Employment Standards TRIBUNAL

An appeal

- by -

Thomas Wilkinson

- 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

TRIBUNAL MEMBER: Frank A.V. Falzon

FILE No.: 2005A/33

DATE OF DECISION: June 7, 2005

DECISION

OVERVIEW

Thomas Wilkinson (the Employee) appeals to this Tribunal from a January 24, 2005 Determination issued by a Delegate of the Director of Employment Standards.

The Determination arose from an employment relationship between the Employee and Double 'R' Safety Ltd. (the Employer) between July 15, 2003 (the date of hiring) and July 17, 2004 (the date the Employee quit).

The Employer provides first aid services to companies operating in northern British Columbia's oil patch. The Employer employed the Employee as a shop manager and first aid attendant. Of particular significance to this appeal is the claim for overtime wages owing during and immediately following the 50 day period between January 16 – March 5, 2004, when the Employee was directed to work continuously in the field, at a camp known as "Apache".

The Determination was issued following a teleconference conducted by the Delegate on December 23, 2004. The Determination ordered the Employer to pay the Employee $2454.47, consisting of one day's regular wages ($200), 3 days' statutory holiday pay ($600), $92.50 in vacation pay and overtime hours worked over 5 days in mid to late March 2004 ($1512.50).[1]

The Employee appeals on the basis that he worked a far greater number of overtime hours than he was credited in the Determination:

- The Employee focuses in particular on the 50 days worked at the Apache camp between January 16 – March 5, 2004. The Employee says that, consistent with industry practice, he worked 12 hours per day during that period. He says he that, consistent with this, he made a specific written claim for 4 overtime hours each weekday, and 12 overtime hours on Saturday and Sunday, except for February 13, 2004 when he worked 10 hours in conjunction with transporting an injured worker to Hospital.

- The Employee also takes issue with the Determination's omission of his claimed overtime of 4 hours for March 6-11, 2004 (while he was still in the bush) and March 13 and 14, 2004 (when he was delivering trucks).

PRELIMINARY ISSUE: APPEAL PERIOD

The Employer has pointed out that the Employee filed his appeal on March 2, 2005, 38 days after the January 24, 2005 Determination was issued. The Employer, who is not represented by counsel, has not made a formal objection that the appeal is out of time, but has posed the question: "Why did this take that long?"

[1] The Employer was also ordered to pay $2000 in administrative penalties, arising from breaches of sections 18, 28, 40 and 45 of the *Employment Standards Act*.

The 38 days arises from the combination of ss. 112(3)(a) and 122(2) of the *Employment Standards Act*, which provide as follows:

112(3) The appeal period referred to in subsection (2) is:

(a) 30 days after the date of service of the determination, if the person was served by registered mail.

122(2) If service is by registered mail, the determination is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.

I note that the Determination itself contains a box in small print on page 2, which applies the above provisions and correctly advises the parties that any appeal must be delivered to the Tribunal by March 2, 2005.

A party is not required to provide an explanation for filing its appeal at any time when there is a right of appeal, including the last day of the appeal period. An explanation is required only where the right of appeal has expired and the ability to appeal then turns on the Tribunal's discretion: see s. 109(1)(b).

THE DELEGATE'S DECISION RESPECTING OVERTIME

Entitlement to Overtime was the 2nd of 4 issues addressed in the Determination. The first issue, which appears to have been the question that occupied the majority of time during the teleconference, was the question whether the Employee was a "manager" as defined in the *Employment Standards Regulation*. On this issue, the Delegate set out the evidence, the competing submissions of the parties and his own finding that the Employee was not a manager, but an employee. That part of the Determination is a model of good reasoning and sound decision-writing. As noted above, this part of the Determination is not under appeal.

The issue of Overtime was dealt with more summarily. Despite the fact that the vast majority of the Employee's claim here was for overtime ($16,937 of the $18,031 claimed on the Complaint and Information Form), the Determination does not, as it did with the "manager" issue, address the positions of the parties, the evidence tendered by both sides and where that evidence was in issue. Instead, the Determination on this issue merely sets out the relevant statutory provision (s. 40), the fact that the Employer had not complied with its duty to keep a record of daily hours worked by the Employee, and states:

> The complainant produced a partial record of the hours he worked by photocopying some pages from his day planner. The complainant's records are not a continuous record of work performed on a daily basis for the last 6 months of employment, rather they consist of 28 days from January 16, 2004 to July 16, 2004, which, as noted above, show the hours worked on a daily basis for some of the 28 days of record. In the absence of any evidence to the contrary, I find the complainant's records credible and are an accurate reflection of the hours he worked on some of the days during his last 6 months of employment. Specifically, the complainant's records show he worked overtime on the following days in 2004: March 12th (total hours worked: 21); March 15th (12); March 17th (14.5); March 20th (11); and March 21st (15.5). There is no evidence in the employer's payroll records that the complainant received overtime wages for working overtime on these days, and as a result, I find the employer has contravened Section 40 of the Act.

DECISION

In my opinion, the Delegate was under a legal duty to address in his reasons why he rejected the complainant's evidence respecting the number of overtime hours worked. Overtime was clearly the central and significant claim advanced in this claim. The decision to accept only a fraction of the several hundred claimed overtime hours as having been properly advanced calls for explanation, particularly where there is no evidence as to a basis on which the Employer contested the overtime hours, and when the Determination itself found as a fact that "on January 16th (2004) [the Employee] was ordered to the Apache camp to be the First Aid person. He did not return from the field until March 5th." The Determination is totally silent on the issue of overtime hours for this period in the field, or indeed for the other dates for which overtime was claimed.

In his submission on this appeal, the Delegate states that he based his decision on the Employee's day planner. The Delegate states that during the teleconference, there was "no discussion" of the additional hours which were set out in the written materials, and therefore the day planner was considered to be a more accurate reflection of overtime hours worked. However, the Employee points out as follows:

> This appeal was brought to ensure I was paid for work I performed for Double R which was not considered in the Determination. My claim in this regard is set out in prima facie evidence concerning my hours worked as set out in my original claim and in the additional supplemental evidence provided by me in the arbitration process (ie., my day planner). It is important to note that neither Double R safety or Mr. Phillips raised any issues with this evidence either in writing or in oral testimony at any point during the proceedings. Of course as the matter was seemingly not in dispute, I did not raise this issue at the adjudication, the only matter seemingly in dispute was that "was I a manager or not"….
>
> Mr. Phillips stated in his response to my appeal "that he did have my original submissions … however there was no discussion of this during the hearing." I agree with this latter statement, but would like to add that there was no discussion whatsoever of hours worked or my original submissions for hours owed throughout the entire adjudication process! Nor were my submissions disputed by Double R or Mr. Phillips.

In my view, it was an error of law in these circumstances for the Delegate to categorically reject a claim for hundreds of hours of overtime worked on the basis that the Employee did not write them all down in his day planner. There is certainly no rule that wage claims will be rejected only if the employee writes them down concurrently. The primary obligation to record hours worked lies on the Employer. Here, the Employer did not perform that duty. On the record here, the Employee did in fact set out in some detail the overtime hours he claimed. He supported this in part with records from his day planner, which he appeared to have prepared concurrently, but he provided even more detail as part of the employment standards claim. The record before me is clear that when the Employee filed its claim with the Director in October 2004, the principal claim was for 442 overtime hours ($16,937.50) worked between January 16, 2004 and July 15, 2004. To support his claim, the Employee provided the Director with written documentation, including:

- Page 11 from the Employment Standards Self-Help Kit (Overtime Wages), which identifies 92 overtime wages worked from January 16-30, 2004

- A separate typed sheet identifying (by my arithmetic) 358.5 overtime hours worked between January 31, 2004 and July 15, 2004. This sheet includes the period when the Employee was in the field, during which time he claimed 4 hours per day and 12 hours each weekend day.

- Specific pages of calendar entries from the Employee during the period between January 16 – July 15, 2004.

If the Delegate was to reject the Employee's claim of overtime hours worked as lacking in credibility or reliability, he would, in order to conduct a fair hearing, need to hear from the Employer and Employee on this issue, and then articulate why he was rejecting some or all of the Employee's evidence. In these circumstances, that would very likely have required the Delegate to hear evidence about the nature of the job, the industry practice and the circumstances in which the Employee prepared and made entries in his day planner.[2] The Delegate would also have to have given some reasons as to why he readily accepted evidence of some very long work days as corroborated in the day planner, but rejected evidence of all the other days claimed.

In the particular circumstances here, it is not an adequate answer to say that "there was no discussion" at the teleconference regarding the details of overtime worked. In my view, the issue being one of great significance and having been squarely raised in the complaint, the Delegate had a duty to ensure, particularly where the parties are not represented, that all issues arising on the complaint were canvassed and that the parties had the opportunity to address them. One can of course see how the "manager" issue came to dominate the teleconference, as this was contested between the parties. But this only makes it more important to ensure that other key issues are not omitted from proper evidence and consideration during the hearing. Unfortunately in this case, I believe this is what happened.

The principal obligation of Delegates is to arrive at the truth; the process employed (whether it is an investigation, a teleconference or a hearing in person) is subsidiary to that fundamental objective. Thus, while I do not accept that Delegates have a legal duty to raise issues that have not been raised by the parties, they do have a legal duty to properly canvass those issues that have.

From an administrative law perspective, there are different ways in which the legal error in this case might be articulated. Perhaps the clearest way to express it is that the Delegate erred in failing to address all the issues that had been raised before him.

[2] In some circumstances, a reasonable inference may arise that hours recorded in a day planner are the only hours that should be believed. But this is not a hard and fast rule, and in some cases, it may be quite unfair to use a partial recording of hours against an employee. It all depends on the circumstances, which of course requires those circumstances to be explored.

ORDER

I am of course not in any position to make a finding as to what additional Overtime hours the Employee is entitled to. Indeed, after full and fair consideration of the material, the answer may be "none". In the circumstances before me, however, I am not prepared to conclude that "none" is the only possible answer that would follow a proper consideration of the issue.

In the result, the most appropriate order is an order that the Determination be referred back to the Director for a full and proper consideration of whether the Employee is entitled to overtime pay over and above the overtime awarded in the January 24, 2005 Determination.

Frank A.V. Falzon
Member
Employment Standards Tribunal