Employment Standards TRIBUNAL

An appeal

- by -

Richard Hoogendoorn

- 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.:** 2008A/42

**DATE OF DECISION:** June 18, 2008

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Richard Hoogendoorn | on his own behalf |
| Rod Bianchini | on behalf of the Director of Employment Standards |
| Gavin Marshall | counsel for Young and Son Media Canada Inc., carrying on business as ELS Language Centers |

## OVERVIEW

1. This is an appeal by Richard Hoogendoorn, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued March 20, 2008.

2. Mr. Hoogendoorn began working as an English language instructor for Young and Son Media Canada Inc. carrying on business as ELS Language Centers ("ELS"), from June 1, 2000. On April 1, 2007, Mr. Hoogendoorn filed a complaint alleging that ELS had contravened the *Act* in failing to pay regular wages and overtime wages. Mr. Hoogendoorn was still employed as an instructor at the time of the hearing of his complaint on September 20, 2007. Mr. Hoogendoorn appeared on his own behalf at the hearing and ELS was represented by Michael Walkey.

3. Following the hearing, the Director's delegate determined that ELS had contravened Section 17 of the *Employment Standards Act* in failing to pay Mr. Hoogendoorn wages. He concluded that Mr. Hoogendoorn was entitled to wages, annual vacation pay and interest in the total amount of $2,333.33. The delegate also imposed a $500 penalty on ELS for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulations.*

4. The delegate was unable to find, on the evidence, that Mr. Hoogendoorn was entitled to overtime wages.

5. Mr. Hoogendoorn contends that the delegate erred in law and failed to observe the principles of natural justice. He also contends that evidence has become available that was not available at the time the Determination was being made.

6. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practise 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). Mr. Hoogendoorn did not seek an oral hearing and I conclude that this appeal can be adjudicated on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination

## ISSUES

7. Whether the delegate erred in law

   a) in finding that Mr. Hoogendoorn was not entitled to overtime wages,

   b) in finding that s. 80 of the *Act* limited Mr. Hoogendoorn's wage recovery to a six month period immediately preceding the filing of his complaint; and

   c) in calculating Mr. Hoogendoorn's wages and vacation pay entitlement

8. Whether the delegate failed to observe the principles of natural justice in issuing the Determination six months after the hearing; and

9. Whether there is new and relevant evidence that would have led the delegate to a different conclusion on a material issue

## FACTS AND ARGUMENT

10. The evidence before the delegate was that Mr. Hoogendoorn spent between 20 to 30 hours per week teaching a variety of classes that were divided into four week programs. In 2006, Mr. Hoogendoorn began to question the way he was paid. He claimed that he was performing work for which he was not being paid. Specifically, he said that he was not paid for preparing assignments, marking tests and providing feedback to the students. In February 2007, Mr. Hoogendoorn raised the issue with his supervisor who, he alleged, was unresponsive. Mr. Hoogendoorn said that ELS had issued verbal and written warnings to him as a result of student complaints about the quality of his classes, leading to his request for additional pay to respond to the complaints. Mr. Hoogendoorn filed his complaint after the parties disagreed on how the *Act* ought to be applied to his situation.

11. Mr. Hoogendoorn claimed that he was entitled to be paid for all hours he worked, directly or indirectly, for ELS. Although Mr. Hoogendoorn's employment agreement provided that he was to be paid for hours he worked, he acknowledged that his employment agreement was silent on how many hours he was to dedicate to class preparation or how this time was to be paid or factored into his pay scheme. He contended that he was entitled to be paid for an additional 1 to 2 hours per day for class preparation. Mr. Hoogendoorn said that he had maintained a detailed account of all hours worked from October 2006 until September 2007 and that he was entitled to $9,234.99 in unpaid overtime wages.

12. ELS's evidence was that instructors were paid only for time spent teaching students in the classroom and that the instructors' hourly wage included work spent outside the classroom preparing for classes. ELS left it up to the instructors how they spent that time in order to meet the requirements of the job. ELS's overtime policy referred to scheduled or incidental overtime hours, both of which had to be approved in advance and only reflected work performed in the classroom.

13. The delegate determined that section 80 of the Act limited Mr. Hoogendoorn's wage recovery to the period October 21, 2006 to April 21, 2007.

14. The delegate found that Mr. Hoogendoorn ought to have been paid for preparation work performed in addition to the hours he actually spent teaching. He concluded that ELS could not "ignore payment of work performed preparing while still requiring Instructors to do preparation work".

15. The delegate found it reasonable that Mr. Hoogendorn would spend additional time outside classroom teaching time preparing lesson plans, marking and other administrative duties. He found that Mr. Hoogendoorn did not work in excess of 8 hours a day or 40 hours per week teaching classes. He accepted Mr. Hoogendoorn's estimate that he spent an additional 1.5 hours of work per day preparing for classes.

16. The delegate declined to apply the overtime rates set out in ELS's General Document, which set out premium rates for time associated with teaching, not preparation for teaching. He concluded that Mr. Hoogendoorn was entitled to be paid an additional 1.5 hours per day at his normal rate of pay, as he did not work more than 8 hours per day or 40 hours per week. The delegate calculated Mr. Hoogendoorn's wage entitlement to be $2,333.33.

17. While Mr. Hoogendoorn suggests he is "very happy" with most of the Determination, he says the delegate erred in several factual ways. Some of those factual errors are not material to the Determination and I have not recited them here.

18. Mr. Hoogendoorn alleges that the delegate erred in calculating the additional hours for which he is entitled to be paid, calculating his vacation pay at 4% rather than 8% as agreed to by ELS, and in determining the six month period for which he was entitled to recover unpaid wages. He argues that his "wage capture period" should extend to the six months before he filed his complaint in April continuing until the date of the hearing.

19. The Director's delegate agrees that he erred in calculating Mr. Hoogendoorn's rate of pay and attached an addendum to his submissions reflecting the correct rate. That re-calculation indicates that Mr. Hoogendoorn is entitled to $2,037.20 rather than the $2,125.20 indicated in the Determination. The delegate also agrees that Mr. Hoogendoorn's vacation pay should be calculated at 6% rather than 4%. He submits that there was no evidence presented at the hearing that Mr. Hoogendoorn was entitled to 8% vacation pay. The delegate re-calculated the vacation amount owing to $122.23, for a total award, with interest, of $2,279.71.

20. The delegate submits that in arriving at his decision he took into account Mr. Hoogendoorn's own evidence that he spent, on average, one to two extra daily hours in preparation for class.

21. The delegate submits that section 80 of the *Act* specifies the wage recovery period to six months before the date the complaint was filed and that there is no error in this respect.

22. Counsel for ELS submits that the appeal should be dismissed on the grounds that it fails to show any significant error or law, principle or fact. He argues that Mr. Hoogendoorn is simply attempting to re-argue the case.

23. Mr. Marshall says that ELS agrees that there was an agreement between the parties that Mr. Hoogendoorn would be paid vacation pay at a rate of 8% effective August, 2007, one month before the hearing and that Mr. Hoogendoorn and ELS reached agreement on the amount and terms and conditions of payment regarding the 8% outstanding vacation pay. He further submits that ELS has paid Mr. Hoogendoorn the outstanding amount and that the delegate's decision with respect to vacation pay need not be disturbed.

24. In his "reply" submission, Mr. Hoogendoorn says that he is entitled to be paid for all hours of work whether those hours are paid at regular time or overtime rates. He submits that the delegate erred in finding that he only worked an additional one to two hours per day, particularly in the months of February, March, April, May, June and July of 2007. He further submits that when he tried to decrease the amount of time he spent preparing for class, his students complained about the quality of his classes and that when ELS restricted his combined teaching and preparation hours to no more than 8 hours per day and 40 hours per week he was no longer able to get all of his tests and assignments marked.

25. Mr. Hoogendoorn alleges that the delegate failed to observe the principles of natural justice in that, had the delegate issued his Determination in a timely manner, he would have been able to submit a second complaint to cover the work he performed after April 22, 2007. He submits that "one of the principles of natural justice is that a decision maker should take into account relevant considerations and extenuating circumstances" and that was not done in his case.

26. Mr. Hoogensdoorn also submits, for the first time, that the delegate erred in attempting to "average" the amount of time he spent preparing for lessons, ignoring section 35 of the *Act.*

## ANALYSIS

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

(a) the director erred in law

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

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

28. The burden of establishing the grounds for an appeal rests with an Appellant. Mr. Hoogendoorn must show clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal. An appeal is not an opportunity to reargue a case made before the delegate.

### *Error of Law*

29. 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

30. 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.

31. 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.

32. Mr. Hoogendoorn's appeal document identifies only two errors of law, that is, that the delegate erred in limiting the period of time in which he could recover wages and erred in calculating his wages. The balance of the appeal sets out alleged factual errors. The delegate has acknowledged two calculation errors. I will incorporate the recalculated amounts in my Order and will not address those items further.

33. Mr. Hoogendoorn argues that the delegate erred in his interpretation of s. 80. That section provides that

> the amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning
>
> (a) in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of the employment
>
> …

34. I am unable to agree that the delegate erred in restricting Mr. Hoogendoorn's wage recovery period. Neither the Director nor the Tribunal have the discretion to avoid mandatory provisions of the *Act* or jurisdiction to extend that period (see: *Wes Woo* (BC EST #D430/02) and *Paradigm Management* (BC EST #D420/00).

35. Mr. Hoogendoorn also argues that, in failing to issue a "timely" decision, the delegate was unfair to him as, had it been issued sooner, he would have been able to file a second complaint to recover wages for an additional six month period.

36. 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. There is nothing in the Determination, the record or the submissions that persuades me that Mr. Hoogendoorn was deprived of an opportunity to present his case or respond to the employer's evidence. There is no statutory requirement that the delegate issue a Determination within a prescribed period and while a six month period between a hearing and the issuance of a Determination is lengthy in the circumstances of this case, I do not agree that the delegate failed to take into account "relevant considerations and extenuating circumstances", or otherwise failed to observe the principles of natural justice.

37. I am not persuaded that the delegate erred in calculating Mr. Hoogendoorn's wages. The record discloses that Mr. Hoogensdoorn's evidence was that, for the months of October 2006 until April 2007, he worked from .5 to 1.5 hours extra per day, and on some occasions, 2.5 hours extra per day, at regular wages. For some pay periods, he also indicated that he worked .5 to 1.5 hours at time and one half. The delegate considered this evidence along with the evidence of the employer. He arrived at his findings based on the evidence along with what he considered to be a reasonable amount of time for preparation. Although Mr. Hoogesndoorn suggests the delegate erred in his conclusions, I am not persuaded the delegate acted without any facts or a view of the facts that cannot be entertained.

38. Mr. Hoogendoorn also submitted that he was entitled to 8% vacation pay on his wages rather than the (amended) amount of 6%. As this evidence was not before the delegate at the hearing, it constitutes new evidence.

39. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

40. I am not persuaded that the evidence on which Mr. Hoogendoorn attempts to rely was unavailable at the time the hearing was held. ELS says that Mr. Hoogendoorn received 8% vacation pay beginning in August, 2007, a month prior to the hearing. Mr. Hoogendoorn could, and should, have presented this evidence to the delegate at the hearing. While I would dismiss the appeal on this issue in any event, I accept ELS's submission that it paid Mr. Hoogendoorn his additional vacation pay in February, 2008.

## ORDER

41. I Order, pursuant to Section 115 of the Act, that the Determination, dated March 20, 2008, be varied to reflect the following amounts owing:

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|---|---|
| Wages: | $2,037.20 |
| Vacation pay: | $ 122.23 |
| Interest: | $ 120.28 |
| Total: | $2,279.71 |

**Carol L. Roberts**
**Member**
**Employment Standards Tribunal**