business World*, BC EST # D050/96 and *British Columbia Securities Commission*, BC EST # RD121/07) it does not appear to be based on any factual foundation. If the delegate had a conversation with Mr. Kleiber in which he expressed this sentiment, that ought to have been recorded in notes and disclosed as part of the record. Furthermore, if Mr. Kleiber did give "not wanting to rock the boat" as his reason for signing the false timesheets, his assertion ought to have been critically evaluated in light of all of the evidence. Given that there was nothing in either the section 112 record or the Determination itself to confirm Mr. Kleiber's sentiment, the delegate's conclusion can only be described as speculation or conjecture and is clearly in error.

Natural Justice

54. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Section 77 of the *Act* requires the director to make reasonable efforts to give a person under investigation an opportunity to respond.
55. In response to Mr. Kleiber's claim for overtime wages, Kelco provided the delegate with Mr. Kleiber's weekly time sheets indicating that, without exception, he worked eight hours per day. The delegate considered Mr. Kleiber's evidence as well as the evidence of two former employees and two project managers of Dilworth Quality Homes.
56. The delegate acknowledged that she had "no record of conveying the evidence of the project managers" to Kelco. However she says that if she did not do so it was because she only spoke to them in January, several months after she disclosed all the other information to Mr. Byrne. This is not a reason for failing to disclose information that was, as is apparent from the Determination, considered by the delegate to be both relevant and highly probative to her ultimate conclusion on this issue.
57. The delegate seems to suggest that she had no duty to disclose this information because Kelco knew that overtime was an issue. She also noted that Kelco had not challenged the evidence of Mr. Reusch who gave evidence he saw Mr. Kleiber work overtime. In my view, the delegate failed to comply with the principles of natural justice when she did not disclose her January conversations with Mr. Lehmann and Mr. Briggs, particularly since they were critical to her conclusion that Mr. Kleiber had worked overtime hours.

58. I find that the delegate's failure to disclose this evidence constitutes a failure to comply with natural justice.
59. Finally, the delegate does not refer to, much less evaluate, statements submitted by Kelco in which several witnesses set out their observations that Mr. Kleiber's work hours did not match the required company schedule and that he often started later than scheduled. In my view, this evidence ought to have been considered, along with all of the other evidence, when assessing the credibility and reliability of Mr. Kleiber's overtime wage claim. The delegate seems to suggest that, although she considered the witness statements, she only did so when assessing Mr. Kleiber's hourly wage claim. In my view, given that some of the witness statements touch upon Mr. Kleiber's hours of work, they were clearly relevant to the overtime wage claim and ought to have been considered in that context. The delegate's failure to do so constitutes a breach of natural justice.
60. For all of these reasons, I allow the appeal.

ORDER

61. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated February 18, 2009, be referred back to the Director delegate to re-evaluate Mr. Kleiber's claim for overtime.

Carol L. Roberts
Member
Employment Standards Tribunal