An appeal

- by -

Robert A. Wing
("Wing")

- 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: David B. Stevenson

FILE No.: 2000/697

DATE OF DECISION: February 14, 2001

British Columbia

DECISION

APPEARANCES

on behalf of Robert A. Wing In person

on behalf of Diamond Seafood & Steak House Ltd. Augustis (Gus) Tsisgonias

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Robert A. Wing ("Wing") of a Determination that was issued on September 22, 2000 by a delegate of the Director of Employment Standards (the "Director").

Wing had filed a complaint with the Director alleging his former employer, Diamond Seafood & Steak House Ltd. ("Diamond"), had contravened the overtime wage and statutory holiday pay provisions of the *Act*. The sole matter considered in the Determination was the overtime claim, as the statutory holiday pay claim was resolved during the investigation and prior to the issuance of the Determination. In respect of the claim for overtime wages, the Determination concluded that Diamond not contravened the *Act* and closed the file on that matter of complaint.

The Determination found that there was not enough evidence to prove that Wing had worked the hours he claimed. Neither Diamond nor Wing had kept a daily record of hours worked.

In this appeal, Wing reasserts the claim he made in the complaint and which was noted in the Determination as follows:

> Robert A. Wing ("Wing") alleges that he worked as a line cook, for a minimum of nine hours per day, six days per week for a monthly salary of $1800.00 and that the employer owes him overtime and statutory holiday pay.

The Director did not appear at the hearing of this appeal and filed no submissions in reply to the appeal.

ISSUE

The sole issue is whether Wing has shown the Director was wrong to have denied his claimed for overtime pay.

THE FACTS

Diamond is a restaurant in Osoyoos, British Columbia. Wing was employed there as a cook from July 15, 1999 to April 23, 2000. The restaurant was open from 4 pm to 10 pm six days a

week. There was no dispute that Wing was required to work six days a week and, with very few exceptions, that he would finish work at 10 pm on each of those days. Nor is there any dispute that in some weeks Wing did not work all six days. The dispute between Wing and his employer was when he started work. Wing said he started work at 1:00 pm each day, while Mr. Tsisgonias, one of the owners of Diamond, said he started at 3:00 pm. The Determination stated Diamond's position as follows:

> The employer states that he hired Wing on July 15, 1999 and he was employed until April 23, 2000, when he quit. The employer advises that the rate of pay was $1,800 per month, six days a week. The restaurant opened at 4.00 PM, therefore Wing was to start work at 3.00 PM. Osoyoos is a small town and only busy July and August. Wing would be finished work at 10.00 PM. The employer did not think it necessary to keep a record of daily hours as Wing is a salaried employee and family. The employer states that Wing did not work over forty hours in a week or 8 in a day and no overtime is due.

Wing was paid twice a month. When he did not work all six days in a week, his pay was deducted an amount equivalent to the number of days he did not work. The evidence showed that in January, March and April, 2000, there were 14 days wages deducted from his pay at a rate of $69.23 for each day he did not work. There is no material showing whether he was deducted any days during 1999.

In one of his submissions on the appeal, Mr. Tsisgonias made the following point:

> When Mr. Wing was first hired. It was explained to him that he had a choice of either work by the hour $7.15 per hour and in winter work would be very minimal and he would likely be laid off due to slow down of the business. Or he could go on salary and receive $1800.00 per month and have employment year round. The reason for this is that in the summer months the business is very busy it is difficult to find workers for such a short period of time and also it helps keep employees from having to seek a second job in the winter months.

Wing was given a Record of Employment (ROE) on or about February 2, 2000. The ROE was prepared and issued by the Accountant for Diamond. The information shown on it, and the source of it, was the subject of much dispute in the submissions and again at the hearing. On its face, the ROE appears to support Wing's assertion that he worked nine hours a day, six days a week. Mr. Tsisgonias says the information recorded on the ROE is incorrect; it was based on wrong information provided by his wife, Maria Tsisgonias, also an owner of Diamond and its manager, to their Accountant. Mr. Tsisgonias provided a letter from the Accountant's office, dated October 25, 2000, part of which stated:

> On the morning on January 31, [2000,] the owner, Maria Tsisgonias, faxed the payroll to me. I spoke with her that afternoon to obtain the hours worked daily by Robert Wing as that information had not been provided previously. Since he was on salary, the hours were not relevant on a pay to pay basis. At that time Maria advised me that Robert was working 9 hour days, 6 days per week. These hours were used to prepare his ROE.

The author of the letter was not called to give evidence at the hearing. In his reply to the appeal, Mr. Tsisgonias also commented on this point:

> The Accountant stated she needed to know how many hours per day Mr. Wing worked so she could calculate his insurable hours. My wife said she did not know how many hours Mr. Wing worked. She was not in charge of the kitchen staff. She would arrive at work between 4 and 5 PM daily. So she went to Mr. Wing and asked him what time he started work and what time he finished so the Accountant could calculate his hours for his UI. Mr. Wing stated he started at 1 PM and finished a 10 PM. This is what Maria told the Accountant.

In his evidence, Wing denied having been asked or having told Mrs. Tsisgonias what his hours of work were. Mrs. Tsisgonias did not appear or give evidence at the hearing.

Wing applied for unemployment insurance benefits after his employment with Diamond ended on April 23, 2000. His application for benefits was denied by the Commission on the basis that he had quit his job without just cause. Wing appealed that decision to a Board of Referees, which held a hearing on the appeal on October 17, 2000. While I am not bound by the findings of fact made by the Board of Referees, I refer to them because they bear on the factual dispute in this appeal. In the Board of Referees decision, they stated, under the heading Findings of Fact:

> The employer submitted records of employment showing 50 - 60 hours of work per week (exhibits 3.1 and 6), which the employer could not explain and, in fact, he disagreed with his own records.

The exhibits referred to were two ROE, the one described above and one that was issued on or about May 2, 2000. The material emanating from the hearing before the Board of Referees also included notes of a telephone conversation between a representative of Diamond and an HRDC Officer on July 19, 2000, which contained the following statement:

> His separation slip was left at his mother-in law's where Rob picked it up. His normal hours were normal [sic] 1:30 - 10:00 PM 6 days a week but staff worked reduced hours during the winter up until May and were expected to work harder during the summer and were paid a regular semi-monthly salary for 11 months every year.

Both parties called a number of witnesses. Wing called his wife, Annabelle Wing, Sharon Prieston, Paul Dias and Gwyn Dias. He also gave evidence. Mr. Tsisgonias, on behalf of Diamond, called Alex Nunes and Charles Feist, as well as giving evidence himself. The objective of the evidence provided by the parties was to establish their respective positions. None of the evidence was determinative. Some of it was helpful, some of it was not.

Wing was employed from July 16, 1999 to April 23, 2000. As the Determination noted, the employer kept no record of daily hours worked. The evidence of Mr. and Mrs. Dias and Mr. Nunes was not very helpful at all. Mr. Dias referred to a "few" times, maybe three, where he had dropped Wing at work, at "around 1:00 pm" and a "few" more times where he had picked him up from work. Mrs. Dias referred to periods of time in July and August, 1999 and a few days

during the Christmas season, 1999 where she had been at the restaurant at "lunch" and had seen Wing there. It appears that "lunch" at the Diamond was a social occasion involving friends and/or family of Mr. and Mrs. Tsisgonias. It was not a time that the restaurant was open to the public. Mr. Nunes referred to seven or eight occasions where he and his wife had been invited to the restaurant for "lunch" with Mr. and Mrs. Tsisgonias. He described "lunch" as taking place from about 12:15 pm to 1:00 or 1:15 pm. On these occasions, he did not recall seeing any staff other than "Chuck" [Charles Feist], who could have been there when he arrived or "maybe would come in later". He couldn't recall, apart from the foregoing, whether there was anyone in the kitchen.

Mrs. Wing stated her husband started work at 1:00 pm and finished at 10:00 pm. Her knowledge was based on two matters: first, her dropping her husband off at work and picking him up during those times when she was not working; and second, from dropping into the restaurant to have "lunch" with her sister, Maria Tsisgonias. Mrs. Wing worked full time from mid-November, 1999 until the end of January, 2000. She worked part-time for periods from mid-August, 1999 to November, 1999, on weekends, and from February, 2000 to April, 2000, half days.

Ms. Prieston said that she baby-sat for Mr. and Mrs. Wing from mid-December, 1999 until late April, 2000. She testified that Wing would drop the children off at approximately 12:50 pm and that he was always dressed for work when he dropped them off. While Ms. Prieston's evidence is also not determinative that Wing started work at 1:00 pm every day throughout his period of employment, it suggests a strong probability that he was at the work place well before 3:00 pm.

Mr. Feist was, and continues to be, employed as a cook at the Diamond. He was asked by Mr. Tsisgonias whether he could recall if there were times when Wing "arrived late" and/or "left early". When asked to clarify what was meant by "late", Mr. Tsisgonias characterized arriving "late" as arriving "after 2:00 pm" and leaving early as leaving "before 10:00 pm". Mr. Feist said he could recall there were such instances, but could not be specific about when they occurred or their frequency. He was asked by Mr. Tsisgonias to state what time he started work and he replied that he usually started about 2:00 or 3:00 pm "depending on what needed to be done". Mr. Feist was never asked to confirm what the Determination notes he told the investigating officer, that Wing would "usually start at 3:00 - 3:30 PM".

ARGUMENT AND ANALYSIS

In this case the burden is on Wing, as the appellant, to establish an error in the Determination such that I should vary or cancel it. In his appeal submission, Wing challenges factual references found in the Determination, specifically the assertion made by Mr. Tsisgonias that Wing "was to start work at 3:00 PM" and the statement made by Mr. Feist that Wing "would usually start at 3:00 - 3:30 PM". The Determination, however, does not on its face include either of those references in its Findings of Fact, which simply states:

> I find that Wing was an employee and worked from July 15, 1999 to April 23, 2000. The employer does not have a daily record of hours. I do not have a schedule of hours worked, therefore I cannot request overtime to be paid. The

> employer is in violation of the Employment Standards Act for not keeping proper records.

In its Analysis, the Determination says:

> I CANNOT REQUEST THAT THE EMPLOYER PAY OVERTIME WHEN I DO NOT KNOW THE HOURS WORKED. THE EMPLOYMENT STANDARDS ACT SECTION 76(2) READS AS FOLLOWS:
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> 76. (1) Subject to subsection (2), the director must investigate a complaint made under section 74.
>
> (2) The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if . . .
>
> (d) there is not enough evidence to prove the complaint, . . .
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> It is evident there is not enough evidence to prove the complaint, therefore I cannot proceed. I cannot accept Wing's record of hours worked for August, 1999. I find it difficult to believe that Wing started work every day at exactly the same time, when the restaurant does not open until 4:00 PM.

There is no other reason for dismissing the complaint than the conclusion there was not enough evidence to prove the complaint and, essentially, this appeal challenges the discretion exercised by the Director under subsection 76(2)(d).

Where an exercise of discretion is being challenged in an appeal, the Tribunal has adopted an approach that is described in the following comments from the Tribunal's decision, *Re Joda M. Takarabe and others*, BC EST #D160/98:

> In *Jody L. Goudreau et al* (BC EST # D066/98), the Tribunal recognized that the Director is "an administrative body charged with enforcing minimum standards of employment . . . " and ". . . is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate." The Tribunal also set out, at page 4, its views about the circumstances under which it would interfere with the Director's exercise of her discretion in administering the Act:
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>> The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
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>>> . . . a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly

> > in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".
> >
> > Associated Provincial Picture Houses v. Wednesbury Corp., [1948] 1 K.B. 223 at 229
>
> Absent any of these considerations, the Director even has the right to be wrong.
>
> Section 81 of the Act requires the Director to include, in a determination, the reasons for it. When assessing an argument that the Director has considered immaterial factors or failed to consider material factors, the Tribunal will confine itself to an examination of the relevant determination.

> In *Boulis v. Minister of Manpower and Immigration*, (1972), 26 D.L.R. (3d) 216 (S.C.C.), the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for bona fide reasons, must not be arbitrary and must not base her decision on irrelevant considerations.

There was no argument raised about whether the Director abused her authority or exercised her discretion in bad faith. Clearly, she did not. Nor can there be any issue about whether the Director had the authority, within the limits set out in subsection 76(2), to stop investigating the complaint and issue the Determination. I do, however, have a concern that the exercise of discretion by the Director was "unreasonable", in the sense described above. In my view, there was enough evidence to prove the complaint and the conclusion of the Director in this case has confused evidence proving the complaint with evidence establishing the scope of the remedy.

As I have noted above, there was no factual dispute that Wing worked six days a week and that, with few exceptions, he finished work at 10:00 pm. Otherwise, there were two main factual elements to the complaint made by Wing, only one of which was addressed in the Determination.

The first element was the claim by Wing that he started work every day at 1:00 pm. The Director considered this element of the claim and did not accept it, saying she found it "difficult to believe" that he would have started work every day, from mid-July, 1999 to late April, 2000, at exactly the same time. In my view that conclusion, considering the circumstances and the milieu in which the complaint arose, was both fair and reasonable. However, as I will explain later, deciding only that Wing did not start work every day at 1:00 pm does not determine whether he was entitled to overtime pay, it only decides that he was not entitled to daily and/or weekly overtime based on working nine hours a day.

The second element to the claim made by Wing was that no breaks were taken during a shift. This part of the claim was not addressed at all in the Determination. The Determination indicates Diamond took the position during the investigation that Wing "was to start work at 3:00 PM". That position was re-asserted, with some modification, in submissions to the Tribunal and during the hearing.

The position taken by Diamond was that Wing was to start work at 3:00 pm. In the reply submission filed by Diamond, Mr. Tsisgonias says:

> Mr. Wing has never worked over 8 hours in one day. He has worked as little as Three hours in a day, especially during winter months.

As well as determining the merits of Wing's claim, the Director was required to consider this assertion because, if it is not yet apparent, the only basis upon which it could reasonably be concluded that Wing was not entitled to some overtime pay would be if it was concluded that he never started work before 3:00 pm *and* that he received the required meal break. On the face of the Determination, it does not appear the Director has done this. On the evidence before me, any suggestion that Wing did not start working before 3:00 pm is as equally "difficult to believe" as the assertion made by Wing that he started every day at 1:00 pm. As well, if no meal break was allowed, as Wing said in his complaint, or if he was required to be available during his meal break, he would, even on the position taken by Diamond, have worked more than 40 hours in a week (6 days a week, seven hours a day). This matter was also an element of the claim that the Director was required to consider but did not.

Notwithstanding the decision to reject Wing's claim that he worked from 1:00 pm to 10:00 pm every day during his employment, there was ample evidence suggesting Wing worked more than forty hours in a week. In the first reply submission to the appeal filed on behalf of Diamond, Mr. Tsisgonias stated:

> Mr. Wing has NEVER started working before 3:00 PM EXCEPT on Tony's days off and Chuck's days off.

That statement is some acknowledgement that on at least two days each week, Wing started work before 3:00 pm. As well, Tony, who is the owner's son, was not working at Diamond during March and April, 2000, suggesting Wing may have started before 3:00 pm more frequently during those months.

Next, two ROEs, issued by Diamond's Accountants on information provided by Mrs. Tsisgonias, showed Wing worked 50 - 60 hours a week. Mrs. Tsisgonias did not appear or testify that the "error" in those ROEs was caused by incorrect information given to her by Wing, as Mr. Tsisgonias alleged. Third, notes submitted to the Board of Referees hearing of a telephone discussion between an HRDC Officer and a representative of Diamond suggest there was some confirmation by Diamond that Wing's normal hours were 1:30 pm - 10:00 pm, six days a week. Fourth, Mr. Feist testified that Wing usually started work sometime between 2:00 pm and 3:00 pm, "depending on what needed to be done". Fifth, Mr. Feist also testified that "arriving late" meant arriving after 2:00 pm. Sixth, in the appeal, Wing stated:

> I also wish to state that Mr. Tsisgonias made a verbal comment to Donna Miller, that my normal working hours were 1:30 pm to 10:00 pm as she advised me of this comment in a telephone conversation.

Wing made the same assertion in his evidence. The point here is twofold. First, the Director has not filed any submission on the appeal and, more particularly, has neither denied the correctness of the statement nor indicated, if it was made, why it was not included and considered in the Determination. Nor did Mr. Tsisgonias, in his evidence, deny that he made such a statement to the investigating officer. Second, taken in context, the importance of the validity of the above assertion is obvious. If the statement was disputed or if Wing misunderstood the comment made to him by the investigating officer, the Director has a responsibility to say so. If Mr. Tsisgonias did make the comment attributed to him and if that comment was conveyed to Wing, it would have been reasonable and proper to have referred to it in the Determination and, in fairness to Wing, to state the reason for not giving it effect. Seventh, there were several references in the submissions on the appeal and at the hearing to why Wing was paid a monthly "salary" of $1800.00 for 11 months of the year, instead of an hourly rate. The rationale for the scheme was explained by Mr. Tsisgonias as being a way to provide a steady monthly wage almost year round, even though it was accepted that Wing, and the other employees working under such an arrangement, would work increased hours in the summer months for full pay with fewer hours in the winter months. Whether Wing was working less hours in the winter was a matter of dispute between Wing and Mr. Tsisgonias. Mr. Feist said that the cooks started later in the winter than in the summer, as the summer was busier. Finally, Mr. Feist also testified that Wing had complained to him more than once that there were "too many hours and not enough money".

To reiterate, what has to be appreciated is that the question the Director had to address was not whether Wing worked the hours he claimed, but whether he was entitled to overtime pay and, coincidentally, whether Diamond contravened the overtime provisions of the *Act* by failing to pay it. There was evidence supporting a conclusion Wing was entitled to some overtime pay. The Director was bound to consider such evidence but, on the face of the Determination, did not.

It follows from the above analysis, that a failure to consider those matters which the Director was required to consider renders the exercise of discretion unreasonable and impacts adversely on the validity of the Determination.

The next question is what should flow from this conclusion. If I were to cancel the Determination and, without more, refer the matter back to the Director, a further investigation by the Director would be required. That would, in my view be both an unnecessary expenditure of the Director's resources and inconsistent with the objective of providing efficient resolution to disputes arising under the *Act* (see Section 2(d) of the *Act*). Based on the evidence I received, I am satisfied that Wing did work more than forty hours in each week where he worked 6 days and that he is entitled to some overtime pay during those weeks. By failing to pay overtime, Diamond has contravened the *Act*.

The more difficult question is deciding the appropriate remedy resulting from the contravention of the *Act*. Neither party kept an adequate record of hours worked. The Director did not accept Wing's record of hours worked or his claim that he worked 9 hours every day during his period

of employment. I have accepted that conclusion as being fair and reasonable. Diamond failed to keep a record of hours worked, as required by the *Act*. However, the absence of any precise record of hours worked should not deny a remedy where a contravention of the *Act* has been demonstrated (see *Re Harrison and Lander*, BC EST #D224/96, Reconsideration denied, BC EST #D344/96 and *Re Parsons*, BC EST #D429/99, Reconsideration denied, BC EST #D149/00). In such circumstances, the task is to reach a fair and reasonable conclusion, based on the best evidence available (see *Mykonos Taverna operating as the Achillion Restaurant*, BC EST #D576/98).

In this case, considering the evidence of all the witnesses, and particularly that of Ms. Prieston and Mr. Feist, I find, on a balance of probabilities, that during the summer Wing started work at any time between 1:00 pm and 2:30 pm and worked an average of 8 hours a day. He is therefore entitled to overtime pay for the period July 15 to September 2, 1999 based on 48 hours of work in each week in which he worked 6 days. I also find, on balance, that for the rest of his period of employment, Wing started work at any time between 1:00 pm and 3:00 pm and worked less in each day, an average of 7.5 hours. He is therefore entitled to overtime pay for the period September 3, 1999 to April 23, 2000 based on 45 hours of work in each week in which he worked 6 days. In my view this conclusion is not only consistent with the evidence, but provides a fair balance between Wing and Diamond.

The Determination will be referred back to the Director to be varied in accordance with the findings of fact made in this decision.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated October 22, 2000 be referred back to the Director.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal

DBS/bls