Employment Standards TRIBUNAL

An appeal

- by -

Spotless Uniform Ltd.
("SUL")

- 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: Carol L. Roberts

FILE No.: 2014A/83

DATE OF DECISION: October 17, 2014

DECISION

SUBMISSIONS

Shaun Heighington, President on behalf of Spotless Uniform Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Spotless Uniform Ltd. ("SUL") has filed an appeal of a Determination issued by the Director of Employment Standards (the "Director") on June 6, 2014. In that Determination, a delegate of the Director ordered SUL to pay its former employee, Daniel Millar, $6,468.27 in wages and interest. The Director also imposed three administrative penalties in the total amount of $1,500 for SUL's contravention of sections 17, 18 and 28 of the *Act*, for a total amount payable of $7,968.27.

2. SUL appeals the Determination contending that the delegate erred in law in making the Determination. SUL also says that evidence has become available that was not available at the time the Determination was being made.

3. These reasons are based on the written submissions of the parties, the section 112(5) "record" that was before the delegate at the time the Determination was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Mr. Millar was a part owner of Northern Linen Supply Ltd. ("Northern") as well as the Production Manager at Northern's operations in Prince George. SUL, a linen supply business, purchased Northern's Prince George assets effective April 1, 2013. Mr. Millar continued to be employed by SUL as its production manager until October 23, 2013.

5. On November 25, 2013, Mr. Millar filed a complaint with the Employment Standards Branch alleging that SUL contravened the *Act* by failing to pay him wages for all hours worked.

6. Following a hearing on April 25, 2014, the delegate concluded that SUL had contravened the *Act* in failing to pay Mr. Millar wages for all hours worked.

7. The parties agreed that Mr. Millar was a manager as defined by section 1 of the *Employment Standards Regulation* (the "*Regulation*"). The delegate found that, although Mr. Millar was excluded from the overtime provisions of the *Act*, he was nevertheless entitled to be paid his regular hourly wage for any hours worked in excess of the specified number of hours in his contract. At issue before the delegate was what Mr. Millar's "regular hours of work" were, as well as the number of hours Mr. Millar worked in excess of those hours.

8. Mr. Millar took the position that his salary was based on a 40 hour week based on conversations with Mr. Heighington, who told him that he could have time off in equal amount to the hours he worked in excess of 40 per week. Mr. Miller testified that he approached SUL regarding payment for his excess hours and was told that they would be "made good later" which he understood to mean that he would be granted time off in lieu of payment for these hours. Mr. Millar conceded that he had never discussed receiving payment for the excess hours. He argued that because he was not granted time off in lieu, he is entitled to payment for that work.

9. Mr. Heighington agreed that he discussed Mr. Millar taking time off to account for any extra hours of work. Mr. Millar also pointed out that his wage statements were based on 80 hours each pay period.

10. In order to determine Mr. Miller's regular hours of work, the delegate considered the testimony of the parties as well as Mr. Millar's wage statements, which were based on a 40 hour work week. The delegate determined that Mr. Millar was entitled to be paid his regular wage for hours worked in excess of 40 hours per week.

11. There was no written employment contract between the parties. Both parties agreed that, while Mr. Millar was at Northern, he was paid a salary regardless of the number of hours worked. The delegate determined that Mr. Millar's employment at Northern was fundamentally different from his employment at SUL because, at Northern, he was a director and minority shareholder.

12. Mr. Millar acknowledged that he had control of his own hours of work and that he did not use the punch clock used by other employees. Mr. Millar never submitted a record of hours of his work, but said that he would have provided his calendar of hours to SUL had he been asked to do so. Mr. Millar's evidence was that SUL was aware he was working long hours and expressed concerns about that. Mr. Millar submitted a calendar containing a record of his hours at the hearing.

13. Mr. Heighington's evidence was that he and Mr. Millar agreed that Mr. Millar was to have full control of his work hours and that he was to ensure he took time off to compensate for any extra hours worked. Mr. Heighington was unaware that Mr. Millar had kept a record of his hours worked, and agreed that he worked long hours for about 45 days after April 1, 2013. However, he said that after this time, there was not sufficient work for Mr. Millar to work more than 8 hours per day.

14. The delegate determined that SUL had not maintained a daily record of hours worked by Mr. Millar in contravention of section 28 of the *Act*. The delegate considered the evidence of Mr. Millar as well as the evidence of Mr. Heighington and two other SUL employees as to Mr. Millar's hours along with Mr. Millar's record of hours of work. The delegate also had regard to the nature of Mr. Millar's duties. He concluded that Mr. Millar's calendar was an accurate record of his days and hours of work with two exceptions which Mr. Millar conceded were erroneous. After adjusting for inaccurate time records and some lunch breaks, the delegate determined Mr. Millar was entitled to wages for 171.25 hours, plus annual vacation pay on those wages.

Argument

15. Mr. Heighington contends that the delegate erred in relying on payroll records in concluding that Mr. Millar's hours were set at 40 hours per week. Mr. Heighington says that SUL's accounting system is based on a program designed to facilitate the preparation of a Record of Employment and that the payroll records were not evidence of Mr. Millar's regular hours. Mr. Heighington also argues that the delegate erred in finding that Mr. Millar's calendar was an accurate record of his hours. Mr. Heighington asserts that the calendar was "created in one sitting," and that if the hours were tracked on a daily basis, the errors Mr. Millar admitted to would not have occurred.

16. Mr. Heighington attached a letter from SUL's controller as new evidence. The controller's letter states that the payroll software program that established Mr. Millar's hours at 40 hours per week was done strictly for the ease of administration.

17. Finally, Mr. Heighington asserts that the delegate erred in law in finding that Mr. Millar was entitled to overtime. He submits that, as a manager, Mr. Millar was not entitled to overtime.

ANALYSIS

18. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

19. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.

20. I am not persuaded that SUL has met that burden.

Error of Law

21. 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. I am not persuaded that the Director erred in law in finding that Mr. Millar was entitled to overtime wages. There was no dispute that Mr. Millar was a manager. However, as the delegate noted, that designation does not preclude Mr. Millar from being paid his regular hourly wage for work performed in excess of his "normal" work week. (see *Kupchanko* (BC EST # RD236/02), a decision which considered issues very similar to the ones in this appeal) In *Kupchanko*, the delegate found Mr. Kupchanko's regular hours of work to be 40 based on his pay statements. The delegate's determination in this case is based on Mr. Millar's wage statements as well as the oral evidence of Mr. Millar and Mr. Heighington. There was some evidence before the delegate that the parties agreed Mr. Millar could take time off in lieu of any extra hours worked and that Mr. Millar worked an 8 hour day. In the absence of any other reliable evidence as to Mr. Millar's regular hours of work, I am unable to find that the delegate's conclusion was unreasonable or perverse.

23. Mr. Heighington also contends that Mr. Millar's record of hours of work was created "after the fact," and thus was both unreliable and not the best evidence of his hours of work. I note that Mr. Heighington advanced this argument at the hearing and had the opportunity to examine Mr. Millar on the entries. The delegate considered Mr. Heighington's objections and made some adjustments to the hours claimed by Mr. Millar. However, given that SUL presented no evidence of Mr. Millar's hours of work, I conclude that the delegate did not err in finding the calendar to be the best evidence. While there were discrepancies and difficulties with the records, the delegate was obliged to consider all of the evidence and arrive at a reasoned decision as to Mr. Millar's hours of work. Although SUL does not agree with his analysis, I do not find his conclusion to be clearly or manifestly wrong.

New Evidence

24. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four part test for admitting new evidence on appeal:

> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
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> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on the material issue.
>
> …

25. SUL presents, as new evidence, a letter from its accountant regarding the software used to prepare payroll. This evidence was, or could have been, available at the time of the hearing. Consequently, it does not meet the test of new evidence. However, in any event, the new evidence merely repeats the oral testimony given at the hearing that was considered by the delegate.

ORDER

26. Pursuant to section 115(1)(f) of the *Act*, I Order that the Determination, dated June 6, 2014, be confirmed in the amount of $7,968.27 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal