Employment Standards TRIBUNAL

An appeal

- by -

Helmcken Holiday Resort Ltd. carrying on business as Helmcken Falls Lodge
("HRR")

- 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.: 2007A/53

DATE OF DECISION: August 15, 2007

DECISION

SUBMISSIONS

Andrew Nelson	on behalf of Helmken Holiday Resort Ltd.
Theresa Robertson	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") brought by Helmken Holiday Resort Ltd. ("HHR") of a Determination that was issued on May 10, 2007 by a delegate of the Director of Employment Standards (the "delegate"). The Determination found that HHR had contravened Part 3, Section 21, Part 4, Section 40 and Part 5, Section 46 of the *Act* in respect of the employment of Daniel Van Rooy ("Van Rooy") and ordered HHR to pay Van Rooy an amount of $6,264.35, an amount which included wages and interest.

2. The Director also imposed administrative penalties on HHR under Section 29(1) of the E*mployment Standards Regulation* (the "*Regulation*") in the amount of $1500.00.

3. The total amount of the Determination is $7,764.35.

4. HHR says the delegate failed to observe principles of natural justice in making the Determination. HHR says a letter it had submitted to a delegate of the Director, dated March 12, 2007, was not considered and a telephone conference of the same date with a delegate attempting to mediate a resolution of the complaint was not correctly relayed to the delegate charged with issuing a Determination. HHR has asked that a transcript of that telephone discussion be produced.

5. HHR also says that evidence has come available that was not available at the time the Determination was being made. The new evidence consists of wage sheets for Van Rooy for the period August 26, 2004 to May 16, 2006. HHR has submitted this new evidence as proof that Van Rooy never had to work overtime in April or May of 2006.

6. The Tribunal has reviewed the appeal, the material submitted in the appeal and the parties' submissions and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

7. The issue in this appeal is whether HHR has shown the delegate committed any reviewable error in making the Determination.

THE FACTS

8. The Determination provides the following background information:

> [Van Rooy] filed a complaint under Section 74 of the *Employment Standards Act* (the Act) alleging Helmken Holiday Resort Ltd. carrying on business as Helmken Falls Lodge (Helmken, the lodge, or the employer) contravened the Act by failing to pay overtime wages, statutory holiday pay and vacation pay as earned. Further he alleges that the employer made unauthorized deductions from his wages.
>
> A hearing was held, by teleconference, on December 12, 2006. During the hearing it appeared that neither of the parties had a clear understanding of the application of the Act to the issues in dispute. In view of this and in the interests of natural justice, I issued a preliminary findings letter, dated February 14, 2007. The letter outlined the issues and explained how the Act applied to them and gave the parties an opportunity to make final submissions and/or attempt mediation again. The parties made submissions and scheduled a settlement conference for March 12, 2007. This was not successful and the file was returned to me for final investigation and determination.

9. Van Rooy was employed by HHR as a chef from August 20, 2004 to May 27, 2006 at a rate of $17.00 an hour. HHR set out the terms of employment for Van Rooy in a letter dated 20th August 2004. Van Rooy's acceptance of the terms is recorded on a copy of the letter filed with the Director.

10. The Determination addressed whether Van Rooy was a "manager" under the *Act* and found he was not. In reaching that conclusion, the Director considered the issue from the perspective of whether Van Rooy's principal employment duties consisted of supervising and/or directing human or other resources and whether Van Rooy was *"employed in an executive capacity"*.

11. In support of his complaint for overtime wages, Van Rooy submitted a record of hours worked for a period from December 15, 2005 to May 27, 2006. The Director did not accept that record as an accurate reflection of hours worked in the period from December 15, 2004 to April 20, 2005. The reasons for that decision are found in the Determination and that decision has not been appealed. The Director did accept that the record accurately reflected Van Rooy's hours of work for the remainder of the period, from April 20, 2005 to May 27, 2005, and allowed the overtime claim for that period. The reasons for that decision are found in the Determination.

12. HHR produced what purported to be a record of hours worked each day by Van Rooy, but this record was not accepted by the Director as being reliable.

ARGUMENT AND ANALYSIS

13. 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.*

14. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds. In particular, and in the context of this appeal, the burden of showing the Director failed to comply with principles of natural justice in making the Determination is on HHR (see *James Hubert D'Hondt operating as D'Hondt Farms*, BCEST #RD021/05 (Reconsideration of BCEST #D144/04)).

15. 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). 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.

16. I shall first to consider whether the new, and additional, evidence that HHR has submitted with the appeal should be accepted and considered by the Tribunal.

17. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal has discretion to allow new or additional evidence. In addition to considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03).

18. The new evidence that HHR has submitted with the appeal comprises wage sheets for Van Rooy for the period August 26, 2004 to May 18, 2006. HHR says the purpose of submitting this information is to show some overtime had been worked and paid to Van Rooy during the summer of 2005. According to the appeal submission, HHR says:

> This proves that the claimant knew how to claim overtime and had he done so in the period immediately before he quit (namely the period covered by the employment standards determination), then he would have been paid it at that time.

> We want this evidence considered as proof that the claimant never had to work overtime in April or May 2006 and only made this spurious claim after he quit.

19. I am not satisfied this new evidence should be accepted or considered. This evidence was reasonably available and could have been provided by HHR during the complaint process. As well, I am not satisfied this information adds anything to the body of evidence which was already before the Director nor is it particularly probative of the premise for which it is submitted.

20. The added difficulty for HHR in asking the Tribunal to accept and consider this new evidence is that it is being submitted to challenge a finding of fact, a matter over which the Tribunal has no authority under Section 112 unless it can be shown the Director committed an error of law in making the challenged finding of fact. There is no suggestion of that in this appeal.

21. HHR says the Director failed to comply with principles of natural justice in three respects:

(i) failing to consider the March 12, 2007 letter and the accompanying documents;

(ii) failing to reflect in the Determination that HHR had agreed in mediation to pay some of the claims made by Van Rooy; and

(iii) failing to disclose letters received from Van Rooy and Don Keeping on March 20, 2007[1].

22. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker.

23. On the first point, the Director says the March 12, 2007 letter was considered in making the Determination. That assertion is confirmed by references in the Determination to submissions made in that letter and to the information provided with it.

24. In final reply, HHR makes the further argument that the submissions in the March 12 letter, and the documents included with it, were not given proper consideration by the Director. As indicated above, it is apparent the Director considered the March 12 letter and the accompanying documents. The Director did not accept that Van Rooy was employed in an executive capacity or that the new evidence provided with the March 12 letter was sufficiently probative to alter that conclusion. It is also apparent that HHR does not agree with the conclusion reached by the Director on this issue, but the appeal does not identify where or how the Director breached principles of natural justice. Having carefully reviewed the Determination in respect of the overtime claim, I can find no reviewable error in it.

25. HHR has not met its burden on this point.

26. The second point, in essence, does not raise an issue of natural justice. The basis for the appeal on this point is that the penalty imposition in respect of the Section 21 and Section 46 contraventions are unfair in the circumstances, which is that HHR had expressed its agreement to pay the amounts which the preliminary findings report indicated would be found owing for those contraventions.

27. Before addressing this point, I will address the request by HHR that the record of the telephone conversation which he had with the delegate assigned to attempt a settlement of the complaint in or

[1] This matter arose in the final reply submitted by HHR on the appeal as a result of the inclusion of those letters in the record produced by the Director under subsection 112(5).

around March 2007 be produced to the Tribunal. The Director, while not denying there was a telephone conversation between Mr. Nelson, on behalf of HHR, and that delegate, says there is no record kept of such discussions as they are settlement discussions conducted on a "without prejudice" basis. If there is no record of the telephone conversation, then of course none can be produced. Even if there were such a record, however, the Tribunal accepts that the mediation process is conducted on a "without prejudice" basis and, barring extraordinary circumstances, would not require, or allow, discussions which take place in that process to be brought into the appeal process.

28. HHR says the delegate conducting the mediation advised Mr. Nelson that the monetary penalties could be avoided if he agreed to pay the amounts that would be found owing if a Determination were issued. HHR says they did agree to pay some of the amounts and expressed that agreement in the March 12, 2007 letter. The relevant parts of that letter state:

> 5) Wage deductions – car and overpaid wages.
>
> We are prepared to reimburse the car payments and claw back in the sum of $1,951.22 and $680.00, but would request that Mr. Van Rooy signs an agreement to confirm his statement that he has no further interest in the ownership of the car.
>
> 6) Statutory Holiday Pay
>
> We are prepared to pay the amount of $278.46 for the Statutory Holiday of May 22nd 2006.
>
> We appreciate the telephone call from the mediator today and are disappointed that Mr. Van Rooy decided not to try to resolve this dispute.
>
> Please let us know when you have reconsidered the above items because we do wish to resolve this dispute without penalty and we should like the opportunity to do so before a formal determination is made.

29. The Director also says there is no indication there was any settlement of any part of the complaint during the mediation process. Finally, the Director says if there was any willingness or intention on the part of HHR to pay parts of the claim made by Van Rooy, it was not manifested in any effort by HHR to make a payment to the Director or Van Rooy before the Determination was issued.

30. In its reply to the submission of the Director, HHR says if the mediating delegate had instructed Mr. Nelson "to make a payment immediately (or at least advised it was something [he] should do)", he would have done so. HHR also says the mediating delegate told Mr. Nelson that another preliminary findings report would be issued prior to the Determination and consequently there was no immediate need to settle or pay the wage deduction and statutory holiday pay matters.

31. This aspect of the appeal is an attempt by HHR to avoid the monetary penalties prescribed in Section 98 of the *Act*.

32. It is unnecessary to review the administrative penalty provisions in the *Act* and *Regulation*. There have been many decisions of the Tribunal that have done that, including *Royal Star Plumbing, Heating & Sprinklers Ltd.*, BC EST #D168/98 and *Director of Employment Standards (Re Summit Security Group Ltd.*, BC EST #RD133/04. It suffices to say the legislative scheme provides mandatory penalties where a contravention is found by the Director in a Determination issued under the *Act*.

33. I am not persuaded that HHR has demonstrated a valid ground of appeal on this point. The circumstances dictate a different conclusion.

34. Van Rooy claimed payment for amounts he felt were owed to him in June 2006. He filed his complaint with the Director in July 2006. There was an attempt at mediating the complaint in November 2006 and a complaint hearing on December 12, 2006. His claims were opposed by HHR throughout the process.

35. The Director issued a preliminary findings report on February 14, 2007, which indicated that if a Determination were to be written, HHR would be found to have contravened Sections 21, 40 and 46 of the *Act* and would be found to owe Van Rooy wages in the amount of $6,179.59. The preliminary findings report contains the following comments:

> If either party wishes to discuss settlement options with a mediator, please contact Paulette Weber at (250) 861-7303 to make arrangements. Should Mr. Nelson wish pay [sic] Mr. Van Rooy $6,179.59 in settlement of his complaint, he should contact Ms. Webber to make arrangements for Mr. Van Rooy to either sign a settlement agreement or a withdrawal of complaint form.
>
> If the complaint is not resolved by February 28, 2007, I will issue a determination based on the evidence before me at that time.

36. The Director is not required to issue a preliminary findings report. The decision to do so, however, is consistent with the purposes of the *Act* and likely contributes significantly to a settling many complaints and avoiding a myriad of problems for the Director. In this case, the report provided a very clear message to HHR that its position on the claims made by Van Rooy was tenuous at best and that the claims should be paid in the amount shown.

37. It does not appear that Mr. Nelson contacted Ms. Webber until February 28, 2007. On March 1, 2007, Mr. Nelson sent a letter to Director, asking whether HHR was able to make partial payment to settle the statutory holiday and overtime items and avoid the penalties and about the ownership of the car and the balance due to HHR on it if he were to settle the entire claim. There is no reply from the Director in the Record or in the appeal.

38. There is no indication that HHR did anything substantive through the entire period from June 2006 to May 10, 2007 about resolving or settling the complaint. The only indications of interest in paying part of the claim occurred following the preliminary findings report, in the questions asked in the March 1, 2007 letter and in the statements reproduced above from the March 12, 2007 letter. Even then, HHR made no effort to tender any amount to the Director.

39. In its final reply, Mr. Nelson, on behalf of HHR says:

> By simply ignoring the discussions I had with the mediator and my letter of March 12th and issuing a Determination, I was denied the ability to settle the claim without penalty.

40. That statement is fundamentally incorrect. HHR had the ability to settle this complaint at any time up to the issuance of the Determination and more than enough opportunity to do so.

41. In all of this, the fact remains that HHR contravened the wage deduction, overtime and statutory holiday provisions *Act* and refused to accept there was any contravention until faced with the likelihood of an

adverse Determination. Even then HHR did nothing substantive to attempt to avoid the issuance of a Determination on all of the claims made by Van Rooy.

42. I see no reason why the Director should not have issued the Determination and imposed administrative penalties for the contraventions which were found.

43. On the third point, I do not find that HHR has any ground for complaint concerning the final comments submitted by Van Rooy to the Director on March 20, 2007, which includes the letter from Mr. Keeping. There is nothing in the final comments from Van Rooy that is new. For the most part, the comments respond to the material provided by HHR in the March 12 letter and speak to the issues of whether Van Rooy was a manager under the *Act* and whether he worked overtime hours.

44. There argument is rejected and the appeal is dismissed.

ORDER

45. Pursuant to Section 115 of the *Act*, I order the Determination dated May 10, 2007 be confirmed in the total amount of $7,764.35, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal