Employment Standards TRIBUNAL

An appeal

- by -

Bruce Cownden and Ronalyn Cownden operating as 486425 B.C. Ltd.
("Cownden or employer")

- 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: Paul E. Love

FILE No.: 2000/714

DATE OF HEARING: January 30, 2001

DATE OF DECISION: February 12, 2001

DECISION

APPEARANCES:

Bruce Cownden and Ronalyn Cownden

William Wood

Jindy Manj

OVERVIEW

This is an appeal by the employer of a Determination, dated September 22, 2000. The employee worked twelve hour shifts, scheduled by the employer for two seasons, without complaint. The employee ceased working and filed a written complaint with the Director of Employment Standards. The employer claims that the employee did not file the claim for overtime wages within six months of the date of last employment. The employer alleges that it was mandatory for the employee to fill in the date that he signed the complaint form, on the complaint form, and the failure to do so invalidated the claim. The employer claims that there was a reasonable doubt as to whether the complaint was filed in time given a number of "errors in dates" made by the Delegate, and by the Tribunal in scheduling the appeal hearing and permitting a late filed submission by the employee. The employer admitted that there was no error in the calculations of the amount of overtime pay made by the Delegate but disputed its liability to pay overtime. I confirmed the Determination as the complaint with regard to overtime was filed within six months of the date of the last day worked.

ISSUES TO BE DECIDED

Did the Delegate err in finding that the complaint was filed within six months of the date the employee last worked?

Did the Delegate err in finding that the employee was entitled to overtime pay?

FACTS

I held an oral hearing in Nanaimo on January 30, 2001, and heard evidence and argument from Bruce Cownden, William Wood, and Jindy Manj.

William Wood worked as a seasonal maintenance/security person for the employer, in its operations at the Rathtrevor campground on Vancouver Island. He worked for the employer for the 1998 and 1999 season. The employer scheduled its security people for three day shifts of eight hours duration and three night shifts which ran from 6:00 pm to 6:00 am,

followed by three days off. The employer had been doing this for 12 years. The employer did not have a variance from the Director and had not instituted a flexible work schedule as outlined by the *Regulations*. Mr. Woods last day of work with the employer was September 13, 1999.

The complaint form which initiated the investigation was undated by Mr. Wood, but date stamped by the Employment Standards Branch ("Branch") office in Nanaimo as received on March 13, 2000.

The Delegate found that Mr. Wood filed his complaint within the time period specified by the *Employment Standards* A*ct* (the *"Act"*).

Mr. Wood worked overtime on a regular basis as a result of working a twelve hour shift, and a lunch period, on a regular basis. The Delegate found that Mr. Wood was entitled to the sum of $1,228.28. This finding was made on the basis of comparing the timesheets and employee paystubs. Mr. Wood was not paid overtime for hours in excess of eight hours per day. Mr. Wood was paid on the basis of the time sheets submitted. Mr. Wood did not object to the shift scheduling during the course of employment. He did, however, file a complaint which included a claim for overtime, after his employment ceased. The employee inquired initially about a claim for compensation for length of service, however, the Delegate found that the employee had no entitlement to compensation for length of service. The Delegate determined that the employer violated sections 35 and 40 of the *Act*.

The calculation of the amount found by the Delegate to be due and owing is not disputed by the employer, however, the employer does dispute its liability to pay overtime. The employer believes that the original claim presented by Mr. Wood to the Director was for compensation for length of service. The employer argues:

(a) the claim for overtime was not presented by the employee within six months of the date of termination;

(b) the employee did not date the form, and that it was mandatory for the employee to date the form;

(c) The complaint and information form submitted by the employee is not dated as required and the original form has been altered by a different pen;

(d) the Delegate erred with regard to the date placed on correspondence sent to the employer during the investigation of the complaint;

(e) the Tribunal erred in issuing a notice of hearing for January 15th, 2001 9:00 am when the dated for hearing scheduled with the adjudicator was January 16th, 10:00 am;

(f) the Tribunal erred in permitting Mr. Wood to late file a submission to the Tribunal, which was dated November 23, 2000 and received by the Tribunal on November 29, 2000;

(g) the Delegate erred in investigating an overtime complaint, when the complaint related to compensation for length of service;

I note that the allegations in (d), (e) and (f) above are not probative of any error in the "dating" of the complaint. I note that there is no prejudice shown by the employer with regard to the late filing of the employee's submission in this appeal. I note from reviewing the complaint form, that the employer is incorrect in (g) above, as this complaint is about overtime, and not compensation for length of service.

Mr. Wood gave evidence and was cross-examined. He stated that he had been in to see someone at the Employment Standards Branch approximately three weeks before he filed the complaint. He stated that he returned and filed the complaint on the date stamped by the Delegate. He indicates that he did not date the form, and that he forgot to date the form. The employer says that this is improbable because Mr. Wood was a meticulous record keeper while employed. I have no hesitation in concluding that Mr. Wood signed the form (the original of which was entered as Exhibit "1") on March 13, 2000. I note that it is unfortunate that this complaint was not assigned to the Delegate for investigation until July 19, 2000. The only alteration to the form as submitted by the employee was that portions of section D of the details of the complaint were highlighted by the Delegate.

The employer argues that it is mandatory that a complaint be dated. The employer filed as exhibit "2" a print out from the website of the Director an "Employment Standards Branch Complaint Submission Form". This form indicates that the field for the date of the complaint is mandatory.

The employer argues that the complaint made by Mr. Wood dealt only with severance pay. He finds some support for that argument by alleging that no details of an overtime complaint are set out in Section D of the complaint form. The employer also argues that in section C the check mark beside overtime appears to be made in different ink. While Mr. Wood cannot recall at this time whether the check mark was placed on the form by him or by the staff person in the Office of the Employment Standards Branch, he did testify that the overtime box was checked at the time that he filed the form. I note that Mr. Wood did apparently check the answer "yes", in Section B that the complaint was about hours of work and overtime. I do not agree with the employer's submission concerning overtime. It is apparent from reading the complaint form as a whole, that overtime was an issue raised.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the employer to establish an error such that I should cancel or vary the Determination. In this case the

employer relied on a number of "procedural arguments" to attempt to prove that the Delegate erred, but curiously did not attack the substance of the Determination. In this case there is no doubt that this employer violated the overtime provisions of the *Act*, and that the employer failed to pay Mr. Wood overtime pay. The employer accepts that the calculations of the Delegate are correct.

It is unfortunate that the investigation of this complaint commenced approximately 10 months after the date the employee ceased working. I mean this as no criticism of the Director, perhaps there are issues relating to workload or allocation of resources, but the *Act* is intended to provide for speedy resolution of complaints. The first letter sent by the Delegate contained a typing error with regard to the date of the letter, which apparently triggered some suspicion by the employer concerning the complaint. The employer could not have been mislead in any way by the letter which he received on or about August 4, 2000, which was dated August 28, 2000, but written on July 28, 2000. There was no prejudice to the employer from the letter. The employer's suspicion was compounded by Mr. Wood's complaint form which was date stamped by the Employment Standards Branch, but was not dated by the employee.

I note that this is apparently the first employment standards complaint, received by this employer, who has provided employment for many employees and who takes pride in a good working relationship with employees in the workplace. The employee, obviously took a different view of the atmosphere at work, as set out in the complaint form. It is unnecessary for me to make any determination regarding atmosphere in the workplace. It is apparent that for whatever reason, Mr. Wood was dissatisfied with his treatment by this employer and filed a complaint. The reasons he filed the complaint are not relevant, unless of course it could be shown by the employer that the complaint was without foundation. Motive in filing a complaint may be relevant if the employer is alleging that the complaint is fabricated or without foundation. This case, however, involves a clear violation of the provisions of the *Act* regarding overtime. The Delegate determined the complaint on the basis of the employer's records.

Formal Requirements for a Complaint:

The *Act* sets out a requirement that an employee who has ceased employment and who wishes to make a complaint under the *Act* must submit a complaint, in writing, within six months after the last day of employment - see sections 72(2)(3)(4). The *Act* does not set out the content required for a written complaint. While the Director uses a standard form to take in complaints, there is no form prescribed in the *Act* or *Regulations* for the filing of a complaint. Here there was a complaint in writing signed by the employee.

The employer suggests that the employee did not raise the issue of overtime in the complaint. The employer argues that the failure to specify the details of the overtime claim in section D of the complaint form invalidates the complaint. I do not accept that submission. In section

D of the form, the employee explains why he has filed his complaint. His reasons relate to his dissatisfaction with the workplace, and a supervisor in the workplace. In section B of the complaint form, the employee identifies that the complaint relates to hours of work and overtime, by checking the appropriate box.

In order to present a claim for filing with the Director, all the claimant need do is identify, in writing, that the complaint is a complaint under the *Act*. There is no requirement for the employee to particularize the details of the claim made. It is not essential that the complainant set forth the complaint with precision. The information must be sufficient to disclose an alleged violation of the *Act*. If those minimum requirements are set out, the Delegate will investigate the complaint. If, during the course of an investigation of a compensation for length of service complaint, the Delegate discovers an overtime complaint, I see no restrictions in the *Act* on the jurisdiction of the Delegate to investigate the complaint provided there is some disclosure that the "complaint is an hours of work or overtime complaint".

The Director is empowered to investigate as long as the complaint is in writing under the *Act*. The Director may be able to conclude an investigation in a more efficient manner, if the employee particularizes the claim. An employee may not have sufficient information to particularize a claim. The employer, however, is required to keep records under the *Act* that relate to hours of work. There is no similar statutory requirement for an employee. I am not prepared to impose more onerous requirements on "formality", than those the legislature felt was necessary in the drafting of this legislation.

The lack of particulars, may in certain circumstances, cause a time barrier to a complaint if a new complaint surfaces, the six month time period has expired, and the particulars of the complaint cannot be linked to the claim form filed. In this case, however, there is no difficult as the employee's claim for overtime is clearly disclosed in the claim filed with the Director. The employee disclosed in section C the complaint was about hours of work or overtime, and as set out in section C the employee believes that overtime is owing. I note section C also makes reference to attached pages, which the employee says were removed from the complaint at the time of the filing, because he was told by the receptionist at the Employment Standards Branch counter that this information was unnecessary.

Issue of Fact - Date of Filing of Complaint

Applying the provisions of the *Interpretation Act, RSBC, 1996 c. 238*, the last day for filing a complaint within 6 months of the date last worked would have been March 14, 2000: *Schermerhorn, BCEST #D 205/98*. The employer's argument that the complaint was filed on the last day for filing is incorrect.

The employer argues that I should have some doubt about the date, and that the date might be a clerical error in light of other clerical errors in dates, made after the complaint was filed by

the Delegate and by the Tribunal. I have no doubt that the complaint form was filed on March 13, 2000, which is the date stamped by the Employment Standards Branch. The employer argues that it is mandatory that the employee must fill in the date on the complaint form. The employer argues this is so because the complaint submission form on the Director's website indicates that the field for the date of the complaint is mandatory. I do not accept the employer's argument that because the form on the Director's website (a copy of which was filed as Exhibit #2) indicates the date of the complaint is mandatory, that the complaint is of no effect. The Director may have set up their "e-filing" system to reject the transmission of undated complaints. I do not accept the argument of the employer that writing the date on the form is mandatory, all that is mandatory is that the Director receives the complaint in writing within six months of the last date of employment.

It is a question of fact whether the complaint was filed in time. This Tribunal will not set aside a finding of fact by the Delegate unless the finding was unreasonable, in that there is no evidentiary basis for the finding. An undated complaint form may raise an issue as to whether the complaint was filed in time under the *Act*. There was evidence before the Delegate, however, that the complaint was filed in time. That evidence consisted of the date stamp placed on the complaint by the branch. The submission of the employer that the date filed "could be incorrect", is not supported by any evidence. The evidence of Mr. Wood is that he filed the complaint on March 13, 2000, and that he did not sign the form through inadvertence and inexperience in dealing with government forms. I accept his evidence, and was given no reason by the employer why his evidence should not be accepted. This complaint was filed on March 13, 2000, and was within six months of the date Mr. Wood last worked. I note that in light of the evidence tendered at this hearing, the failure by Mr. Wood to write in the date on the complaint form is a technical irregularity, within the meaning of s. 123 of the *Act*, and a technical irregularity does not invalidate a proceeding.

Having received a complaint, filed in time, it is the duty of the Delegate to investigate the complaint. This is set out in s. 76 of the *Act*. In certain circumstances, none of which apply to the present case, the Director has the discretion to refuse to investigate a complaint, stop or postpone investigating a complaint. These circumstances set out in s. 76(2) include:

(a) the complaint is not made within the time limits;

(b) the Act does not apply to the complaint;

(c) the complaint is frivolous, vexatious or trivial;

(d) there is not enough evidence to prove the complaint;

(e) another proceeding has commenced;

(f) a decision has been made relating to the subject matter of the complaint by a court, tribunal or arbitrator;

(g) the dispute that caused the complaint is resolved

I note that a vague complaint form may cause the Delegate some concern that the complaint is frivolous, vexatious or trivial. In this case, however, the Delegate's investigation revealed that the employee had a valid complaint regarding overtime. In the investigation the Delegate found clear breaches of the *Act* by the employer in how it scheduled its security people. Given the evidence of the employer at this hearing, there may be other maintenance/security employees who have valid complaints, because the employer was unaware of his obligations under the *Act* with regard to shift scheduling and overtime. The employer's practice of scheduling twelve hour shifts without a variance, and without a flexible work schedule as defined in the *Act* and *Regulations*, had been a lengthy practice prior to this Determination.

Working the Shifts without Complaint:

The employer has the responsibility to control overtime worked by an employee - see s. 35 of the *Act*. If the employer wishes to avoid liability for payment of overtime, the employer must take steps to ensure that the employee does not work overtime: *BCA Industrial Controls, BCEST #D 245/97; Decock, BCEST #D206/97, International Energy Systems Corp, BCEST #D 189/97*. In this case the employer scheduled twelve hour shifts, which were worked by Mr. Wood without complaint for two seasons. The employer was apparently unaware of the requirements of s. 35 and of the *Act*. An employer cannot defeat a claim for overtime by relying on lack of knowledge. It is apparent from the evidence of Mr. Cownden that he did not "knowingly" violate the overtime provisions of the *Act*. The employer views it as unfortunate that Mr. Woods did not attempt to settle the complaint with him before complaining to the Director. There is no requirement in the *Act*, however, that an employee commence or exhaust negotiations with an employer prior to filing a complaint.

Section 4 of the *Act* is often a significant shock to new employers or employers not familiar with this legislation, as the *Act* does interfere with the traditional notion of "freedom of contract". Employees cannot contract away the minimum standards set out in the *Act*. The *Act* places a significant obligation on employers, not only to know the law, but to post the standards in the workplace. The fact that the employee agreed to work a twelve hour shift is irrelevant to the issue of whether the employer breached the *Act*. Section 4 of the *Act* clearly states that an agreement which is contrary to the *Act* is void. Any performance of the agreement by the employee, without complaint, does not excuse the employer from its obligation to adhere to the *Act*. This Tribunal has held, on numerous occasions, that an agreement to work for straight time wages for all hours of work is void under s. 4 of the *Act: Re Regional Security Ltd., BCEST #D200/97 ; Goldsmith Enterprises Ltd., #D042/97), Cliff Roussel Construction Ltd., BCEST #D235/97 ; Northway Restaurant Ltd., BCEST #D133/97.*

The employer suggests that he paid in error Mr. Wood for a lunch break. The employer did pay the employee for a meal break in accordance with its time sheets. The Delegate relied on the employer's time sheets in his calculations. The employee was required to be available for

emergency call out, and often had a radio with him during his meal breaks. I am not satisfied that the Delegate erred in relying on the employer's records in the calculation of the amount of overtime due and owing to the employee.

The employer has demonstrated that there were typographical errors in a letter issued by the Delegate prior to the Determination. This error is of no consequence in assessing whether the Delegate erred in finding that the complaint was filed in time, or that the employee was entitled to overtime wages.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination dated September 22, 2000.

Paul E. Love

Paul E. Love
Adjudicator
Employment Standards Tribunal