Employment Standards TRIBUNAL

An appeal

- by -

Ngerageze Heritier Guillaume
("Guillaume")

- 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: David B. Stevenson

FILE No.: 2011A/25

DATE OF DECISION: June 28, 2011

DECISION

SUBMISSIONS

Ros Salvador	counsel for Ngerageze Heritier Guillaume
Pir Indar Sahota	counsel for Khaira Enterprises Ltd.
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the *"Act"*) by Ngerageze Heritier Guillaume ("Guillaume") of part of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 4, 2011. In its entirety, the Determination applied to fifty-eight former employees of Khaira Enterprises Ltd. ("Khaira"), including Guillaume. The appeal only relates to that part of the Determination relating to the Director's finding of the wages owing to Guillaume, and this decision applies only to that part of the Determination.

2. In respect of the relevant part of the Determination, the Director found that Khaira had contravened the *Employment Standards Act* (the *"Act"*) by failing to pay Guillaume regular and overtime wages, compensation for length of service, statutory holiday pay and vacation pay and ordered Khaira to pay Guillaume an amount of $9,247.77, an amount which also included interest under section 88 of the *Act*.

3. Counsel for Guillaume says the Director erred in that part of the Determination applying to Guillaume by "randomly attributing significantly less hours to him than what the record shows he actually worked".

4. The Tribunal has discretion whether to hold an oral hearing on an appeal. The Tribunal has decided the issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

ISSUE

5. The issue in this appeal is whether Guillaume has shown the Director made a reviewable error in the Determination.

THE FACTS

6. The Determination indicates that Khaira does reforestation work throughout British Columbia, mostly through contracts from the BC Ministry of Forests. The work done by Khaira includes tree planting, brushing (clearing bushes and cut grass using hand tools around newly planted trees to allow growth) and other silviculture work. In 2010, up to mid-July, Khaira had contracts to do reforestation work on Texada Island and in Powell River, Kamloops, Salmon Arm, Revelstoke, and Golden.

7. Guillaume was hired by Khaira as a tree planter and brusher. He was employed from March 17, 2010, to July 18, 2010, on contracts on Texada Island, in Powell River, Kamloops, Revelstoke, and Golden.

8. The Director found Guillaume worked a total of 39 days on the Kamloops contract doing tree planting over three pay periods on a piece rate of $0.20 per tree for all days except from May 8 to 12, 2010, when he was at $0.25 per tree. The Director found he earned a total of $6,549.69 for this work.

9. The Director found he worked a total of 434.50 regular and overtime hours on the Texada Island, Powell River, Revelstoke, and Golden contracts at a rate of $17.00 an hour. The Director calculated he was entitled to be paid hourly wages in the amount of $10,046.00 for this work.

10. The total wages the Director found were earned by Guillaume was $16,631.92, an amount which included compensation for length of service in the amount of $680.00 and statutory holiday pay and vacation pay in the amount of $866.10.

11. The Director found Guillaume had been paid gross wages in the amount of $7,525.37and deducted that amount from gross wages earned to reach an amount of gross wages payable, to which interest under section 88 was added to reach an amount which represented the balance of wages owing.

12. At issue in this appeal are the hours of work attributed to him by the Director.

ARGUMENT

13. Counsel for Guillaume says the Director's finding that he worked 434.50 regular and overtime hours on the Texada Island, Powell River, Revelstoke, and Golden contracts is without any rational foundation and is inconsistent with other findings made by the Director about how the hours of work of employees would be, and were, calculated. She notes the Director determined that the hours of work of each employee would be based, at least in part, on records provided by seven employees, who are referred to on pages R33 and R40 of the Determination. I will refer to these employees as the "reference" employees. She says although Guillaume indicated in his statement to the Director that he had taken only three days off, July 1st, 2nd and 3rd, the Director, for reasons unexplained in the Determination, found he had worked almost fifty hours less (even after making the adjustment for the three days off) than the reference employees who had substantially the same work record as he did.

14. As well, counsel says that, oddly, the difference in the total hours worked between Guillaume and the reference employees was attributed by the Director to time and one-half hours. The finding by the Director on the straight time hours and the double time hours worked by Guillaume is virtually identical to the reference employees with substantially the same work record as his. She notes that one of the reference employees who had the same work record as Guillaume and had indicated to the Director that he had taken four personal days off was found to have worked 479 hours: 308.5 at straight time; 155 at time and one-half and 15.5 at double time while Guillaume was found to have worked 313 hours at straight time, 107.75 hours at time and one-half and 13.75 hours at double time.

15. In response, counsel for Khaira submits that because all of the workers did not work every day, their hours of work cannot be generalized and compared to another worker. Counsel says he is not able to respond specifically to Guillaume's situation because their records are with the Director. He does not agree that the records of other employees can be used by Guillaume to favour his appeal.

16. The Director says that Guillaume did not provide sufficient information relating to his work; that he claimed he took only three personal days off and had worked on March 26, June 24-25 and July 9. He also stated he worked every single day in Kamloops – a total of 43 days. The Director says the weight of evidence showed that no employees of Khaira worked on March 26 or June 24-25 and that there were at least two days in

Kamloops when employees did not work. The Director says the discrepancies brought the credibility of Guillaume's statements in respect of the hours he worked into question. He says Guillaume had the onus of proving that he worked on the days he claimed and he failed to meet that onus.

17. In final reply, counsel for Guillaume says there was no issue of Guillaume's credibility raised in the Determination and submits it is inappropriate for such an issue to be raised for the first time at the appeal stage. She says if there was a question of credibility, there was a duty on the Director to raise it and provide reasons for his finding on that issue.

18. Counsel says the assertion that Guillaume said he had worked on March 26, June 24-25 and July 9 is inaccurate. The statement made to the Director, which was transmitted by e-mail on November 23, 2010, says, in part:

> During his time working for Khaira Mr. Guillaume took three personal days off to go back to Winnipeg. He left on June 30th and got back on July 4th. Mr. Guillaume did not take any other personal days off **when other people were working**. (Emphasis in submission)

19. Counsel says Guillaume made no submissions about working on March 26, June 24-25 and July 9, which she refers to as "collective days off". Counsel acknowledges Guillaume did say he worked every day in Kamloops and that he continues to maintain that position, even though the Director determined, on balance, that he had worked there for only 39 days. Counsel says, however, that particular finding by the Director is not under appeal; what is being questioned in the appeal is the unexplained reduction of 49.5 hours of time and one-half for his work in other locations compared with other employees who also did not work on March 26, June 24-25 and July 9.

20. Counsel elaborates on the submission made in the original appeal submission, that the reduction in hours worked was made in the time and one-half hours and not, as one would expect, as an general reduction in hours affecting both straight time and overtime hours. She says the relative difference between the straight time hours and the overtime hours found to have been worked by Guillaume is contrary to the Director's finding, at pages R29-R30, that:

> The evidence before me indicates Khaira determined which worksite to work on a daily basis and transported all workers to the selected worksite. A majority of employees worked at the selected worksite at the same time. Accordingly, the total hours worked by each employee would be similar.

21. Counsel submits this finding would indicate Guillaume's overtime hours should be proportionate to the reference employees in a similar position as him, as his straight time hours were.

ANALYSIS

22. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

23. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

24. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

25. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

> 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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 reasonably be entertained; and
> 5. adopting a method of assessment which is wrong in principle.

26. This appeal alleges the Director committed an error of law in that the Director made findings of fact that were either unsupported by any evidence on the record or were entirely inconsistent with the evidence on the record.

27. I am satisfied Guillaume has demonstrated the Director committed an error of law in reaching the conclusion he worked 434.50 regular and overtime hours on the Texada Island, Powell River, Revelstoke, and Golden contracts.

28. I do not find the Director acted without any evidence. Clearly there was evidence before the Director relating to the hours worked by Guillaume. I do find, however, that the findings made by the Director were based on a view of the facts that could not reasonably be entertained. There are several reasons for my reaching this conclusion.

29. First, there is nothing in the Determination that indicates the finding of the Director on the hours worked by Guillaume was grounded in an adverse view about his credibility. I agree with counsel for Guillaume that it is not appropriate for the Director to raise a credibility issue for the first time in the appeal process. The Determination contains no indication there was any concern, and there was no finding, about Guillaume's credibility during the investigation. If there had been, the Determination would need to show the Director acted judicially in weighing and assessing his credibility and that of the evidence he provided, include a finding against his credibility and provide reasons for that finding. None of that is present here. Consequently, I find there was no apparent reason to reject the information he provided about the days he worked at Texada Island, Powell River, Revelstoke, and Golden. It is also a bit ingenuous for the Director to say Guillaume had the burden of proving he worked the hours he claimed, when none of the employees, other than the reference employees, had done that.

30. That does not necessarily end the matter, since the reasons for the Director's finding, even though insufficient on the issue of credibility, may support the finding made when looked at in the context of the all of the evidence.

31. However, the evidence does not support the Director's assertion that Guillaume said he worked on March 26, June 24-25 and July 9, 2010, dates which were generally accepted as days when no employees worked. The information provided in the November 23 e-mail said only that he did not take any other personal days off "when other people were working". I have three points to make about statement. First, if the Director assumed it meant that Guillaume was saying he worked every day other than the personal days off and felt this gave rise to a credibility issue, he was required to put that to Guillaume and allow him to respond to the perception of the Director about this statement. It is a question of basic fairness. Second, and in any event, I find it was not reasonable for the Director to read into the statement provided by Guillaume a conclusion that he had worked every day other than those he took off as personal days, including days other people were not working. The statement appears plain enough on its face. Third, a finding that Guillaume did not work on those common days off would still put him in no different position that the reference employees, whose records show they also did not work any hours on those common days off.

32. Additionally, the difference between what the Director found Guillaume to have worked and what the Director accepted the reference employees having a similar work record to Guillaume to have worked is predominantly allocated only to time and one-half hours. I will illustrate this point with the following information from the Determination.

33. The Director accepted the records provided by seven employees as being credible and relied on these records, in part, in deciding the hours of work of other employees. Of those seven employees, four had similar work records to Guillaume: Ngakira Gazire, Kalitse Kahamba, Dedieu Kibasi and Steven Kagamba Munga. Each worked from March 17 to July 17; each worked hourly doing tree planting and brushing work at Texada Island, Powell River, Revelstoke and Golden. The Director accepted these employees worked 517, 479, 515.25 and 505.50 total hours, respectively, on these contracts. The difference between the total hours for Mr. Kahamba and the other three being is attributed to four personal days off taken by this employee that were not taken by the other three employees. The total hours were allocated to straight time, time and one-half and double time hours as follows:

Mr. Gazire:	317.50	188.75	15.25
Mr. Kahamba:	308.50	155	15.50
Mr. Kibasi:	319	181	15.25
Mr. Munga:	314	179	12.50

34. For comparison, the allocation of Guillaume's hours was 313 straight time, 107.75 time and one-half and 13.75 double time.

35. Applying the Director's finding that the majority of employees worked at the same sites at the same time and would therefore have similar hours worked, a conclusion that Guillaume worked approximately 45 time and one-half hours less than Mr. Kahamba (who had the next lowest total of time and one-half hours), while working more straight time hours over the same period, doing the same work on the same contracts, defies logic. Based on the fact that all employees were transported to from the campsites to the worksites in vehicles operated by Khaira, such a conclusion would have Guillaume frequently stopping work after working straight time hours and idly waiting for other employees to finish their day before returning with them in the company transport to the campsite. If the Director believed Guillaume was not one of the "majority of employees [who] worked at the selected worksites at the same time", there is no such finding to that effect in the Determination and I can only accept he falls within the collection of employees whose "total hours worked . . . would be similar".

36. Accordingly, I cannot conclude that an examination of all of the evidence provides any support for the finding made on Guillaume's hours. To the contrary, such an examination serves to confirm the Director's finding cannot be rationally supported on the evidence.

37. Guillaume's appeal succeeds.

38. Counsel for Guillaume has submitted that rather than referring the matter back to the Director, I re-calculate the wages owing to him, using Mr. Kahamba's hours worked as a guide. Mr. Kahamba, as I indicated above, was one of the reference employees whose work record was similar to Guillaume's. The only apparent difference between the circumstances of Mr. Kahamba and Guillaume was that the former had taken four personal days off and his hourly wage was found to be $16.00 an hour.

39. I agree with counsel's suggestion, with some modifications, and will exercise my authority to vary the Determination as it relates to Guillaume as follows:

Regular wages ($17.00 X 313 hours) + ($6,549.69 on piece rate)		$11,870.69
Overtime pay ($25.50 X 155 hours) + ($34.00 X 13.75 hours)		$4420.00
Statutory holiday pay ($162.41 + $64.00)		$226.41
Compensation for length of service (1 week average regular wage)		$680.00
Vacation pay (4% of gross earnings)		$687.88
	Total wages earned	$17,884.98
Less wages paid		($7,525.37)
	Subtotal	$10,359.61

40. Section 88 interest will need to be calculated on the subtotal, which reflects the amount of gross wages owing.

ORDER

41. Pursuant to section 115 of the *Act*, that part of the Determination dated February 4, 2011, relating to the wage calculation for Guillaume, shall be varied to show the gross wage owing as $10,359.61, together with any interest that has accrued on that amount under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal