Employment Standards TRIBUNAL

An appeal

- by -

Sandy C. McKenna

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Carol L. Roberts

FILE No.: 2001/782

DATE OF HEARING: January 30, 2001

DATE OF DECISION: January 31, 2001

DECISION

APPEARANCES:

On his own behalf: S. McKenna

For Trev Deely Motorcycle: D. Osarchuk, D. Wallace

OVERVIEW

This is an appeal by Sandy McKenna, pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued October 30, 2001. Mr. McKenna complained that he did not receive all wages earned while working for Trev Deely Motorcycles (1991) Ltd. ("Deely"). After an investigation, the Director concluded that there was no contravention of the Act, and pursuant to s. 76, closed the file.

ISSUE TO BE DECIDED

Whether the Director erred in concluding that Mr. McKenna was not entitled to overtime wages.

FACTS

Mr. McKenna worked for Deely, a motorcycle sales and service business, as a service shop foreman from August 2000 to June, 2001. He was hired to work 8 hours per day, 5 days per week. He filed a complaint alleging he was owed 700 hours of overtime wages.

During his investigation of Mr. McKenna's complaint, the delegate spoke to Mr. McKenna, Deely's General Manager and Assistant General Manager, and nine other current and former employees of Deely. He also reviewed payroll documents, and the company's alarm system activation and deactivation times in order to assess whether Mr. McKenna worked earlier or later than the shop hours. The delegate summarized the evidence and his analysis of that evidence, and provided his conclusions to Mr. McKenna on October 16, 2001. In his covering letter, the delegate wrote, in part, as follows:

> .. as you can see from the attached summary I am unable to conclude you are owed any additional remuneration under the ESA... If upon review of the attached material you wish me to issue a two or three page determination, which can be appealed by either party, please contact me by October 29, 2001, and I will do so. If you wish to provide evidence that you believe clearly demonstrates that you are owed additional wages, please do so by October 29, 2001. If I have not heard from you by October 29, 2001, I will close your file as withdrawn.

The delegate provided Mr. McKenna with his work number, fax number and email address, as well as his mailing address. Mr. McKenna did not respond to the letter with any evidence, although I understand that he advised the delegate that he did not agree with his conclusion.

In the Determination, which was issued October 30, the delegate concluded that the alarm code information was not sufficient to demonstrate that Mr. McKenna worked more or less than 8 hours per day, or 40 hours per week. The delegate found that Deely had a well-established process whereby an employee could establish a time bank and accumulate hours at overtime rates, and take time off with pay at his convenience. The delegate reviewed the payroll records that showed that Mr. McKenna was paid for 8 hour days. He noted that Mr. McKenna was aware of the time bank, since he not only administered the service shop's time bank, but stored his own hours in a time bank. The delegate inferred that, since Mr. McKenna took as many as five days off with pay from his time bank, had he put more overtime in, that would have been recorded in the time bank.

Finally, the delegate stated that, even if he was able to conclude, on a balance of probabilities, that Mr. McKenna put in more hours than he was paid, he was unable to determine how many hours that would have been, since Mr. McKenna did not keep a contemporaneous record of his hours.

ARGUMENT

Mr. McKenna alleges that the delegate advised him that, if he had a calendar on which he recorded his hours, his case would be stronger. Mr. McKenna stated that the delegate was not pleased with his response that he could make one up, but would not because he believed that the truth would come out. Mr. McKenna argues that he did not make up the hours he claimed for, and contends that a letter from the general manager on September 15, 2000, supports his assertion that he worked overtime in an effort to assist the company. Mr. McKenna advised the delegate that the number of hours he put in would be well documented by current and former employees as well as the monthly opening and closing report from the security company. At the hearing, Mr. McKenna did not challenge the delegate's summary of the witnesses' evidence. However, he claimed that the alarm code reports supported his overtime claim.

Mr. McKenna argues that a second party examining the relevant documentation will draw a different conclusion. Mr. McKenna states that he should be compensated, at minimum, for the 126.8 hours that the alarm records show he was working overtime.

Deely argues that Determination should be upheld. It submits that the letter provided to Mr. McKenna by the general manager was written one month after he began working at Deely, and was simply an expression of positive feedback of a new employee within the probationary period. It further submits that, even if alarm codes show that Mr. McKenna entered or left the building at times specified, there is no evidence that he was working on Deely business at the time.

Deely notes that the 11 witnesses interviewed by the delegate do not support Mr. McKenna's claim that he worked overtime. It also repeats that Mr. McKenna was well aware of overtime requirements and record keeping, and that Mr. McKenna in fact banked, and took, 5 days overtime. When Mr. McKenna left his employment, Deely asked him to provide his outstanding banked time. The record submitted showed that 8 hours were owing, and Mr. McKenna was paid for those 8 hours.

The Director's delegate submits that the evidence does not support Mr. McKenna's claim, and that his appeal submissions do not alter that finding. He contends that the appeal should be dismissed.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Although Mr. McKenna appeared surprised that he had the onus of substantiating the appeal, I note that the Tribunal's guide to the Appeal process clearly states "**The Appellant has the burden of proof to explain what is wrong with the Determination and how the Tribunal should change**" it. (my emphasis)

Section 76 (2)(d) of the Act provides that the Director may refuse to investigate a complaint or may stop or postpone investigating a complaint if there is not enough evidence to prove the complaint.

Having reviewed the submissions of the parties, I am not persuaded that the Director erred in ceasing the investigation into Mr. McKenna's complaint.

Mr. McKenna sets out two grounds for his appeal: that the delegate failed to provide him with an opportunity to respond, and that he failed to consider relevant facts.

I will address each ground separately.

There is no evidence that the delegate failed to provide Mr. McKenna with an opportunity to respond. Mr. McKenna acknowledged that he received the letter of October 16 setting out the delegate's findings, and seeking further evidence from him if he disagreed with his conclusions. Mr. McKenna argued that the delegate was not easy to contact, and that he seemed "more interested in going on his six week holidays" than responding to him. I have reviewed the documentation and note that the delegate took a two week vacation in July, well before Mr. McKenna was given the opportunity to reply. Mr. McKenna acknowledged that he did not respond to the delegate because he did not understand that he could do so. The delegate's letter is neither ambiguous or unclear. It provides Mr. McKenna to make submissions before the Determination was issued.

Mr. McKenna also bases his appeal on this ground, in part, on his claim that the delegate was "not happy" with his response that he did not record his hours contemporaneously. The most

that can be drawn from this statement is that the delegate found an absence of evidence corroborating Mr. McKenna's claim. I cannot infer from this that the delegate denied Mr. McKenna an opportunity to be heard.

There is no evidence supporting Mr. McKenna's first ground of appeal.

Mr. McKenna further argues, as I understand it, that the delegate misunderstood, or failed to appreciate, the facts. Mr. McKenna's evidence and arguments do not differ from those made to the delegate. He suggests that a second person reviewing the information might come to another conclusion than the delegate.

An appeal is not an opportunity for a new opinion because an appellant is dissatisfied with the result. As outlined in the appeal form, an appellant must demonstrate an error in the facts or that the delegate failed to consider relevant facts.

Having reviewed the evidence and submissions, I am unable to find that the delegate's conclusion is perverse, or unreasonable, based on the evidence before him. Mr. McKenna does not dispute the witness statements. None of those statements support Mr. McKenna's claim for overtime. As a whole, they indicate that while Mr. McKenna might have worked late some days, he also left early on others, and that his hours likely balanced out to an average of 8 hours per day. Those witnesses also noted that Mr. McKenna was very aware of an overtime bank, and that there should not have been a problem with overtime payments as a result. Given that Mr. McKenna did not dispute these statements, I cannot find that the delegate erred in concluding that this evidence did not support his overtime claim.

In his letter of October 15, the delegate noted as follows with respect to the alarm system

Between September 6, 2000 and June 4, 2001, there are approximately 15 times when the complainant turned off the alarm system and presumably opened up the store, During the same period, there are approximately 60 times he turned on the alarm system at the end of the day. Of those 60 times it would appear the complainant showed up after hours for some reason on about a dozen occasions. These dozen or so times he seems to have turned off the alarm system then, few minutes later turned it back on again. In the period for which the alarm codes were supplied there were around 6 times the complainant turned off the alarm system in the morning and turned it back on again in the evening...The resultant total, 126.38 hours, does not demonstrate that the complainant worked an extra 126.38 hours. The complainant may have left corresponding earlier, arrived correspondingly after, or taken the difference in time off either during a working day or at either the end or the beginning of a week. Conversely this evidence does not indicate whether the complainant arrived earlier or left after his regular 8 hours a day.

The delegate invited Mr. McKenna to provide evidence disputing this conclusion. Mr. McKenna did not. Nor did he provide any evidence disputing that conclusion on appeal. I am unable to find the delegate's conclusion, on these facts, is unreasonable. The alarm codes simply do not confirm that Mr. McKenna worked 700, or indeed, any, hours of overtime. According to the evidence of

the witnesses as well as Deely's general manager and assistant general manager, Mr. McKenna often left work early to catch a ferry to the Island, and spent time at work on personal matters. In addition, Mr. McKenna was often in the shop on Thursday evenings, when staff were allowed to work on their own bikes.

Furthermore, the evidence is that Mr. McKenna was aware that staff were to record any additional time they worked in excess of 40 hours per week, and that at the time he quit his employment, he claimed, and was paid, for 8 hours of overtime.

In summary, I am unable to find that the delegate erred in concluding that Mr. McKenna was not owed overtime, and ceasing to investigate the complaint, pursuant to s. 76.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated October 30, 2001 be confirmed.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal