Employment Standards TRIBUNAL

An appeal

- by -

John Evinger
("Evinger")

- 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.: 2012A/57

DATE OF DECISION: August 8, 2012

DECISION

SUBMISSIONS

John Evinger	on his own behalf
Taryn L. Mackie	counsel for Frontier-Kemper Constructors ULC
Rod Bianchini	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the *"Act"*) by John Evinger ("Evinger") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 16, 2012.

2. The Determination was made in respect of a complaint filed by Evinger who alleged his former employer, Frontier-Kemper Constructors ULC ("Frontier-Kemper"), had contravened the *Act* by failing to pay overtime.

3. The Director found Frontier-Kemper had contravened Part 3, section 28 and Part 4, section 40 of the *Act* and ordered Frontier-Kemper to pay Evinger an amount of $4,586.91, an amount which included wages and interest.

4. The Director also imposed administrative penalties on Frontier-Kemper under Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") in the amount of $1,000.00.

5. The total amount of the Determination is $5,586.91.

6. In this appeal, Evinger says the Director failed to observe principles of natural justice in calculating the overtime wages owed. He seeks to have the Director re-calculate the amount owing to him for overtime.

7. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from the written submissions and the material on the section 112(5) "record", together with the submissions of the parties and any additional evidence allowed by the Tribunal to be added to the "record".

ISSUE

8. The sole issue in this appeal is whether Evinger has shown the Director made any reviewable error in calculating the overtime wages owing to him.

FACTS

9. I shall confine my review of the facts to the general nature of the complaint made by Evinger against Frontier-Kemper and to the evidence and findings relating to the issue raised in this appeal.

10. Evinger was employed in the Occupational Health and Safety ("OH&S") division of Frontier-Kemper on the Seymour-Capilano tunnel project from June 21, 2010, to August 9, 2011, at the rate of $84,000.00 a year.

11. Following his termination, Evinger filed a complaint with the Director alleging Frontier-Kemper had failed to pay overtime wages. Frontier-Kemper opposed the complaint, saying Evinger was a manager for the purposes of the *Act* and excluded from the overtime provisions in Part 4 of the *Act*. In any event, and alternatively, Frontier-Kemper challenged the amount of overtime wages claimed by Evinger. Those two matters were described in the Determination as the issues to be decided by the Director.

12. In support of his claim, Evinger provided the Director with a record of hours that was, with some minor adjustments, accepted by the Director and used as the basis the overtime calculations. Frontier-Kemper kept no record of the hours worked by Evinger.

13. The Director calculated Evinger's overtime entitlement based on all hours worked paid at straight time. The rationale for this method of calculating the overtime was the Director's finding that Evinger's employment was not based on a 40 hour work week, but on the hours of work that were "required to get the job done", which, logically, were the hours he actually worked.

14. In result, the overtime wages to which Evinger was found to be entitled was a "top-up" on his regular wage, which was calculated according to definition of "regular wage" found in section 1 of the *Act*, at the overtime premium for the overtime hours worked.

ARGUMENT

15. Evinger says the Director's view of the hours of work in the employment agreement is flawed and unfair. He says hours of work for the job were never on the table when he discussed the position with Frontier-Kemper and were never set at the time of his hire.

16. Frontier-Kemper and the Director have responded to this appeal.

17. Counsel for Frontier-Kemper says the appeal shows no failure by the Director to observe principles of natural justice. In any event, counsel says the calculation of the overtime owed to Evinger was based on findings of fact made by the Director that are disputed by Evinger. Counsel submits those findings, which justify the basis for the calculations made by the Director, were not errors of law and are not reviewable on appeal.

18. The Director submits the issue of the amount of Evinger's overtime entitlement was fully canvassed in the Determination, reasonable findings of fact on that issue were made and reasons for those findings and the overtime calculations were provided. The Director says no error was made.

ANALYSIS

19. 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.*

20. The Tribunal has consistently and repeatedly stated that an appeal under Section 112 is not intended as an opportunity to either resubmit the evidence and argument that was before the Director in the complaint process or submit evidence and argument that was not provided during the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions. An appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds of review identified in section 112. More particularly, a party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

21. It is well established that the Tribunal has no authority to consider appeals based on alleged errors in findings and conclusions of fact unless such findings and conclusions amount to 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.

22. While the appeal is grounded in natural justice, on its face it does not raise any natural justice issues.

23. In the context of the complaint process conducted in this case, the notion of "natural justice" required the Director to provide all of the parties with a fair opportunity to be heard and to not interfere with that opportunity in an unfair or inappropriate way. That requirement substantially echoes what is set out in section 77 of the *Act*. As the Tribunal stated in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party (see *BWI Business World Incorporated*, BC EST #D050/96).

24. I can see nothing in the appeal that raises any concern the Director failed to accord the parties the required procedural rights. This ground of appeal is rejected.

25. I also find that the appeal does not show there is any other reviewable error in the Determination. The Director was entitled to make findings of fact relating to the employment agreement on hours of work and did so. The findings were based on evidence provided to the Director and were reasoned. The Tribunal has no authority to review the findings of fact that were made by the Director in respect of the matter under appeal in this case.

26. The appeal is dismissed.

ORDER

27. Pursuant to section 115 of the *Act*, I order the Determination dated April 16, 2012, be confirmed in the amount of $5,586.91, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal