Employment Standards TRIBUNAL

An appeal

- by -

Orr Hotel, operating as Dominion Hotel
("Orr Hotel")

- 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: Lorne D. Collingwood

FILE No.: 2000/399

DATE OF HEARING: January 26, 2001

DATE OF DECISION: February 26, 2001

DECISION

OVERVIEW

The appeal is by Orr Hotel Limited operating as the Dominion Hotel (and which I will refer to as "Orr Hotel" and "the employer") and pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). Appealed is a Determination issued by a delegate of the Director of Employment Standards ("the Director") on May 17, 2000. The Determination orders Orr Hotel to pay Oscar Khodarakhsh, Douglas Smith, Alfonso Tang and Peter Joch a total of $5,321.59 in wages including interest.

The appeal, as originally filed, claimed that no money was owed to any of the above employees. Matters concerning Khodarakhsh and Joch were subsequently settled. The matter of the order to pay Smith and the matter of the order to pay Tang were not.

Douglas Smith has been awarded a total of $559.23 in wages, interest included. Underlying the order to pay Smith is a decision which is that the employment began on July 18, 1998 and a decision which is that Smith worked a certain amount of overtime. Orr Hotel, on appeal, claims that the employment did not begin on the 18th but the 25th of July, 1998 and that Smith did not work overtime.

Alfonso Tang is awarded statutory holiday pay and compensation for length of service, a total of $1,722.43, vacation pay and interest included. Orr Hotel, on appeal, claims that Tang is not owed compensation for length of service because he quit. The employer accepts that Tang is owed statutory holiday pay as set out in the Determination but it argues that it has, in effect, already paid him that amount, the reason being, it is said, that he has received much more than that, the employer making the mistake of paying him for all of lunch breaks.

APPEARANCES:

Yeong K. Kang	For the Orr Hotel
Douglas Smith	On his own behalf
Alfonso Tang	On his own behalf

ISSUES TO BE DECIDED

Smith is awarded wages for work and/or training which is prior to the 25th of July and that is appealed.

The matter of whether Smith did or did not work overtime is at issue.

In the case of Tang, I must decide whether the employer's liability to pay compensation for length of service has or has not been discharged.

I must decide whether there is a basis for amending the order to pay Tang because of what is said to be paid lunch breaks.

What I must ultimately decide is whether the appellant has or has not shown that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law.

FACTS (in respect to the Smith employment)

According to the Determination, Smith was employed by Orr Hotel from July 18, 1998 to August 10, 1998. It was his job to attend to matters at the front desk of the Dominion Hotel.

The Determination awards Smith pay for 8 hours of work on the 18th of July, 8 hours on the 21st of July, 4.75 hours on the 23rd of July and 10 hours on the 24th of July. That is 30.75 hours of the work for which pay is awarded.

The employer, on appeal, claims that Smith did not start work until the 25th of July, 1998. According to the employee, he was invited by Yeong K. Kang, the owner of Orr Hotel, to work on a test basis, and to come in for some training, on the 18th and then the 21st, 23rd and 24th. It is his testimony that there was really no training in that he was basically left alone and he had to look after the front desk all by himself. It is also his testimony that it was only on filing his Complaint that he learned that people are to be paid for training.

I find that the employer does not produce evidence which shows that Smith began the employment on the 25th. All that is produced as support for the claim is the employment agreement for Smith. It is dated July 27, 1998 and, according to the agreement, the employment commenced July 25, 1998. I attach no great importance to that, however, as I am satisfied that the employee did not know, on signing the agreement, that there are circumstances where employees are to paid for testing and what an employer may call training. As I see it, the 25th is likely signify nothing more than the date when Smith was offered continuous employment by Orr Hotel.

The appeal in respect to the wages which the employer is ordered to pay for work or training before the 25th is found to be nothing but argument that Smith, a university graduate, did not need training given the level of his education, and that he certainly did not require anything like 30 hours of training.

The Overtime Issue

The delegate has found that Smith worked some overtime, usually only a quarter of an hour, or half an hour, but that he sometimes worked much longer than that, the most being 3 hours on the 31st of July.

The employer claims that it is unlikely that Smith worked any overtime as there was no need for him to work overtime. The employer explains that it has three shifts, 7 a.m. to 3 p.m., 3 to 11 and 11 to 7 and it argues that Smith was therefore free to go at the end of each and every one of his shifts as the next shift was always there to take over.

According the employee, there were forever problems at the hotel, be it a computer problem, a lack of cigarettes to sell, a problem balancing inventory or, and most often, irate customers. He claims that he had to stay a bit longer on occasion so as to convey the nature and status of some of those problems to Oscar Khodarakhsh who, I am told, is the person who normally worked the afternoon shift, or whomever else was to take over from Smith at the end of his shift. He also explains that where there is overtime of an hour or more, it is due to a person's absence, or someone was late in getting to work, and so Smith had to remain at work until help arrived.

I am prepared to accept that the employee in fact worked overtime. It is likely. The employer's shifts do not overlap one another. I am sure there was an occasional need to attend to problems and talk about problems. And whenever the person handling the front desk on the next shift was late, Smith would have been required to remain at work until a replacement arrived.

I find that there is in fact no evidence to show that the employee did not work overtime as is set out in the Determination.

The employer argues that, even if Smith did work overtime, he is not entitled to pay because the overtime is contrary to an Orr Hotel policy which prohibits overtime. The employee tells me that no one ever told him that there was such policy. I am not presented with evidence that establishes that Orr Hotel does in fact have a policy which prohibits any overtime work by Smith.

ANALYSIS

The burden of proof is on the appellant.

It is argued that the Determination awards 30.75 hours of pay for training and that that is clearly excessive but I find that the employer misinterprets the Determination. The delegate does not at any point in the Determination state that there was 30.75 hours of training. What the delegate has done is accept that Smith was at work or was receiving training for that amount of time. He has not distinguished between the two, nor should he have done so.

A person is an employee and entitled to wages for work which he or she is required to perform or even just allowed to perform by the employer. A person is also to be considered an employee if they are being trained for the employer's business. That is clear from the *Act*'s definition of "employee".

> "**employee**" includes
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
> (c) a person being trained by an employer for the employer's business,
> (d) a person on leave from an employer, and
> (e) a person who has a right of recall; … . (my emphasis)

I am not shown evidence which proves that Smith did not work or receive training prior to the 25th of July, 1998. I see nothing obviously wrong with the Determination, that the employee is entitled to wages for 30.75 hours of work and training which is before the 25th of July. Indeed, I am prepared to accept that Smith was brought in for testing, if not training, which required that he perform work for the employer. It is just that the testing and training is of the sink or swim variety.

I attach no importance to the fact that the employment contract was signed on the 27th. I have already found that it is not clear proof that the employment began on the 25th. And an employee cannot, moreover, waive his or her right to pay for work or training by signing an employment agreement or contract, whether the work is before or after the signing of the contract. Any agreement or contract which provides for less than the minimum standards of the *Act* is null and void by virtue of section 4 of the *Act*.

> **4** The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

Sections 43, 49, 61 and 69 have no application to Smith but pertain to union employees.

On the matter of the order to pay overtime wages, I am not shown evidence which proves that the employee did not work overtime as set out in the Determination. I am led to believe that he probably did work overtime and, as is noted above, I have found that there is not evidence which establishes a policy which prohibited overtime.

The order to pay Smith is confirmed.

FACTS (in respect to the Tang employment)

Alfonso Tang went about performing maintenance at the Dominion Hotel. The employment ran from March 1, 1997 to August 28, 1998.

In the Determination, the delegate concludes that there "is no question that the employer was not paying for statutory holidays in accordance with the *Act*". Tang is awarded pay for 10 statutory holidays and the employer accepts that it owes that amount of pay.

Orr Hotel, on appeal, claims that its accountant made the mistake of not deducting for lunch breaks in calculating pay. It claims that Tang had a one hour lunch break. And it claims that the amount of the alleged error more than offsets the order to pay statutory holiday pay.

The employer argues that it is time for a full accounting of earnings and pay. The employer is seeking to have the Tribunal accept and consider what is said to be proper recalculation of the amount owed, the lunch break error considered. It relies on time cards and other payroll records showing hours worked, at least, that is what the employer claims. Tang claims that some of the employer's time cards are forgeries and he points out that while a number of the cards have been signed by him, there a number which only have his name printed on the top of the card.

I find that the employer is seeking to rely, on appeal, on information which it could have produced at the investigative stage but did not. The delegate reports, on the detailed calculation sheet which accompanies the Determination, that the "employer did not provide time sheets".

I also find that there is in fact no evidence which shows that the employee received an actual lunch break. The employer's claim is devoid of support. All Kang has had to say on the point is that there were occasions when he observed Tang eating his lunch and that, on one occasion, he found the man asleep. But the latter has nothing whatsoever to do with the matter of whether Tang did or did not receive lunch breaks and the fact that Tang ate lunch is not in dispute. According to the employee, he ate his lunch as and when he could, which was, for the most part, during the first of his two paid breaks, a 15 minute break which was two hours into his shift (at noon) and a second 15 minute break which was at 3 o'clock.

Tang tells me that he was expected to work right through his shift with no lunch break and that the decrepit nature of the building and its mechanical systems demanded just that. There being no clear evidence to the contrary, I accept that as fact.

Compensation for Length of Service

The employer has all along argued that Tang quit.

The employee's claim is that he was terminated when he refused to agree to work 6 hours a day, 6 days a week unless he was paid overtime.

The Determination is that the employee was terminated by the employer. The delegate found that even if it is that Tang was not actually fired, the employee was laid off, the employer did not bring him back to work in 13 weeks, and so it follows that the employee was in effect terminated by the employer, the layoff becoming permanent at that point.

The employer, on appeal, claims that Tang made vague complaints concerning the employer, said that he did not wish to continue working for the hotel because of his age and the type of work that he had to do at the hotel, and that he then up and quit. But, again, the employer fails to produce evidence to show what is alleged.

ANALYSIS

There is not evidence in this case to indicate that Tang did in fact take a lunch break. I am not inclined to believe that the employer did mistakenly pay Tang for lunch breaks for a whole year. It is more likely that the employer paid him what it did because it represents work performed by Tang.

I would not in any event allow the employer to produce evidence of time worked on appeal because it is evidence which could have been, indeed, should have been submitted to the Director. And the time for arguing that there should be a full accounting of what is owed and what has been paid is not on appeal but at the investigative stage. The Tribunal has said in numerous decisions, beginning with *Tri-West Tractor Ltd.* (BCEST No. D268/96) and *Kaiser Stables Ltd.* (BCEST No. D058/97), that it will not normally allow an appellant to raise issues or present evidence which could have been raised or presented at the investigative stage. In *Tri-West*, the principle is stated as follows:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. … The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

Decisions like *Tri-West* preserve the fairness and integrity of the *Act*'s decision-making process. If it were not for such decisions, the role of the Director would be seriously impaired and the appeal process would become unmanageable and eventually fall into disrepute.

Turning to the matter of length of service compensation, I again note that the burden is on the employer to show that the liability to pay compensation for length of service has been discharged. Subsection 63 (3) of the *Act* provides that the liability can be discharged as follows:

> **63** (3) The liability is deemed to be discharged if the employee
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> (a) is given written notice of termination as follows:
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> (i) one week's notice after 3 consecutive months of employment;
>
> (ii) 2 weeks' notice after 12 consecutive months of employment;
>
> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
>
> (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
>
> (c) terminates the employment, retires from employment, or is dismissed for just cause.
>
> (my emphasis)

In this case, the employer argues that the employee quit but it fails to submit clear evidence of that. As such, I must accept that termination was as the delegate has found, namely, termination at the hand of the employer.

It is an employee's right to resign his or her employment and that right is something which only the employee may exercise. An employer may not deem that an employee has quit.

The Tribunal has through its decisions said that there must be clear, unequivocal facts to show that the employee voluntarily exercised his or her right to quit. And it has recognized that there is both a subjective and an objective element to quitting. Subjectively, the employee must form the intention to quit. Objectively, he or she must act in a way, or demonstrate conduct, which is inconsistent with continuing the employment. [See for example, *Burnaby Select Taxi Ltd. and Zoltan Kiss*, (1996), BCEST No. D091/96.]

There is not plain, clear evidence to show that the employee quit in this case. It is not shown that Tang ever formed the intention to quit. He certainly did not voice such an intention. And there is not evidence to show that he acted in a way which is inconsistent with continuing the employment.

The order to pay Tang is confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the determination which orders Orr Hotel and Golden Tree to pay Douglas J. Smith $559.23 be confirmed and to that amount is added whatever further interest has accrued pursuant to section 88 of the *Act*.

I also order, pursuant to section 115 of the *Act*, that the determination which orders Orr Hotel and Golden Tree to pay Alfonso Tang $1,722.43 be confirmed and to that amount is added whatever further interest has accrued pursuant to section 88 of the *Act*.

LORNE D. COLLINGWOOD

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal