

An appeal

- by -

Bryan Johnson

- 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: Sheldon M. Seigel

FILE No.: 2009A/071

DATE OF DECISION: July 23, 2009

DECISION

SUBMISSIONS

Bryan Johnson	on his own behalf
Scott Phillips	on behalf of Sodexo Canada Ltd.
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by the Employee, of a Determination that was issued on April 16, 2009, by a delegate of the Director of Employment Standards (the “Director”). Mr. Johnson was employed by Sodexo Canada Ltd. (the “Employer”). He complained that he was not paid wages for time worked beyond his regular hours of employment. The Director found that the Employer had not contravened the *Act* and published a Determination so concluding.
2. The Employee appeals and submits that the Director failed to observe the principles of natural justice in making the Determination.
3. The Employee seeks a change or variation of the Determination.

ISSUE

4. The issue in this appeal is whether the Director failed to observe the principles of natural justice in making the Determination. In particular, the Employee’s reasons for appealing are that the Director made some fundamental mistakes and arrived at incorrect conclusions in making the Determination.

ARGUMENT

5. The Employee presents three arguments in support of his appeal:
 1. The Director states that Mr. Johnson was expected to work extra hours without pay. The Employee argues that this statement is “ludicrous” as individuals are not likely to agree to work without pay.
 2. The discussion in the Determination of how many hours the Employee worked during “regular business hours” was irrelevant as there is no dispute that Mr. Johnson worked regular business hours.
 3. The Employer had phone records available to it that would have supported Mr. Johnson’s claim. The phone records were not produced by the Employer, and the Director did not pursue the matter beyond making a single request for them.

ANALYSIS

6. A review of the file indicates that the Appellant was invited to and allowed the opportunity to participate in the Director's investigation process. The Director communicated comprehensively with the Employee and allowed full participation in a hearing process. The evidence available to the Director was thorough and comprehensive.
7. The Employee maintained that the telephone records in the possession of the Employer were critical to his argument, and he requested that the Director seek those records from the Employer. The Director chose to pursue that avenue and provided the telephone number forwarded by the Employee to the Employer for that purpose. The Employer satisfied the Director that the number provided was a land-line and records of use of that line were not available. The Director was satisfied with that result and she proceeded to make the Determination based on the information before her. In doing so, the Director held that there was insufficient evidence to satisfy her that the records were critical to a determination. I find the Director's actions were reasonable in this regard and did not breach any of the fundamental rules of natural justice. She was entitled to assess the probative value of the potential evidence to be gained by further pursuit of records. She found additional records unnecessary and did not pursue them further. The Appellant has the onus of establishing his appeal. If he does not have available to him the evidence required to establish his claim, he may not seek relief by faulting the Director or Respondent Employer for not providing such evidence for him.
8. Mr. Johnson was employed as a manager and as such was not entitled to overtime pay. He claimed that the hours he worked were in excess of those expected in a normal working week and that he should be compensated for those additional hours. The Director found that Mr. Johnson was a manager within the definition of the *Act* and as such he was not entitled to overtime pay. The Director also found that if Mr. Johnson worked additional hours for the Employer outside of the terms of his employment, he would be entitled to compensation for such hours. The Director went on to find, however, that the evidence did not establish that Mr. Johnson worked outside of the terms of his employment. The Director held that as a manager, Mr. Johnson was responsible for the 24 hour operation of a call centre and that the hours of his employment were not fixed nor discussed prior to or after the commencement of his employment. The Director found that the evidence disclosed that both Employer and Employee knew the nature and extent of the services that Mr. Johnson was to provide and that these services and the hours they required to perform constituted the terms of Mr. Johnson's employment. The Director further found there was no evidence to indicate that Mr. Johnson's salary was affixed to a certain number of hours or that he was required to perform duties outside of his anticipated role. The Director also found that Mr. Johnson knew he would be required to work beyond regular business hours.
9. The Director concluded:

As managers are not covered under the hours of work provisions of the Act, any claim for extra pay for extra time must be founded on a clear agreement between the parties.
10. I find this to be correct and supported by *UAP Inc. v. The Director of Employment Standards* (BC EST # D418/01).
11. The Employee appears to base much of his argument on the statement that "Mr. Johnson was expected to work extra hours without pay." This would have been better phrased: Mr. Johnson was expected to work extra hours without *additional* pay. The Director was not saying that Mr. Johnson should have worked for no

compensation, but that the hours Mr. Johnson worked in addition to normal business hours were expected under the terms of his employment and anticipated in the provision of his salary as a manager.

12. The Determination describes the Employee's position in detail and sets out why the Employee's submissions are not sufficient to satisfy the Director that the Employee was entitled to further wages under the *Act*.
13. The stated ground of appeal was that the Director failed to observe the principles of natural justice. This is a procedural ground that under some circumstances requires an examination of the material put before the adjudicator. It is not, however, an opportunity to re-argue the same substantive issues before a second adjudicator. I find that the Director sought and collected sufficient relevant information pertaining to the complaint to make an informed decision. There is no evidence that the Director was in any manner biased, or that she failed to allow the Employee ample opportunity to make its case. The provisions of the *Act* were followed. There is no evidence of procedural irregularity before me.
14. I find that natural justice was served by the procedures relating to the Determination. The appeal fails.

ORDER

15. Pursuant to section 115 of the *Act*, I confirm the Determination dated April 16, 2009.

Sheldon M. Seigel
Member
Employment Standards Tribunal