

An appeal

- by -

Kelco Drywall Ltd.
("Kelco")

- 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.: 2009A/112

DATE OF DECISION: November 3, 2009

DECISION

SUBMISSIONS

Clay Williams, FH& P Lawyers	on behalf of Kelco Drywall Ltd.
Kathleen Demic	on behalf of the Director of Employment Standards
Jurgen Klieber	on his own behalf

OVERVIEW

1. This decision relates to an appeal by Kelco Drywall Ltd., ("Kelco"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued February 18, 2009.
2. Kelco employed Jurgen Klieber as a drywall finisher from August 27, 2007 until August 11, 2008. After quitting his employment and returning to Germany, Mr. Klieber filed a complaint alleging, among other things, that Kelco had failed to pay him overtime wages. As Mr. Klieber had returned to Germany, the delegate investigated his complaint. She ultimately determined that Kelco had contravened section 28(d) of the *Act* in failing to maintain payroll records and in failing to pay Mr. Klieber, overtime wages.
3. Kelco appealed the Determination. I allowed the appeal, finding that the delegate had erred in applying the "best evidence" rule in determining Mr. Klieber's hours of work and in failing to observe principles of natural justice by not disclosing certain evidence to the employer in arriving at her decision. I referred the matter back to the delegate to "re-evaluate Mr. Klieber's claim to overtime". (BC EST #D058/09)
4. In a supplement to the original decision dated August 20, 2009, (the "Referral Back" report), the delegate stated that she had "reviewed the evidence again" and confirmed her earlier decision that Mr. Klieber was entitled to overtime wages.
5. Kelco contends that the delegate misconstrued the scope of the referral back, repeats her original errors by breaching the requirements of natural justice and failed to comply with the best evidence rule. Kelco further contends that the delegate compounded these errors by advocating for Mr. Klieber rather than acting as an impartial adjudicator.
6. This appeal is decided on the submissions of the parties and the Referral Back Report.

ISSUE

7. Did the delegate err in failing to address the errors identified in the original decision and in improperly advocating for a party rather than impartially adjudicating a complaint?

FACTS AND ARGUMENT

8. The background facts to this appeal are set out in my first decision.

Failure to properly apply the “best evidence” rule

9. Although Kelco had properly maintained payroll records, including timesheets completed and signed by Mr. Klieber confirming that he had worked eight hours per day, Mr. Klieber submitted personal daily planner books that suggested he worked in excess of eight hours a day to support his complaint. Without stating her reasons, the delegate indicated that she preferred Mr. Klieber’s records over those maintained by Kelco. I found that the delegate had misapplied the “best evidence” rule in preferring Mr. Klieber’s personal time sheets over Kelco’s records:

The delegate rejected the employer’s records without articulating any reason for doing so apart from suggesting that Mr. Byrne did not monitor his workers at every site. She also provided no reason for preferring Mr. Klieber’s personal record over his signed weekly time sheets even though Kelco challenged the veracity of those records. There may be circumstances in which a delegate would reject signed time sheets as being unreliable. One of those circumstances would be if there was some evidence they were prepared under duress. However, there were no facts before the delegate from which she could draw such an inference. While the delegate suggests that Mr. Klieber signed the timesheets under duress, those suggestions are not contained in the Determination itself but in her submissions on appeal. Not only does this submission appear to be advocating on behalf of an employee which goes beyond the proper role of the Director on appeal, (see *BWT Business World BC EST #D05/96* and *British Columbia Securities Commission, BC EST #RD121/07*) it does not appear to be based on any factual foundation. If the delegate had a conversation with Mr. Klieber in which he expressed this sentiment, that ought to have been recorded in notes and disclosed as part of the record. Furthermore, if Mr. Klieber did [not] give “not wanting to rock the boat” as his reason for signing the false timesheets, his assertion ought to have been critically evaluated in light of all of the evidence. Given that there was nothing in either the section 112 record or the Determination itself to confirm Mr. Klieber’s sentiment, the delegate’s conclusion can only be described as speculation or conjecture and is clearly in error.

Failure to comply with principles of natural justice

10. The delegate also interviewed five witnesses, one of whom advised her that he recalled Mr. Klieber on the jobsite on the weekend and evenings, while a second told her that he visited Mr. Klieber at the jobsite one evening after 6 p.m. The delegate acknowledged that she had not disclosed these witness statements to Kelco but appeared to suggest she did not need to do so since Kelco was aware that overtime hours were at issue. I found that the delegate’s failure to disclose this evidence constituted a failure to comply with principles of natural justice, particularly since she relied on these statements in arriving at her conclusions.
11. In the August 20, 2009 referral back report, the delegate described her task as to “[review] the evidence again.”
12. After repeating the evidence of the two witnesses who observed Mr. Klieber at the job site, the delegate states that the witnesses “provided clear, forthright, detailed stories where they stated they actually witnessed Mr. Klieber working either during the evening or on weekends”. She notes that the witnesses provided this information independently of each other. The delegate also states that Kelco did not dispute the evidence of one of the witnesses at all, while it questioned the credibility of the other because of an alleged personal relationship between Mrs. Klieber and the witness. The delegate found the witnesses to be credible.
13. Although the delegate noted that Mr. Klieber “was not truthful about the fact that he often started later than 7:00 a.m.”, that “he did not advise Kelco that he was disregarding the employer’s overtime policy by working extra hours” and that he “continued to sign weekly time sheets which indicated 8 hours per day”, she nevertheless concluded that Mr. Klieber worked after 3:30 p.m. or weekends on at least some occasions.

14. The delegate set out reasons why she believed Mr. Klieber's personal time records were maintained contemporaneously:

As I re-examine the journals my thoughts keep going back to the statements provided by both parties and I am again struck by the similarity in their evidence pertaining to Mr. Klieber's inability to keep up with the schedule. In light of the undisputed fact that Mr. Klieber struggled to complete the assigned work within the time allotted by the employer, I must ask myself how likely is it that Mr. Klieber worked extra hours during the course of his employment in order to keep up? How likely is it that he would try to hide this from his employer and continue to sign the weekly time sheets?

...

There is no doubt, based on the evidence, that Mr. Klieber's performance and speed was an issue. Indeed, he may have continued to work for Kelco in the same manner, saying nothing about extra hours except for the fact that Kelco presented a new contract, without any prior notice, which effectively dropped his rate of pay by nearly \$5.00 per hour.

The evidence surrounding this event, which led to Mr. Klieber's self termination, clearly indicates that he was very angry about the new contract and he states clearly that he felt forced into signing it. He further stated that the drop in pay caused financial difficulties for his family and ultimately was the reason he decided to quit. Given his anger about the position he felt forced into by Kelco, it is not surprising that after he quit he decided to put in a claim for the extra hours he worked during the course of his employment.

Kelco claims that its employees do not work overtime because there is an overtime policy in place, However I find it difficult to believe that Kelco did not have at least a suspicion that some of its many employees may have put in extra hours.

15. Counsel for Kelco submits that the delegate failed to mention, let alone evaluate, the evidence of witnesses on behalf of Kelco, perpetuating the breach of natural justice found in the original Determination. Kelco also says that it has still not had the opportunity to review the witness statements other than as they were reported in the original Determination.
16. Kelco says that the delegate treats the questions Kelco raises in its appeal about the witness's credibility as if it is the only objection Kelco has to the evidence. It says that the appeal was not the proper forum for a thorough inquiry into the evidence and Kelco's submissions were not a thorough rebuttal of it.
17. Kelco also submits that the delegate's submissions go beyond the proper scope of the Director's role on appeal and that the delegate's continued preference for the employee's private records fly in the face of objective adjudication.
18. Finally, Kelco submits that the delegate again conducted an incomplete and flawed analysis of Mr. Klieber's private records and "invented" a motive for Mr. Klieber to submit false timesheets.
19. Kelco contends that, that in light of these errors, I ought to make an order dismissing the claim for overtime wages and award costs against the Director.
20. Mr. Klieber's submission does not address the grounds of appeal but suggests that the Determination should stand.

ANALYSIS

21. In my initial decision I concluded that the delegate had erred in law in misapplying the best evidence rule and in arriving at a conclusion that was unsustainable on the evidence before her. I also found that the delegate had failed to observe the principles of natural justice in not disclosing certain evidence to Kelco and allowing it the opportunity to respond. I referred the matter back to the delegate to “re-evaluate Mr. Klieber’s claim to overtime”. Implicit in this referral back order is that the delegate was to do so in a manner that corrected the error of law and breach of natural justice identified in the decision.
22. On the referral back, the delegate interpreted her task as to “review the evidence again”. Not only did the delegate misinterpret her task, she failed to cure the errors identified in my initial decision.
23. The delegate did not disclose any of the witness statements to Kelco despite my conclusion that her failure to do so in the first instance constituted a breach of natural justice. Rather, she attempts to clarify her original decision based on Kelco’s appeal submissions. The delegate has failed to appreciate that natural justice requires full disclosure of statements and a full opportunity to respond. Furthermore, the delegate does not mention, let alone assess the evidence of the employer’s witnesses in her review of the evidence.
24. Although the delegate finds that Mr. Klieber’s personal journals were maintained contemporaneously, she did not disclose those journals to Kelco and afford it the opportunity to respond to their content. Furthermore, she gives no reasons why she finds Mr. Klieber’s hours of work as recorded in his daily planner to be more reliable than the records he prepared, signed and provided to his employer on a regular basis. She provides no explanation as to how she reconciles the admittedly false records to ones that were provided only after Mr. Klieber returned to Germany even though I found that to be an error of law in my first decision.
25. The delegate’s failure to address the errors identified in my decision not only compounds her original error but suggests that she approached her task with a closed mind, using the referral back as an opportunity to buttress her original decision. I find the delegate’s reasons for her conclusion in the Referral Back report to be inadequate. I conclude that she has repeated her initial breaches by failing to properly analyze the evidence and denying the parties natural justice.

Remedy

26. Kelco asks that I dismiss Mr. Klieber’s claim for overtime based on the two flawed decisions. It says that to refer the matter back to the delegate for a second time would be to ignore the objective of the *Act* to provide fair and efficient procedures for resolving disputes. It also submits that given the delegate’s consideration of the evidence thus far, there would clearly be a reasonable apprehension of bias if this delegate were directed to revisit this matter again.
27. In *Hub City* (BC EST #D27/04) a case similar to this, the Tribunal said as follows:

In the present case, however, I am at a loss to understand how the Director has so misapprehended the referral back I ordered in BC EST #295/03. In that decision, I set out the reasons why the Complaint Hearing was a breach of natural justice ...Instead of conducting another Complaint Hearing – this time after communicating with the Roses as they requested and after ensuring proper notice is given of the Hearing – the delegate makes a report which attempts to defend the correctness of the Determination I found to have been in error.

...

In short, the Director's flawed and unfairly conducted investigation remains flawed and unfairly conducted, despite my effort to administer a cure. This Tribunal has held that where a Determination is flawed on the major issue, it may be more appropriate to cancel the Determination than to refer to back with directions (see *Re Thomas*, BC EST #D115/03). A second referral back in this case would not only be undignified, but it would be contrary to the fairness and efficiency principles in the Act. This is therefore one of those (hopefully) rare cases in which the flaws in the Determination are incurable and it must be cancelled.

28. However, the Tribunal has also referred matters back for a third decision with specific instruction that the matter be decided by a different delegate. In *ARA Developments* (BC EST #D123/08) I said:

I recognize that remitting this matter back to the Director for a third hearing is costly and frustrating to the parties. It also does not meet one of the stated objectives of the *Act*, that of providing for efficient hearings. Nevertheless, where there is a manifest error in the conduct of a hearing, the Tribunal is obliged to correct that error to ensure that other purposes are met.

29. I sympathize with the fact that the employer has been put to the time and expense of responding to two flawed Determinations and that referring this matter back yet again does not achieve the objective of providing fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*. However, there are other, equally important objectives of the Act, including ensuring that employees in British Columbia receive at least basic standards of compensation and conditions of employment. It is, in my view, inappropriate to give one of the purposes more weight than another. In the circumstances, I find it appropriate to refer this matter back to be investigated by a new delegate.
30. In light of my decision on this issue, I find it unnecessary to address Kelco's argument that the delegate improperly advocated for Mr. Klieber rather than impartially adjudicating the complaint.

Costs

31. The Tribunal has no authority to award costs either under the Administrative Tribunals Act or the Employment Standards Act. (see also *Super Save Disposal Inc. and Acton Transport Ltd.* BC EST #D50/05 and *Rite Style Manufacturing Ltd. and M.D.F. Doors Ltd.* BC EST #D105/05)

ORDER

33. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated February 18, 2009 and the Referral Back report, dated August 20, 2009, be cancelled. The matter is referred back to the Director of Employment Standards for a new hearing before a different delegate.

Carol L. Roberts
Member
Employment Standards Tribunal